2016
DIGEST OF CASE LAWS
DIRECT TAXES

Supreme Court
High Courts
Income-tax Appellate Tribunal
Authority for Advance Ruling
Allied Laws
Reference to CBDT Circulars and Articles

(For Private Circulation)
Compiled by Research team

Disclaimer — The contents of this digest are solely for educational and informal purposes. It does not constitute professional advice or formal documentation. While due care and sincere efforts have been made in preparing this digest to avoid errors or omissions. The existence of mistakes and omissions herein are not ruled out. Any mistake ,error or discrepancy noted may be brought to the notice, which shall be considered in the next digest. Neither the authors, publishers, nor itatonline.org and its affiliates accept any liabilities for any loss or damage of any kind arising out of inaccurate or incomplete information from this digest nor action can be taken in reliance thereon. It is requested that, to avoid any doubt, the reader should cross check all the facts, law and contents of the digest with original reports referred by the authors. No part of this digest should be distributed or copied (Except for non-commercial use), without express written permission of itatonlne.org. We also acknowledge that the digest is prepared on referring the following Journals and magazines, we sincerely acknowledge their contribution. (ACCJ, BCAJ, CTC, CTR, DTR, ITD, ITR, ITR (Trib.), TTJ, Taxman, itatonline.org, ctconline.org and taxmann. com. Contribution by the authors to bring out this digest is only on honorary basis to help the professionals to find out the case laws reported in various journals or magazines at one stop.

All disputes are subject to Mumbai Jurisdiction.

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

ACKNOWLEDGEMENTS

Sincere thanks to the research team and 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 team of the AIFTP Journal Committee

Editorial Team

Adv. Aarti Vissanji
CA. H. N. Motiwalla
Adv. Keshav B. Bhujle
Adv. M. Subramanian
CA. Pradip Kapasi
Adv. Subhash S. Shetty

Research Team

Adv. Aditya Ajgaonkar
Adv. Arati Sathe
Adv. Ajay Singh
CA. Aliasger Rampurawala
Adv. Bharath Janarthanan
CA. Dhanesh Bafna
Adv. Dharan Gandhi
Adv .Gautam Thacker
Adv. Harsh Kothari
Adv. Hiten Chande
Adv. Jitendra Singh
Adv. Kalpesh Turalkar
CA. Ketan Ved
Adv. Neelam Jadhav
CA. Nikhil R. Tiwari
Adv. Paras S. Savla
Adv. Priyanka Jain
Adv. Prem Chandra Tripathi
Adv. Rahul Hakani
Adv. Rahul Sarda
Adv. Sashank Dundu
Adv. Viraj Mehta

PREFACE

2016 – Digest of Case Laws on Direct Taxes

We are glad to present "2016 – Digest of case laws on direct taxes". This year's digest is the fifth year of our private publication for the reference of professional colleagues who regularly appear before High Courts, the Income Tax Appellate Tribunal and Commissioners of Income-tax (Appeals).

In this publication, our research team has digested section-wise, --- cases which are reported in the year 2016 in various reports, journals, magazines and online media. The cases are digested in the descending order of relevance, i.e. Supreme Court, High Courts, Income Tax Appellate 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. Miruri & Co. Ltd.	Miruri & Co Ltd.; CIT v.
ITO v. Infinera India Ltd.	Infinera India Ltd.; ITO v.
DCIT v. Suthanther Assumtha	Suthanther Assumtha; DCIT v.
Jitendra Kumar Soneja v. ITO	Jitendra Kumar Soneja v. ITO

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.

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

15th September, 2017

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

www.bombayhighcourt.nic,in

www.ctconline.org

www.delhihighcourt.nic.in

www.itatonline.org

www.manupatra.com

www.taxlawsonline.com

www.taxmann.com

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)

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.)

Abbreviations

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)
Surat	– (Srt)
Vishakhapatnam	– (Vishakha)

Case Laws Index

Section wise Index

Income-tax Act, 1961

Arrangement of Section

Income-tax Act, 1961

CHAPTER 1
PRELIMINARY

S.2. Definitions

S. 2(1A) : Agricultural income – Growing of plants in nursery is an agricultural activity as this involves all activities of agricultural farming. [S. 147, 148, 260A] 1
Dismissing the appeal of revenue, the Court held that; growing of plants in nursery is an agricultural activity as this involves all activities of agricultural farming. Revenue contended that assessee did not submit any document with regard to expenditure incurred towards agricultural operations of nursery. Court held that, where revenue had not raised issue of expenditure on income from flowers and petals of nursery during assessment proceedings and even during appeal, it could not be introduced for first time in appeal under section 260A. (AY. 2007-08)
CIT v. K. N. Pannirselvam (2016) 243 Taxman 219 (Mad.)(HC)

S. 2(1A) : Agricultural income – Estimation of income without considering the land holding by the assessee was deleted. 2
Allowing the appeal of the assessee, the Tribunal held that, the assessee had land holding of 75 acres therefore estimation of income was not justified. (AY. 2008-09)
Amarjit Singh v. ITO (2016) 48 ITR 622 (Amritsar)(Trib.)

S. 2(IB) : Amalgamation – Order passed on amalgamating company was held to be not nullity [S. 143(3)] 3
Assessment completed on the amalgamating company. Held, amalgamation took place after the completion of the financial year in respect of which assessment was completed, held, order passed on the amalgamating company was not a nullity. (AY. 2002-03)
CIT v. Shaw Wallace Distilleries Ltd. (2016) 386 ITR 14 / 240 Taxman 348 / 290 CTR 684 (Cal.)(HC)

S. 2(14) : Capital asset – Agricultural land – Method of measurement – Distance to be measured taking into account access road – Certificates of Revenue and transport authorities relevant – Certificates that land was beyond specified limit. [Ss. 2(14)(iii)(b), 45, General Clauses Act, 1897, S. 11] 4
Dismissing the appeal of the revenue, the Court held that; there could not be any justifiable reason to reject the certificates of the Village Administrative Officer, Deputy Surveyor and the General Manager, Metropolitan Transport Corporation. No reason had been given by the AO for the rejection of the certificates. Method of measurement of distance to be measured taking into account access road. The profit from sale of the land was not assessable as capital gains. (AY. 2009-10)
CIT v. Sakunthala Rangarajan (Smt.) (2016) 389 ITR 103 / 292 CTR 451 / 74 taxmann.com 94 (Mad.)(HC)

5 **S.2(14) : Capital asset – Sale of land – Land was not situated within jurisdiction of a municipality or a cantonment board – Not assessable as capital gains or business income – Entitle exemption. [Ss. 2(IA), 2(13), 2(14)(iii), 28(i), 45, 260A]**

Assessee did not pay capital gains tax on sale of a land by treating it as agricultural land, on the ground that the land was not situated within jurisdiction of a municipality or a cantonment board as contemplated under clause (iii). Assessee was engaged in agricultural operations on such land. It was specified as agricultural land in revenue records and was not subjected to any conversion as non-agricultural land. AO called the report from Tahsildar who stated that the land are not cultivated for the past 8 years. AO assessed the income under the head capital gains. CIT(A) accepted the contention of assessee and deleted the addition as capital gains. On appeal by revenue dismissing the appeal Tribunal held that since intention of assessee from inception was to carry on agricultural operations and there was no intention to sell land in future at that point of time and it was only due to boom in real estate market which came into picture at a later stage, assessee sold land, merely because of fact that land was sold for profit, it could not be held that income arising from sale of land was taxable as profit arising from adventure in nature of trade. On appeal High Court dismissed the appeal of revenue. (AY. 2011-12)

PCIT v. Mansi Finance Chennai Ltd. (2016) 388 ITR 514 / 141 DTR 321 / 289 CTR 381 (Mad.)(HC)

Editorial: Order of Tribunal in ACIT v. Mansi Finance Chennai Ltd. (2016) 157 ITD 194/ 141 DTR 305/ 181 TTJ 821 (Chennai) (Trib.) is affirmed.

6 **S. 2(14) : Capital asset – Capital gains – Sale of silver utensils – Loss incurred on sale of silver utensils is held to be not allowable. [Ss. 28(i), 45]**

The assessee claimed loss on sale of silver utensils. The Assessing Officer held that silver wares being personal effects were not within the purview of the capital assets in accordance with the definition of "capital asset" under section 2(14) of the Act. The CIT(A) and the Tribunal confirmed this. On appeal : Held, that the silver utensils were purchased in the year 1966-67. The occasion to use the silver utensils for the purpose of business of the assessee arose at least 30 years after the silver utensils were allegedly purchased. Therefore, the silver utensils could not be said to have been purchased for the business of the assessee. The silver utensils were the personal effects of the assessee and they were out of the purview of capital assets. The loss incurred on sale of silver utensils was not allowable. (AY. 2001-02)

Ashok Surana v. CIT (2016) 384 ITR 267 (Cal.)(HC)

7 **S. 2(14) : Capital asset – Advance given to subsidiary – Loss arising on sale of said asset was held to be treated as short term capital loss – OECD Model Convention [S. 2(47)(i), 9(1)(i), Art. 13]**

Allowing the appeal of the assessee, the Tribunal held that Advance given by assessee, a non-resident company, to its wholly owned subsidiary is a property in sense it is an interest which a person can hold and enjoy, and since it is a property and it is not covered by exclusion clauses set out in section 2(14), it is required to be treated as a 'capital asset' and if any loss arises on sale of said asset, it would be treated as short term capital loss. (AY. 2002-03)

Siemens Nixdorf Informationssysteme GmbH v. DIT (2016) 158 ITD 480 / 179 TTJ 71 (Mum.)(Trib.)

S. 2(14) : Capital asset – Agricultural land – Situation of a land nearby a highway and appreciation in price would not alter character of land leading to conclusion that land was not an agricultural land [S. 2(IA), 2(14)(iii), 45] 8

Dismissing the appeal of the revenue, the Tribunal held that; situation of a land nearby a highway and appreciation in price would not alter character of land leading to conclusion that land was not an agricultural land. (AY. 2010-11)

ITO v. Kalathingal Faizal Rahiman (2016) 158 ITD 488 (Cochin)(Trib.)

S. 2(14): Capital asset – Agricultural land – Agricultural land beyond 8 Kms. of municipal limits, is it not a capital, hence not liable to be assessed as capital gains [Ss. 2(14) (iii), 45] 9

Dismissing the appeal of revenue, the Tribunal held that since agricultural land in question was lying in an area beyond 8 Kms. of municipal limits, it was not a capital asset u/s. 2(14)(iii). Therefore, sale consideration was not liable to capital gains tax. (AY. 2008-09)

ITO v. Megh Chand Meena, HUF (2016) 159 ITD 457 / 181 TTJ 240 (Jaipur)(Trib.)

S. 2(14) : Capital asset – Agricultural land – Beyond 8 kms from municipal limits – Land bought by developer, could not be a determining factor by itself to say that land was converted into use for non – agricultural purposes, gain is exempt from tax. [S. 2(14)(iii), 45] 10

Dismissing the appeal of the revenue, the Tribunal held that mere fact that land in question was bought by Developer, could not be a determining factor by itself to say that land was converted into use for non-agricultural purposes. Since land was situated beyond 8 km from municipal limits, it did not come within purview of s. 2(14)(iii) either under item (a) or (b) and hence same could not be considered as capital asset and, thus, no capital gain tax could be charged on sale transaction of this land entered by assessee. (AY. 2009-10)

ITO v. Ayisha Fathima (Smt.) (2016) 160 ITD 377 / 182 TTJ 437 (Chennai)(Trib.)

S. 2(14) : Capital asset – Agricultural land – Compensation on acquisition of agricultural land, were existence of cattle shed, well, pump house, septic tank and compound wall on said land would not convert it into non-Agricultural land. [S. 2(IA), 2(14)(iii), 45] 11

The AO held that 30 cents of land acquired consisted of a residential building with plinth area of 1200 sq. feet, a cattle shed, a well, a pump house, septic tank, compound wall, etc., and it would be fair and reasonable to hold that out of 30 cents of land, 20 cents of land was required to accommodate above structures. He accordingly treated 1/3rd of value of land as agricultural and 2/3rd of value along with surplus attributable to building as non-agricultural. Allowing the appeal of the assessee the Tribunal held that the assessee was actually cultivating land with agricultural crops. Moreover, land was located within a Panchayat far away from notified areas in Municipal Corporation. Mere existence of well, septic tank, compound wall, cattle shed, pump house, a small house, etc., would not convert agricultural land into a non-agricultural land. (AY. 2011-12)

T. C. Vavachan v. ITO (2016) 159 ITD 48 (Cochin)(Trib.)

12 **S. 2(14) : Capital asset – Agricultural land – Land situated beyond 8KMs from municipality or cantonment board cannot be considered as agricultural land merely because it was recorded as agricultural land from revenue records. [S.2(14)(iii), 45]**
Allowing the appeal of the revenue, the Tribunal held that, Land situated beyond 8KMs from municipality or cantonment board cannot be considered as agricultural land merely because it was recorded as agricultural land from revenue records. (AY. 2006-07)
ITO v. Aboobucker (2016) 157 ITD 717 / 141 DTR 78 / 180 TTJ 510 (Chennai)(Trib.)

13 **S. 2(14) : Capital asset – Shares – Non-resident not having permanent establishment in India – Provisions relating to minimum alternate tax, transfer pricing and TDS not applicable – Non-resident not bound to file return in India – DTAA – India – Mauritius. [S. 92 to 92F, 115JB, 139, 195, Art. 5, 13]**
Non-resident not having permanent establishment in India, Transaction not for avoidance of tax. Shares to be treated as capital asset not stock-in-trade. Profits not business income but capital gains which is not taxable in India. Even if treated as business income not taxable in absence of permanent establishment. Provisions relating to minimum alternate tax, transfer pricing and TDS not applicable. Non-resident is not bound to file return in India considering the DTAA-India-Mauritius.
Dow Agro Sciences Agricultural Products Ltd., In re (2016) 380 ITR 668 / 131 DTR 177 / 65 taxmann.com 245 / 284 CTR 50 (AAR)

14 **S. 2(15) : Charitable purpose – Town improvement trust formed under Act – Entitled to exemption. [S.11, 12, 12A, 12AA]**
Assessee deriving income from constructing and selling residential apartments, commercial flats and booths. Activities carried out with larger and predominant objective of general public utility of satisfying need for housing accommodation. Merely referring to extent of profit making activities without correlating it to other activities of trust not proper. Assessee entitled to exemption. (AY. 2009-10, 2011-12)
CIT v. Improvement Trust Moga (2016) 76 taxmann.com 363/ (2017) 390 ITR 547 / 291 CTR 352 / 145 DTR 350 (P&H)(HC)

15 **S. 2(15) : Charitable purpose – Publication of newspapers – Business income of the Trust predominant motive was profit motive denial of exemption was justified [S. 11, 12, 12A].**
The issue involved was interpretation of section 2(15) of the Act, and in particular proviso thereto. Court held that the amendment also indicates that the legislature accepted the observations in Surat Art Silk's to the effect that the purpose of the enacting section 2(15) in 1961 was to overcome the decision of the Privy Council in the Tribune's case. While the legislature in the 1984 amendment which continued up to the year 2009 altered this position by deleting the words "not involving the carrying on of any activity for profit", it reintroduced an exclusionary clause albeit in different and wider terms in the 2009 amendment. The exclusionary clause related to the object of general public utility and not the advancement thereof.
The normal incidence of trade and commerce is also profit. Considering the nature of the legislation, we are inclined to accept Mr. Bhan's contention that each of these three words indicates the element of profit. A wider meaning ought not to be given to these words especially in a taxing statute. Section 2(15) defines charitable purpose. As in the

case of any other definition, it is to assist the construction of the main provisions in which the terms defined are used. The main provisions such as sections 11, 12 and 13 use the words "charitable purpose" in the context of granting the assessee's the relief against taxation partly or fully often subject to certain conditions. If a trade or business or commercial activity does not result in profit, it would not be necessary to deal with the same in the Income-tax Act. The relief from taxation partly or fully predicates taxability and taxability predicates income and income predicates profit. This is the normal sense of these terms. There is nothing in the Act which persuades us that the words are used in section 2(15) with a different intention. There is nothing in the Act and in particular section 2(15) thereof that indicates that the legislature contemplated a trade or a business or a commercial activity other than for profit. It is obviously for this reason that the legislature did not add to the words "trade, commerce or business" (used twice in the proviso) the words "carried on for profit". On facts the question was answered in favour of revenue. (AY. 2009-10)

The Tribune Trust v. CIT (2016) 76 taxmann.com 363 / (2017) 390 ITR 547 / 291 CTR 352 / 145 DTR 350 (P&H)(HC)

S. 2(15) : Charitable purpose – No denial of exemption under S. 11 to an educational trust if it lets out its auditorium for educational activities. [S. 11, 12A] 16

Dismissing the appeal of the revenue, the court held that ;if the pre-dominant object is to carry out a charitable purpose and not to earn profit, the purpose would not lose its charitable character merely because the some profit arises from the activity. Therefore exemption cannot be denied under S. 11 to an educational trust if it let out its auditorium for educational activities. (AY. 2009-10)

DIT(E) v. Lala Lajpatrai Memorial Trust (2016) 383 ITR 345 / 136 DTR 233 / 240 Taxman 557 (Bom.)(HC)

S. 2(15) : Charitable purpose – For providing training charging fees – Such activity does not amount to services in relation to trade, commerce and industry it amounts to imparting education. [S. 10(23C)(vi)] 17

Assessee institution engaged in imparting higher and specialized education in field of communication including advertising and its related subjects. Training given to individual as well as to persons sent by companies to meet needs of Indian industry and commerce. Held, such activity does not amount to services in relation to trade, commerce and industry it amounts to imparting education, it will still be held that the institution exist solely for educational purpose.

Mudra Foundation for Communications Research & Education v. CCIT (2016) 237 Taxman 139 / 137 DTR 293 / 287 CTR 135 (Guj.)(HC)

S. 2(15) : Charitable purpose – Activities undertaken by the assessee cannot be said to be of a charitable and religious nature in the absence of any trust deed, registration under sections 12AA/80G and further where the bank accounts were maintained in the individual assessee's name. [S.12AA, 80G] 18

Assessee filed a return of income declaring his total income of ₹ 2,10,870/-. The assessee, in the course of assessment proceedings, stated that he was a religious

preacher and that he did not have any personal bank account and that he did not carry out any business activity. AO obtained information from the bank under section 133(6) and treated income from bank deposits as assessee's income from profession and vocation and after disallowing certain expenses made an addition of ₹ 1,21,67,653/-. CIT(A) and ITAT dismissed the assessee's appeals against the above stated additions. Before the High Court, the assessee submitted that he managed an old historic Dera carrying on charitable and religious activities and the bank accounts were that of the Dera and the assessee merely managed the same. High Court noted that the bank account was in the name of the assessee and had a nomination in favour of the assessee's son and therefore could not be said to be that of the Dera. High Court rejected the argument that the activities done by the appellant were of charitable and religious nature and were being done in the name of Dera. High Court noted that there was no trust deed, no registration sought under section 12AA, etc. High Court dismissed the assessee's appeal as no illegality or perversity in the order of the Tribunal was pointed out. (AY. 2009-10)

Makhan Singh v. ITO (2016) 236 Taxman 364 / 136 DTR 336 (P&H)(HC)

19 **S. 2(15) : Charitable purpose – Medical relief – Running veterinary hospitals is covered under specific category of 'medical relief' hence eligible exemption. [S.11]**

Assessee engaged in running veterinary hospitals, collected nominal cess from milk producers members in lieu of providing them research, animal nursery, fertility, vaccination and breed improvement facilities, it could be regarded as rendering medical relief services, therefore, assessee could not be regarded as an entity advancing any other object of general public utility covered by proviso to S. 2(15). (AY 2010-11)

Amul Research & Development Association v. ITO (2016) 160 ITD 454 / 182 TTJ 794 / 145 DTR 30 (Ahd.)(Trib.)

20 **S. 2(15) : Charitable purpose – Coaching for particular examination does not amount to imparting education – Not entitle to exemption. [S. 11]**

The main object of the assessee, a trust registered under section 12A of the Income tax Act, 1961, was conducting review and courses for helping aspiring members in preparing for Certified Information Systems Auditor and Certified Information Security Manager certification and organizing seminars and workshops on various topics in the field of information technology, security, control and audit. The assessee claimed exemption under section 11 of the Act. The Assessing Officer denied the claim on the ground that the assessee had collected a sum from persons appearing for the examination for the course of certified information system auditor and seminar fees from the participants which showed that the assessee was engaged in commercial activity in the nature of trade, business and commerce and hence the object of the assessee fell under advancement of any other object of general public utility and the provisions of section 2(15) were clearly attracted. The Commissioner (Appeals) confirmed the order of the Assessing Officer. The Tribunal held that the definition of charitable purpose was inclusive and not exhaustive. A coaching institute could not be considered an institution as normal schooling. Mere coaching classes might provide some kind of knowledge to the students but that kind of acquisition of knowledge through coaching classes could

not fall within the meaning of "education" as provided in section 2(15) of the Act. The assessee carried on advancement of any other object of general public utility and in terms of the proviso to section 2(15), advancement of any other object of general public utility would not be charitable purpose if it involves any activity of rendering any service in relation to any trade, commerce or business for consideration, irrespective of the application of the money. Therefore, the assessee was hit by the proviso to section 2(15) and was not entitled to the benefit of section 11. It could not be considered to be an "educational trust" within the meaning of section 2(15) of the Act and it was not entitled to exemption under section 11 of the Act and the income of the assessee was to be assessed as business income under the head "association of persons". (AY. 2009-10)
Information Systems Audit and Control Association v. DDIT (E) (2016) 157 ITD 815 / 46 ITR 665 / 179 TTJ 99 (Chennai)(Trib.)

S. 2(15) : Charitable purpose – Education – Proviso would not apply where assessee – society, running an educational institution for courses of B.Tech, M.Tech, and MBA, maintained a textile unit for purpose of imparting practical training to students. [S.11] 21
Allowing the appeal of assessee the Tribunal held that; Proviso would not apply where assessee-society, running an educational institution for courses of B.Tech, M.Tech, and MBA, maintained a textile unit for purpose of imparting practical training to students.
Technological Institute of Textile & Science v. DIT (2016) 158 ITD 808 (Kol.)(Trib.)

S. 2(15) : Charitable purpose – Provision of Medical Relief is charitable activity hence surplus generated does not disentitle assessee from exemption. [S. 11, 12AA] 22
The activity in the nature of 'medical relief' fell outside the scope of the proviso to section 2(15). Hence, any surplus resulting from the aforementioned activity would not be taxable, if the surplus was dealt with in the manner provided under the Act. Accordingly, the corpus donations were not to be included in the assessee's total income. (AY. 2010-11)
Sundaram Medical Foundation v. Dy. CIT (E) (2016) 45 ITR 500 (Chennai)(Trib.)

S. 2(22)(e) : Deemed dividend – Loan from subsidiaries – Intermediary between the two subsidiaries – Additions cannot be made as deemed dividend. 23
Dismissing the appeal of revenue, the Court held that in view of the decision of the Division Bench of the Madras High Court made in [Tax Case (Appeal) No. 16 of 2010, dated 17-6-2013], wherein the assessee-company received loans from some of its subsidiaries and advanced money to some of the subsidiaries and on the basis of the available particulars it has been held that the assessee-company is only a intermediary between the two subsidiary companies and no beneficial interest has been accrued to it by the advances between the subsidiary companies and sub-subsidiary companies and consequently the ingredients of section 2(22)(e) is not attracted, the instant Bench is of the considered view that the revenue has not shown sufficient cause or reason to interfere with the order passed by the Tribunal confirming the order passed by the Commissioner (Appeals). Accordingly, the appeal was liable to be dismissed. (AY. 2006-07)
CIT v. Farida Holdings (P.) Ltd. (2016) 243 Taxman 428 (Mad.)(HC)
Editorial: SLP was granted to the revenue, CIT v. Farida Holdings (P.) Ltd. (2016) 243 Taxman 434 (SC)

24 **S. 2(22)(e) : Deemed dividend – Not a shareholder – Addition cannot be made as deemed dividend.**

Tribunal held that as assessee was not shareholder of two companies, amount received by it did not attract provisions of deemed dividend. On appeal to High Court: The Bombay High Court in the cases of *CIT v. Universal Medicare (P.) Ltd. [2010] 324 ITR 263* and *CIT v. Impact Containers (P.) Ltd. [2014] 367 ITR 346* has held that deemed dividend has to be taxed in the hands of the shareholder of the company giving the loans and/or advance. In the instant case, admittedly, the assessee is not a shareholder of the two companies. In the above view, the question as formulated by the revenue did not give rise to any substantial question of law. Thus not entertained. (AY. 2005-06)

CIT v. Alfa Sai Minerals (P.) Ltd. (2016) 243 Taxman 216 (Bom.)(HC)

Editorial : SLP was granted to the revenue, CIT v. Alfa Sai Mineral (P.) Ltd. (2016) 243 Taxman 140 (SC)

25 **S. 2(22)(e) : Deemed dividend – Not a shareholder – Not liable to be taxed as deemed dividend.**

Dismissing the appeal of revenue, the Court held that; the assessee is not shareholder of company advancing loan, hence not be liable to be taxed on deemed dividend. (AY. 2007-08)

CIT v. Narmina Trade Investment P. Ltd. (2016) 388 ITR 243 (Bom.)(HC)

26 **S. 2(22)(e) : Deemed dividend – Share premium does not constitute accumulated profits or even profits of company – Payment made by company in ordinary course of its business of money lending being substantial part of its business – Payment does not amount to deemed dividend.**

An advance or loan made to a shareholder or the concern by a company in the ordinary course of its business, where the lending of money was a substantial part of the business of the company was not deemed dividend under section 2(22)(e). Further, share premium would not constitute accumulated profits or even profits of the company. (AY. 2004-05)

CIT v. Shree Balaji Glass Manufacturing P. Ltd. (2016) 386 ITR 128 / 241 Taxman 265 (Cal.)(HC)

27 **S. 2(22)(e) : Deemed dividend – Loan or advance to a non-shareholder, though beneficial owner, cannot be treated as deemed dividend.**

The assessee received a loan from M/s. Jupiter Capital Pvt. Ltd. whose 99% of shares were held by M/s. Vectra Holding Pvt. Ltd. in which the assessee owns 95% of the shares. The AO treated the said loan as deemed dividend u/s. 2(22)(e) of the Act. The CIT(A) confirmed the AO's action, however, the Tribunal reversed the same. On appeal, the High Court held that since the assessee is not a shareholder in the lender company which is condition for invoking section 2(22)(e), loan amount cannot be taxed in the hands of assessee. (AY. 2008-09)

PCIT v. Rajeev Chandrashekar (2016) 239 Taxman 216 (Karn.)(HC)

Editorial : SLP was granted, PCIT v. Rajeev Chandrashekar (2016) 243 Taxman 139 (SC)

S. 2(22)(e) : Deemed dividend – Shareholder – Deposits made by the investors were retained by the assessee in the firm for a longer period – Assessable as deemed dividend. 28

The assessee could not explain why the heavy deposits made by the investors were retained by the assessee in the firm for a longer period, it was held to be a case of deemed income as the assessee was a shareholder in all the companies. (AY. 1995-1996 to 1998-1999)

CIT v. O.P. Srivastava (2013) 219 Taxman 133 / (2014) 265 CTR 484 / (2016) 385 ITR 547 (All.)(HC)

CIT v. Subrat Roy (2013) 219 Taxman 133 / (2014) 265 CTR 484 / (2016) 385 ITR 547 (All.)(HC)

Editorial : The decision was recalled by order dt 21 February, 2014. The Supreme Court seta aside the order (CIT v. Subrata Roy (2016) 385 ITR 570 / 287 CTR 129 / 71 taxmann. com 89 (SC)

S. 2(22)(e) : Deemed dividend – Deposits received by the Assessee, a partnership firm, who is not a shareholder in a concern from which deposit was received – Deemed dividend taxable only in the hands of shareholders. 29

Dismissing the appeal of revenue; The High Court observed the definition of the effect of clause (e) of section 2(22) was to broaden the ambit of the expression 'dividend' by including certain payments which company had made by way of loan or advance or payments made on behalf of or for individual benefit of a shareholder. However the definition did not alter the legal position that dividend has to be taxed in the hands of the shareholder. The High Court thus ruled in favour of the Assessee.

CIT v. Skyline Great Hills (2016) 238 Taxman 675 (Bom.)(HC)

S. 2(22)(e) : Deemed dividend – Inter-corporate transactions – Loans given by companies to each other in course of *inter se* business transactions could not be regarded as deemed dividend. 30

Allowing the appeal of the assessee the Tribunal held that; Assessee is major share holder in three companies, loans given by those companies to each other in the course of *inter se* business transactions could not be regarded as deemed dividend in the hands of the assessee. (AY. 2009-10)

Chandrasekhar Maruti v. ACIT (2016) 159 ITD 822 / (2017) 183 TTJ 459 / 146 DTR 198 (Mum.)(Trib.)

S. 2(22)(e) : Deemed dividend – Assessee-firm was not shareholder of its sister concern, provisions was not attracted 31

Tribunal held that; since assessee-firm was not shareholder of its sister concern, provisions of deemed dividend was not attracted. (AY. 2007-08)

Shiv Transport & Travels v. ITO (2016) 157 ITD 835 (Kol.)(Trib.)

32 **S. 2(22)(e) : Deemed dividend – Loan received and paid – Only excess amount of debit in books of account of company can be considered as deemed dividend, matter was remanded.**
Tribunal held that where the assessee, received the loan and also paid the loan, only excess amount of debit in books of account of company can be considered as deemed dividend. Matter was remanded. (AY. 2005-06 to 2007-08)
Gurbinder Singh v. ACIT (2016) 161 ITD 256 (Chennai)(Trib.)

33 **S. 2(22)(e) : Deemed dividend – Advance in course of a commercial transactions the said advance cannot be assessed as deemed dividend.**
Allowing the appeal of the assessee, the Tribunal held that advance is in course of a commercial transaction between advancer company and the advance company, it would not be regarded as 'loan' or 'advance' to be assessed as deemed dividend. (AY. 2011-12)
Namita V. Samant v. CIT (2016) 161 ITD 15 (Mum.)(Trib.)

34 **S. 2(22)(e) : Deemed dividend – Commercial transactions between closely held companies cannot be assessed as deemed dividend.**
The Tribunal held that when the amount was advanced or paid out of any commercial expediency or in the course of business and were not gratuitous payments for the benefit of the shareholders, then such payment made through inter corporate transactions between the parties cannot be treated deemed dividend at the hands of assessee shareholder. Thus the provisions of section 2(22)(e) are not applicable in this case. (AY. 2009-10)
Chandrasekhar Maruti Musale v. ACIT (2016) 159 ITD 822 / (2017) 183 TTJ 459 (Mum.) (Trib.)

35 **S. 2(22)(e) : Deemed dividend – Loan by proprietary concern of assessee was held to be deemed dividend.**
Dismissing the appeal of assesse the Tribunal held that there is nothing on record to suggest that the amounts given by the company to the assessee shareholder were consideration for the personal guarantees and collateral securities given by him for the loans raised by the company. VFPL has accumulated profits in reserves and surplus and therefore the amounts received by the assessee are in the nature of loans and advances attracting the provisions of S. 2(22)(e) and, therefore, the same are taxable as deemed dividend. (AY. 2008-09, 2009-10)
Dipesh Lalchand Shah v. ACIT (2016) 158 ITD 515 / 179 TTJ 654 / 138 DTR 155 (Ahd.) (Trib.)

36 **S. 2(22)(e) : Deemed dividend – Assessee was neither beneficial shareholder nor even a shareholder, provisions of section 2(22)€ cannot be applied.**
The assessee was not a registered shareholder of GTL from which it had received an advance during the previous year in question. The only ground on which the Assessing Officer had treated the amount as deemed dividend was that both the companies had common shareholders. That could not be a reason for treating the amount as deemed dividend under section 2(22)(e). Since the Assessing Officer had failed to establish that

the assessee was the beneficial shareholder or even a shareholder of GTL, the provisions of section 2(22)(e) could not be applied. (AY. 2009-10)
DCIT v. Gebbs Healthcare Solutions Pvt. Ltd. (2016) 46 ITR 551 (Mum.)(Trib.)

S. 2(22)(e) : Deemed dividend – Loan or advance by NBFC to be excluded – Literal interpretation to deeming provisions. [S.115-O] 37
The assessee was engaged in the business of media operation. It received loan from two non-banking financial companies. The Assessing Officer treated the advances as deemed dividend under section 2(22)(e) read with sections 56 and 115-O of the Income tax Act, 1961, holding that the directors of the assessee were substantially interested in the lender companies and some of the shareholders were common in both companies. The Commissioner (Appeals) deleted the addition. The Tribunal held that the lender companies were registered with the Reserve Bank of India since 1998 in the category of loan investment company. The lender companies were public limited companies and so the loan or advance given to the assessee would not fall in the ken of section 2(22)(e) and, moreover, the lender companies were non-banking financial companies which were also excluded from the deeming provision. Further a deeming provision has to be interpreted strictly and it cannot be stretched to more than that for which the deeming provision can be literally interpreted. Nothing can be added or implied while interpreting a deeming provision. One can only look at the language used. (AY. 2008-09)
DCIT v. Sindhu Holdings Ltd. (2016) 46 ITR 771 (Delhi)(Trib.)

S. 2(22)(e) : Deemed dividend – Loan by company – Percentage of shareholding has to be checked at the time of availing loan for purpose of deemed dividend. 38
For invoking the provision of section 2(22)(e), percentage of shareholding has to be checked at the time of availing loan for purpose of deemed dividend, therefore, the loan given to the assessee should not be treated as 'deemed dividend' for the purpose of invoking provisions of section 2(22)(e). (AY. 2005-06)
ACIT v. Jagjit Singh Jaswant Singh Oberoi (2015) 155 ITD 283 / (2016) 177 TTJ 118 / 134 DTR 74 (Nag.)(Trib.)

S. 2(22)(e) : Deemed dividend – Loan – Beneficial ownership of more than 10 per cent shares in a closely held company – Assessable as deemed dividend. [S. 153A] 39
Assessee, who was a shareholder and director in a closely held company having beneficial ownership of more than 10 per cent shares, had taken certain loan from company. In assessment proceedings assessee submitted that loan was taken for purpose of purchase of land for company and, therefore, could not be treated as deemed dividend. However, assessee failed to prove by furnishing relevant details in form of agreements or details of amount spent for purpose for which it was drawn and he kept on changing his arguments at each stage of proceedings. Tribunal held that loan taken by assessee was rightly considered as deemed dividend. (AY. 2007-08 to 2009-10)
M. Amareswara Rao v. Dy. CIT (2016) 157 ITD 657 / 136 DTR 153 / 178 TTJ 700 (Visakha)(Trib)

40 **S. 2(22)(e) : Deemed dividend – Not applicable to loans or deposits from public company.**

On appeal by revenue, the Tribunal while deciding the issue in favour of the assessee, held that since S Ltd. was a public limited company and registered with RBI since 1998 in the category of loan investment company and engaged in activities of share sale, financing activities, etc. the loan or advance or inter-corporate deposit given to the assessee did not fall within section 2(22)(e) and moreover, it was a non-banking financial company which was excluded from the deeming provision. (AY. 2008-09)

Dy. CIT v. Sindhu Realtors Pvt. Ltd. (2016) 45 ITR 448 (Delhi)(Trib.)

41 **S. (22)(e) : Deemed dividend – Loans and advances to shareholders – Loans received by the company would be treated as deemed dividend in hands of P and S in proportion to their shareholdings.**

Assessees P and S were directors in two sister companies namely AI and AE. Shareholdings of both directors in AE was 50 per cent whereas in AI it was 53.85 per cent for P and 46.11 per cent for S. AI had received ₹ 10 lakh as loan from AE. AO held that loan received from was to be treated as deemed dividend in the hands of individual directors and since P and S were equal beneficiary of shares to tune of 50 per cent each in AI the company which had received the loan. On appeal CIT(A) affirmed the order of AO. On appeal the assessees contended that no mechanism had been provided in Act regarding computation of deemed dividend in hands of directors and in absence of any such mechanism, charging provisions would fail and no additions could be made. Tribunal held that if by reasonable construction of relevant section, income could be deduced, then merely on ground that specific provision had not been provided, it could not be held that computation provisions failed; therefore, percentage of shareholdings in concern to which loan was given would be determining factor of deemed dividend in case of shareholder and accordingly, 53.85 per cent, i.e., ₹ 5,38,850 should have been assessed as dividend in hands of P and 46.11 per cent, i.e. ₹ 4,61,100, in hands of S. (AY. 2007-08)

Puneet Bhagat v. ITO (2016) 157 ITD 353 (SMC)(Delhi)(Trib.)

42 **S. 2(22)(e) : Deemed dividend – Business transactions – Accounts produced by assessee shows that it has several transactions with the company relating to purchase and sale of goods, job work charges, rent paid and received – Transactions are business transactions in ordinary course of business – Could not be treated as deemed dividend**

Held that copy of account shows that the assessee has number of transactions related to purchase & sale of goods, job work charges, rent received & paid. Also, there was debit balance in the books of assessee and there was a closing credit balance. Thereby, these are business transactions during the ordinary course of business. Said cannot be construed as deemed dividend u/s. 2(22)(e). (AY. 1999-00, 2005-06)

K. G. Petrochem Ltd. v. ACIT (2016) 176 TTJ 1(UO) (Jaipur)(Trib.)

S. 2(22)(e) : Deemed dividend – Loan account is different from a current account on which provisions of s. 2(22)(e) are not applicable. 43

There was a running current account between the assessee and the private limited company in which she was a director. At the end of the year, the balance was squared off and there was no closing balance. The AO held that the monies lent by the company to the Assessee were loans and advances within the meaning of s. 2(22)(e). The ITAT deleted the addition made by the AO and held that the current account between the Assessee and the Director was a mutual account which was reciprocal demands between the parties and did not benefit the assessee alone. It was thus held that s. 2(22)(e) cannot be invoked on current account transactions. (AY. 2009-10)

ITO v. Gayatri Chakraborty (Smt.) (2016) 45 ITR 197 (Kol.)(Trib.)

S. 2(22)(e) : Deemed dividend – Not applicable to loans from NBFCs and companies which are listed on a stock exchange. 44

The assessee had received inter-corporate deposit from another company which was an NBFC and was listed in the Delhi Stock Exchange. The AO treated the same as deemed dividend and added the same to the income of the Assessee. On appeal, the ITAT held that the said loan could not be considered as deemed dividend since deeming provisions were to be read strictly and NBFCs and listed companies were excluded from the said provision. (AY. 2008-09)

DCIT v. Sindhu Realtors Pvt. Ltd. (2016) 45 ITR 448 (Delhi)(Trib.)
DCIT v. Sindhu Holdings Ltd. (2016) 176 TTJ 41 (UO) (Delhi)(Trib.)

S. 2(22)(e) : Deemed dividend – Son and daughter had over dawn from the company where the assessee was a share holder having 41 percent of shares – Addition cannot be made as deemed dividend. 45

Allowing the appeal of assessee the Tribunal held that; Where assessee was a shareholder in a company holding 41 per cent of shares and during year he and his son and daughter had overdrawn certain amount from said company and Assessing Officer treating said amount as deemed dividend under section 2(22)(e) added same in income of assessee, since both son and daughter were not shareholders in company and during year company got only negative accumulated profits, provisions of section 2(22)(e) could not be invoked. (AY. 2007-08)

Manoj Murarka v. ACIT (2016) 156 ITD 793 / (2017) 184 TTJ 555 (Kol.)(Trib.)

S. 2(22)(d) : Deemed dividend – Buy-back cannot be assessed as deemed dividend – The capital gains on buy – back are exempt under the India-Mauritius DTAA – [Art. 10, Companies Act, S.77, 100, 105, 391] 46

A buy back cannot be regarded as a "colourable transaction" and cannot be assessed as "deemed dividend". The capital gains on buy-back are exempt under the India-Mauritius DTAA. (ITA No. 3726/Mum/2015, dt. 12.02.2015)(AY. 2011-12)

Goldman Sachs (India)Securities Pvt. Ltd. v. ITO (Mum.)(Trib.); www.itatonline.org

47 **S.2(22)(d) : Deemed dividend – Redemption of preference shares does not constitute "deemed dividend". [S.2(47), Companies Act, S. 80(3), 100]**
Redemption of preference shares does not constitute "deemed dividend". (ITA No. 4669/Mum/2014. Dt. 06.04.2016)(AY. 2005-06)
Uday K. Pradhan v. ITO (Mum.)(Trib.); www.itatonline.org

48 **S. 2(24) : Income – Interest – Accrual – Rate of interest reduced by passing resolution by board of directors before end of year – Interest taxable at reduced rate. [S. 4, 145]**
On a reference answering the question in favour of assessee the Court held that the Appellate Tribunal was not justified in holding that the interest had accrued on day-to-day basis and not at the end of the year and that the interest rate stood reduced only from March 17, 1989. On facts the rate of interest was reduced by passing resolution by board of directors before end of year hence interest was taxable at reduced rates. (AY. 1989-90)
Renu Sagar Power Col. Ltd v. CIT (2016) 389 ITR 310 (All.)(HC)

49 **S. 2(24) : Income – Accrual – Amount given by Government for a specified purpose for utilisation in Government scheme, said amount and interest could not be assessed as income of the assessee. [S. 4, 145]**
Allowing the appeal of the assesse, the Court held that; the assessee was to act as a custodian of the money, the utilisation thereof was fully controlled by the Government, the money remained as given for the specified purpose and the interest earned was also to be utilised for specified purpose, but under the control of the Government as per the conditions of the grant. There was no liberty available to the assessee to utilise the amount of interest as it desired. Hence no income accrued to the assessee.(AY. 2008-09, 2010-11)
Karnataka Municipal Data Society v. ITO (2016) 389 ITR 441 / 76 Taxmann.com 167 (Karn.)(HC)

50 **S. 2(24) : Income – Interest received from overseas head office – Not taxable.**
Interest received by the Indian branch of a foreign bank from the head office is not taxable in India. (AY. 1998-99, 1999-2000)
DIT (IT) v. Oman International Bank S.A.O.G. (2016) 386 ITR 151 (Bom.)(HC)

51 **S. 2(24) : Income – Accrual – Lease of factory to group company – Reduction in lease rent by resolution of board of directors on account of financial inability – *Bona fides* of transaction not in dispute – Reduced rent alone to be taxed. [S. 145]**
The assessee took a sugar factory on lease and sub-leased it to its sister concern on an annual rental of ₹ 225 lakhs. In the previous year relevant to the AY. 2002-03, due to extensive repairs and renovations, the assessee agreed to reduce the lease rent to ₹ 75 lakhs and a board resolution was adopted on March 5, 2002 by the board of directors of the assessee in respect of the reduction in the lease rent from the sub-lessee. Held, since the *bona fides* of the transaction were never in dispute and there was evidence to show that the assessee had resolved to remit the sum of ₹ 150 lakhs and that it had received only ₹ 75 lakhs, no addition could be made.(AY. 2002-03)
CIT v. Shree Hanuman Sugar and Industries Ltd. (2016) 386 ITR 218 / 243 Taxman 417 (Cal.)(HC)

S. 2(24) : Income – Capital or revenue – Sales tax subsidy – Subsidy for encouraging industries to set up units in rural areas – Subsidy constituted a capital receipt. [S.4] 52
Subsidy given in accordance with the scheme of the State Government for encouraging the industries to set up their units in rural areas and for compensating for the hardship in setting up such industries in remote rural areas was capital receipt and not taxable. (AY. 2005-06)
PCIT v. Talbros Engineering Ltd. (2016) 386 ITR 154 (P&H)(HC)

S. 2(24) : Income – Society, which ran a business enterprise in its own name was duty bound to offer its profits to tax before diverting any funds to 'Distributable Pool Fund Account' for distribution to its members – Amount transferred is not assessable as income of the Society. [Ss. 4, 80P] 53
The assessee was a society of 'Maliks' who were owners of land (Agar) on which salt was manufactured. The society was formed *inter alia* to acquire from the 'Maliks' their rights and to manufacture salt and its bye-products. Assessee manufactured and sold salt and other bye-products in its own name. The sale proceeds were being transferred to an account called 'Distributable Pool Fund Account' for distribution among the members of the society. After such transfer to the members, the society would offer remaining income to tax. The AO held that such transfer could not be considered as expenditure, accordingly assessed the amount transferred to 'Distributable Pool Fund Account' during the year.
The High Court held that society earns 'profits' which falls within the definition of 'income' under Section 2(24) of the Act. Therefore the AO was right in holding that the transfer of 'fund' for subsequent distribution to the members before payment of tax is not a 'deductible expenditure' in computation of business income of the assessee, further held that the income declared after disbursement of profits is not logical and has no relevance in determination of taxable profit under the Income-tax Act. Further the High Court held that assessee, a co-operative entity which runs a business enterprise is duty bound to offer its profits to tax before diverting any funds to the 'Distributable Pool Fund Account' and dismissed the Revenue's appeal. Amount transferred is not assessable as income of the Society. (AY. 2007-08)(2006-07)
CIT v. Nagarbail Salt-Owners Co-operative Society Ltd. (2016) 238 Taxman 689 / 135 DTR 22 / 290 CTR 211 (Karn.)(HC)
CIT v. Nagarbail Salt-Owners Co-operative Society Ltd. (2016) 76 taxmann.com 2 / (2017) 390 ITR 415 / 291 CTR 287 (Karn.)(HC)

S. 2(24) : Income – Capital or revenue – Receipt representing compensation for loss of source of income would be treated as capital receipt. 54
Assessee was a journalist by profession and was appointed as the foreign correspondent in India of a German news magazine. German publisher paid a lump sum amount upon termination as sign off compensation for association of past 23 years and loss of work space. Assessing Officer treated the compensation received to be revenue in nature and chargeable to tax under Income-tax Act, 1961.
High Court noted that the receipt in the hands of the Assessee was compensation for loss of an income generating asset. Termination of contract had fatally injured the

appellant's only source of income for the last 23 years. The mere fact that the Assessee was free to earn through other sources would not make a difference. High Court relied on Supreme Court ruling in *Kettlewell Bullen and Co. Ltd. v. CIT (1964) 53 ITR 261(SC)* and *Oberoi Hotel Pvt. Ltd. v. CIT (1999) 236 ITR 903(SC)* wherein the court held that if receipt represents compensation for the loss of a source of income, it would be capital and it matters little that the assessee continues to be in receipt of income from its other similar operations. Accordingly the Court ruled in favour of the Assessee and treated the receipt as capital receipt. (AY. 1994-95)
CIT v. Sharda Sinha (2016) 237 Taxman 111 (Delhi)(HC)

55 **S. 2(24) : Income – Contribution by employees to staff welfare scheme is similar to sundry creditors and hence is not taxable [S. 2(24)(x)]**
The employees of the assessee had contributed to a staff welfare scheme. The AO taxed the same considering that it would fall within the category of any other fund for the welfare of employees as specified in s. 2(24)(x). The ITAT held that the staff welfare scheme account could be considered as sundry creditors and not as a welfare scheme account as defined in s. 2(24)(x). (AY. 2010-11)
Muthoot Finance Ltd. v. Addl. CIT (2016) 52 ITR 241 (Cochin)(Trib.)

56 **S. 2(24) : Income – Insertion of sub-clause (xviii) is not retrospective – Assessee received subsidy from Tea Board and Ministry of Commerce & Industry, Government of India – Prior to aforesaid amendment, if a subsidy was regarded as revenue subsidy, it would be taxable besides value of subsidy getting reduced from actual cost of depreciable assets for purpose of allowing depreciation [S. 2(24)(xviii), 43(1)]**
Held that the aforesaid amendment to S. 2(24)(xviii) of the Act has two parts. The first part says that any subsidy whether it is capital or revenue will be regarded as "income". The second part is that, if the value of the subsidy is reduced from the value of actual cost u/s.43(1) of the Act for allowing depreciation, then the subsidy will not be taxed as "income". If, we were to hold that the amendment is retrospective then the 1st part of the amendment by which any subsidy, whether capital or revenue, is to be regarded as "Income" will create a charge to tax and unless the legislature specifically imposes a charge to tax, retrospectively cannot be given. Therefore the first part cannot be regarded as having retrospective operation. The second part of the amended provision of S.2(24)(xviii) of the Act gives a relief in the form of relieving double taxation, one in the form of the subsidy being taxed as income and again the value of subsidy being reduced from the actual cost of fixed assets on which depreciation is to be allowed. It is not possible to regard one part of an amended provision as having retrospective operation and the other part having only prospective operation. If the legislature wanted the amendment to be applicable in the manner as contended by assessee, it would have so provided in the Finance Act, 2015. By a process of interpretation it would not be proper to regard retrospectively to only one part of an amendment. Therefore prior to the amendment referred to above, if a subsidy is regarded as revenue subsidy, it would be taxable besides the value of the subsidy getting reduced from the actual cost of

depreciable assets for the purpose of allowing depreciation, if the conditions laid down in Explanation 10 to S.43(1) of the Act are satisfied. (AY. 2006-07)
Limtex Tea & Industries Ltd. v. ACIT (2016) 156 ITD 900 / 176 TTJ 265 / 131 DTR 209 (Kol.)(Trib.)

S. 2(24) : Income – Interest from recurring deposits is taxable on maturity when it gets entitled and due. 57
The Assessee deposited funds in recurring deposits with banks for varying periods from 3-10 years. Since, the interest on the recurring deposits was payable at the time of maturity, the same was not offered for tax. The AO held that since in case of recurring deposit the interest is received and reinvested, it has to be taxed every year. The ITAT held that the interest in respect of securities were entitled, due and receivable only on maturity and accordingly, it would taxed in that year. Further, the entire income had accrued and was offered to tax in subsequent AY by the assessee. (AY. 2001-02, 2003-04 to 2008-09)
West Bengal Infrastructure Development Finance Corporation v. ACIT (2016) 45 ITR 285 (Kol.)(Trib.)
DCIT v. West Bengal Infrastructure Development Finance Corporation (2016) 45 ITR 285 (Kol.)(Trib.)

S. 2(24) : Income – Interest is crystallized and accrues in the year in which it gets finalized and quantified and would be taxable in that year. 58
The assessee had deposited sums with Pay and Accounts Office of the Government of West Bengal, which did not initially carry interest. In 2001 it was pointed out that the funds were kept in interest bearing account, and interest was due to be paid to public sector undertakings. Subsequently, after much negotiations, in 2004, the State Government decided that it would pay interest. According to the assessee, the interest had crystallized in 2005 when it was ultimately quantified and accrued to it. According to the AO, the interest had accrued in the impugned AY. It was held by the ITAT that considering the fact that the interest was finalized and quantified in 2005, it would have crystallized then and would be taxable in that year. (AY. 2001-02, 2003-04 to 2008-09)
West Bengal Infrastructure Development Finance Corporation v. ACIT (2016) 45 ITR 285 (Kol.)(Trib.)
DCIT v. West Bengal Infrastructure Development Finance Corporation (2016) 45 ITR 285 (Kol.)(Trib.)

S. 2(28A) : Interest – Loan processing fees – Tax deduction at source provisions will not apply to loan processing fees paid to any banking company to which Banking Regulations Act, 1949 applies. [S. 194A, 194J, Banking Regulations Act, 1949] 59
Definition of interest as given in S. 2(28A) will include any service fee or any other charge in respect of money borrowed; thus, loan, processing fee falls within such definition and, therefore, it cannot be reckoned as payment for rendering of any managerial services by bank. Loan processing fees paid to any banking company to which Banking Regulations Act, 1949 applies, is not liable to deduction of TDS. (AY. 2010-11)
DCIT v. Laqshya Media (P.) Ltd. (2016) 160 ITD 35 / 182 TTJ 318 (Mum.)(Trib.)

60 **S. 2(42A) : Short-term capital asset – Period of holding is to be determined from the date on which the agreement to purchase is entered into by paying a substantial amount though the sale deed is executed at a later point in time.**
Assessee agreed to purchase land by way of an agreement dated 1st April, 1995 for which an advance of ₹ 40 lakh was paid by the assessee to the seller in terms of the agreement. However, due to certain disputes the sale deed could not be executed. Ultimately, a compromise was entered into between the parties, and in terms of the said compromise, instead of 3 acres 39 guntas of land which was to be sold in favour of the assessee, only 27 guntas of land was agreed to be sold to the assessee. A sale deed was executed in favour of the assessee on 5th December, 2002 and the balance sum of ₹ 1 lakh was paid by the assessee. Assessee sold the land to a third party on 20th May 2005 for ₹ 1,02,50,000/- and treated the gains as long term capital gains. AO held the gains to be short term in nature. HC, following the SC decision in the case of Sanjeev Lal, held the gains to be long term in nature. HC observed that in the facts of the present case out of a sum of ₹ 41 lakh which was payable, the assessee had already paid ₹ 40 lakh at the time of entering into of the agreement to sell. HC further held that determination of period of holding was a beneficial piece of legislation and the same had to be construed liberally. (AY. 2006-07)
Lahar Singh Siroya v. ACIT (2016) 138 DTR 331 (Karn.)(HC)

61 **S. 2(42A) : Short-term capital asset – Immovable property – Period of holding would commence from date when he became owner of property, by virtue of family arrangement and not from date when his grandmother expired. [S.45, 49(1) (iii), 54EC]**
Assessee received immovable property belonging to his grandmother, by way of family settlement, to determine nature of capital gain arising from sale of said property, the period of holding would commence from date when he became owner of property, by virtue of family arrangement and not from date when his grandmother expired. Accordingly the appeal of assessee was dismissed. (AY. 2009-10)
Nitul B. Shah v. ITO (2016) 158 ITD 830 / 141 DTR 180 / 181 TTJ 284 (Mum.)(Trib.)

62 **S. 2(42B) : Short-term capital gain – Long-term capital asset – Short-term capital asset – An agreement to purchase property merely creates a right to seek specific performance. The asset cannot be considered to be "held" from the date of the agreement so as to constitute long-term capital gains [S.2(14), 2(29A), 2(42A), 45]**
The appellant entered into an agreement on 18th May, 1980 with M/s. Shubhada Prints Pvt. Ltd. for acquiring leasehold rights of immovable property (said land) situated at Majas Village, Jogeshwari (E), Mumbai, for consideration set out therein. The appellant purchaser was required to file a Suit in this Court being Suit No.1077 of 1981 against the vendor Shubhada Prints Pvt. Ltd., *inter alia*, seeking specific performance of the agreement to assign the leasehold rights in the said land. An earnest money of ₹ 25,000/ – had been paid at the time of execution of the agreement. During the pendency of the Suit, the parties arrived at Consent Terms on 11th March, 1988 pursuant to which the defendant – vendor agreed to assign the leasehold rights in the said land at a lump sum of ₹ 4,50,000/ – instead of lower consideration originally payable under the suit agreement. The appellant thereafter sold the said land to one

M/s. Associated Estate and Investment Corporation vide agreement dated 29th November, 1988 for a price of ₹ 37,70,000/ – resulting in capital gain to him. According to the appellant, he was holding the said land since 1980 i.e. from the date of the agreement dated 18th May, 1980 and hence the gain was long term in nature. The Assessing Officer and Tribunal, however, found that the appellant came into possession only pursuant to the Consent Terms and therefore the amount of consideration received on sale by the appellant is to be treated as short term capital gain and he was assessed accordingly. On appeal by the assessee, the High Court HELD dismissing the appeal:
(i) Consequent to the vendor not honouring the agreement dated 18th May, 1980, all that the appellant had was a right to seek specific performance which he sought to enforce by filing the suit. The appellant did not have possession of the said land. It is only on the Consent Terms being filed in Court that the appellant got ownership and possession.
(ii) In our opinion, the assessee-appellant 'held' the property only upon the order being passed upon filing of the Consent Terms in Court on 11th March, 1988. The said land was sold on 29th November, 1988. Therefore it falls beyond the scope of long term capital gains and within the province of short term capital gain. Accordingly, we are of the view that the gains resulting from the sale of the said land in November 1988 would be a short term capital gain. (AY. 1989-90)
Bindiya H. Malkani v. CIT (2016) 386 ITR 87 / 138 DTR 46 / 287 CTR 184 (Bom.)(HC)

S. 2(42C) : Slump Sale – Transferee had taken over all fixed assets and specified current assets but did not take over loans and liabilities, hence transaction of sale of fixed and current assets was out of purview of slump sale and direction to compute the income on the basis of item wise sale was held to be justified. [S. 45, S.50B] 63
The assessee-company was engaged in the manufacturing of thermoplastic films, sheets and liners. It sold its manufacturing division to 'T' Ltd. The assessee's case was that the transaction for transferring the undertaking was not covered within the definition under section 2(42C). The Assessing Officer disregarded the claim of the assessee and treated the transaction of sale of undertaking as slump sale.
The Commissioner (Appeals) held that in the case of assessee there was no slump section 50B will be attracted when an undertaking is transferred for lump sum consideration without values being assigned to the individual assets and liabilities in such sales. Dismissing the appeal of the Revenue, the Tribunal held that in the instant case the transferee had taken over all fixed assets, specified current assets but did not takeover all the loan and liabilities, and, thus, transaction of sale of the fixed and current assets was out of the purview of slump sale. (AY. 2005-06)
DCIT v. Xpro India Ltd. (2016) 161 ITD 93 (Kol.)(Trib.)

S. 2(47) : Transfer – Transfer includes extinguishment of rights in capital asset – Surrender of floor area ratio rights in land amounts to transfer – Liable to capital gains tax. [S. 2(14), 2(47)(ii), 45] 64
Held, the assessee had relinquished his rights over the floor area and, consequently, his right in the floor area got extinguished to a certain extent. The seized material also disclosed that the developer had paid ₹ 3.15 crores towards such surrender of floor area ratio and the sum would amount to sale proceeds. Thus, it was a clear case of transfer

within the definition as found in section 2(47) of the Act. The transfer was complete on the day when the plan was sanctioned and the building of the apartment complex started since there was no way for the assessee either getting back the floor area ratio or using it. (AY. 1999-2000)
CIT v. Dinesh D. Ranka (2016) 380 ITR 440 / (2015) 280 CTR 224 (Karn.)(HC)
Editorial: SLP of assessee is rejected Dinesh D. Ranka v. CIT (2016) 239 Taxman 262 (SC)

65 **S. 2(47)(v) : Transfer – Any transaction involving the allowing of the possession of any immoveable property – Land development agreement with developer, possession of land was not given, cannot be assessed as capital gains. [S.45, 51]**
The Tribunal held that the assessee has not given the possession of the land to the developer in the terms of development agreement as the land was in the occupation of slum dwellers and no sanction and other permissions were obtained by the developer which was a precondition for delivery of possession under the said agreement there was no transfer of land even under section 2(47)(v) in the relevant year so as to give rise to capital gains more so the agreement was not registered with the Registrar under the Registration Act. (AY. 2008-09)
ACIT v. Jawaharlal L. Agicha (2016) 161 ITD 429 / (2017) 183 TTJ 176 / 151 DTR 241 (Mum.)(Trib.)

Section 3 : Previous year

66 **S. 3 : Previous year – Setting up of business – New business or for a new source of income, previous year would start from date of setting up of new business or from date when new source of income has come into existence – Interest – Income from other sources – Interest income was to be reduced from capital cost of project instead of taxing as income from other sources. [S.4, 56]**
During relevant financial years, assessee's business undertaking of generation of power was not set up and plant and machinery was in process of installation. Assessee contended that its previous year was not started in relevant years, Revenue authorities, however, opined that assessee's business was set up in relevant previous year. Tribunal held that for an assessee, there may be a previous year from 1st April in respect of an existing business or existing source of income while in case of a new business or a new source of income which has come into existence in that financial year, previous year will start from date of setting up of new business or from date when new source of income has come into existence. Where business of generation of power was not set up during relevant financial year, interest income from fixed deposit on temporarily placing of fund with bank, would be reduced from capital cost of project instead of taxing it as income from other sources. (AY. 2010-11, 2011-12)
Prayagraj Power Generation Co. Ltd. v. ITO (2016) 158 ITD 909 / 139 DTR 161 / 180 TTJ 271 (Luck)(Trib.)

CHAPTER II
BASIS OF CHARGE

S. 4 : Charge of income-tax

S. 4 : Charge of income-tax – Capital or revenue – Voluntary subsidies (subvention) paid by a holding company to its loss making subsidiary is to protect the capital investment of the holding company and is a capital receipt in the hands of the recipient. 67

Allowing the appeal the Court held that; The subvention received by the assessee, from its parent Company in Germany in a situation where the assessee, company was making losses is a capital receipt. (AY. 1999-00, 2000-01, 2001-02)

Siemens Public Communications Network Ltd. v. CIT (2016) 144 DTR 370 / (2017) 390 ITR 1 / 291 CTR 22 / 244 Taxman 188 (SC)

Editorial: Decision of Karnataka High Court is reversed Siemens Public Communications Network Ltd. v. CIT, ITA No. 59, 488 489 of 2007 dt 9-10-2013

S. 4 : Charge of income-tax – Share capital received for allotment of flats is a capital receipt and not income. The principles of mutuality does not apply to such transactions. [S. 28(i)] 68

The Karnataka High Court held, following *Shree Nirmal Commercial v. CIT 193 ITR 694 (Bom) and 213 ITR 361 (FB)*, that share capital received by a housing company from its shareholders in consideration of allotting area to them is assessable as business profits. It was also held that the principles of mutuality are not applicable. It was also held that deposits received from the shareholders for future maintenance is assessable as business income. On appeal to the Supreme Court HELD:

After hearing the learned counsels for the parties and perusing the relevant material, we modify the order of the High Court by holding that the amount (₹ 45,84,000/-) on account of share capital received from the various shareholders ought not to have been treated as business income. (AY.1996-97)

G. S. Homes & Hotels P. Ltd. v. Dy.CIT (2016) 141 DTR 201 / 289 CTR 105 (SC)

Editorial : Review petition was dismissed, G. S. Homes & Hotels P. Ltd. v. Dy.CIT (2017) 291 CTR 240 / 144 DTR 371 (SC)

S. 4 : Charge of income-tax – Derived – Subsidy by way of refund of excise duty and interest for setting up a new industrial undertaking is a capital receipt & not taxable as income. Alternatively, such receipts are "derived" from the industrial undertaking and are deductible u/s. 80-IB. [S.80-IB] 69

The assessee, pursuant to the New Industrial Policy announced for the State of J&K, received excise refund and interest subsidy, etc. which it claimed to be a capital receipt. In the alternative, it was claimed that the same was eligible for deduction u/s. 80-IB. The AO, CIT(A) and Tribunal rejected the claim and held the receipts to be revenue on the ground that the subsidy (i) was for established industry and not to set up a new one, (ii) it was available after commercial production, (iii) it was recurring in nature, (iv) it was not for purchasing capital assets and (v) it was for running the business profitably. On appeal by the assessee, the High Court (333 ITR 335) reversed the orders of lower authorities and held as follows:

(i) The ratio of Sahney Steel 228 ITR 253 (SC), Ponni Sugars 306 ITR 392 (SC) and Mepco Industries 319 ITR 208 (SC) is that to determine whether incentives & subsidies are revenue or capital receipts, the purpose underlying the incentives is the determinative test. If the object of the subsidy scheme is to enable the assessee to run the business more profitably then the receipt is on revenue account. On the other hand, if the object of the subsidy scheme is to enable the assessee to set up a new unit or to expand the existing unit then the receipt of the subsidy was on capital account. It is the object for which the subsidy/assistance is given which determines the nature of the incentive/subsidy. The form or the mechanism through which the subsidy is given is irrelevant;

(ii) On facts, the object of the subsidy scheme was (a) to accelerate industrial development in J&K and (b) generate employment in J&K. Such incentives, designed to achieve a public purpose, cannot, by any stretch of reasoning, be construed as production or operational incentives for the benefit of assesses alone. It cannot be construed as mere production and trade incentives;

(iii) The fact that the incentives were available only after commencement of commercial production cannot be viewed in isolation. The other factors which were weighed by the Tribunal are also decisive to determine the character of the incentives/ subsidies in view of the stated objects of the subsidy scheme;

(iv) Question whether the subsidy receipts are eligible u/s. 80-IB were not decided.

On appeal by the department to the Supreme Court HELD dismissing the appeal:

The issue raised in these appeals is covered against the Revenue by the decision of this Court in "*Commissioner of Income Tax, Madras vs. Ponni Sugars and Chemicals Ltd.*", reported in (2008) 9 SCC 337, or in the alternate, in "*Commissioner of Income Tax v. Meghalaya Steels Ltd*.", reported in (2016) 3 SCALE 192 (383 ITR 217 (SC)). The appeals are, therefore, dismissed.(AY. 2005-06)

CIT v. Shree Balaji Alloys (2016) 138 DTR 36 / 287 CTR 459 (SC)

70 **S. 4 : Charge of income-tax – Sums collected towards apprehended sales tax liability – Refundable – Cannot be assessable as income.**

Dismissing the appeal, the Court held that the amounts collected by the assessee from its customers towards apprehended sales tax liability on sale of bottles and packing materials was not taxable because it was refundable. (AY. 1988-89, 1989-90, 1990-91)

CIT v. Khoday Breweries Ltd. (2016) 382 ITR 1 / 243 Taxman 229 (SC)

71 **S. 4 : Charge of income-tax – Income was assessed in respective individual shares hence income cannot be assessed as an Association of Persons. [S. 260A]**

High Court held that where the view expressed by Tribunal was consistent with materials placed on record, no substantial questioning of law would arise. The Tribunal on the facts of the case had held that where no income accrued to assessee-AOP but to respective constituents of AOP in their individual capacities, then assessee was not liable to be taxed.

CIT v. Rajdeep & PMCC Infrastructure (2016) 73 taxmann.com 255 (Bom.)(HC)

Editorial : SLP of revenue is dismissed; CIT v. Rajdeep & PMCC Infrastructure Ltd. (2016) 242 Taxman 181 (SC)

S. 4 : Charge of income-tax – Compassionate appointment given to dependent of deceased employee is not 'Pecuniary Advantage' and, therefore, amount received on such appointment is not liable for deduction for determination of compensation under Motor Vehicle Act [S. 192, Motor Vehicles Act, 1988, S. 168] 72

Dismissing the appeal the Court held that compassionate appointment given to dependent of deceased employee cannot be termed as 'Pecuniary Advantage' under periphery of Motor Vehicles Act and, therefore, amount received on such appointment is not liable for deduction for determination of compensation under Motor Vehicle Act.

National Insurance Co. Ltd. v. Lakhwinder Kaur (2016) 236 Taxman 558 (P& H)(HC)

S. 4 : Charge of income-tax – Capital or revenue – Money deposited by public with assessee was capital in nature 73

Dismissing the appeal of the revenue, the Court held that Money deposited by public with assessee was capital in nature. (AY. 1988-89, 1990-91)

CIT v. Sahara Investment India Ltd. (2016) 242 Taxman 121 (All.)(HC)

Editorial: SLP of revenue was dismissed CIT v. Sahara Investment India Ltd. (2016) 242 Taxman 106 (SC)

S. 4 : Charge of income-tax – Capital or revenue – Grant received by corporation from Central Government and State Government for restoration of tourist sites damaged by tsunami was to be regarded as capital receipt. [S.28(i)] 74

Dismissing the appeal of revenue, the Court held that; grant received by assessee-corporation from Central Government and State Government for restoration of tourist sites damaged by tsunami was to be regarded as capital receipt. (AY. 2005-06, 2006-07)

CIT v. Tamil Nadu Tourism Development Corporation Ltd. (2016) 241 Taxman 441 / 288 CTR 444 (Mad.)(HC)

S. 4 : Charge of income-tax – Amount was received by trust and not by individual trustee in his individual capacity, assessee was not liable to pay tax on assumed income [Wealth-tax Act, 1957, S.3] 75

Trustee purchased lottery ticket with amount withdrawn from trust account. Amount received on winning lottery was distributed amongst all beneficiaries of trust. Beneficiaries paid taxes individually on their respective share of income, even TDS was shown in balance sheet of trust account. Since amount was received by trust and not by individual trustee in his individual capacity, assessee was not liable to pay tax on assumed income. Since income of Trust is accepted, the appellant cannot be assessed under wealth tax Act, 1957

Bahadursingh T. Waghela v. WTO (2016) 243 Taxman 86 / (2017) 147 DTR 101 / 292 CTR 514 (Guj.)(HC)

S. 4 : Charge of income-tax – Interest from non-performing assets was held to be not assessable. [S.145] 76

Dismissing the appeal of revenue the Court held that once a particular asset was shown to be a non-performing asset, then the assumption was that it was not yielding any revenue. When it was not yielding any revenue, the question of showing that revenue and paying tax would not arise. It was evident that the mere nomenclature adopted

with reference to the bad loans and advances receivable, would refer to all non-performing assets of any nature, of whatever category. Hence interest receivable from non-performing assets, bad and doubtful debts though the actual expression used was interest payable and not reflected in the profit and loss account, could be deducted. (AY. 2009-10)

CIT v. Siddeshwar Co-operative Bank Ltd. (2016) 388 ITR 588 / 240 Taxman 588 (Karn.) (HC)

CIT v. Sindagi Urban Co-operative Bank Ltd. (2016) 388 ITR / 240 Taxman 588 (Karn.) (HC)

77 **S. 4 : Charge of income-tax – Income – Sale of property – Part of consideration unpaid – Notional interest not chargeable.**

Court held that unless the contract was taken into account and the terms and conditions of sale were examined, it could not be said with any amount of certainty whether the contract between the parties provided for payment of interest or was silent as regards the liability of the buyer to pay interest or there was any stipulation not to pay interest. There was no room for speculation in that regard. There was nothing in the orders of the Assessing Officer, the Commissioner (Appeals) the Tribunal to show that the subsidiary (HRL) did not use its funds for the running of the hotel or for the purpose of providing for facilities for the growth of tourism in India nor was there any evidence to show that any part of the money due and owing by HRL to the assessee was spent for any personal business of any of the directors. In that view of the matter, the addition made by the Assessing Officer and upheld by the Commissioner (Appeals) and the Tribunal were not sustainable. (AY. 2003-04)

New Kenilworth Hotel P. Ltd. v. CIT (2016) 387 ITR 201 / (2017) 292 CTR 336 (Cal.)(HC)

78 **S. 4 : Charge of income-tax – Amount received under compromise decree in connection with dispute regarding leave and licence agreement – No details regarding dispute was furnished – Tribunal is justified in assessing the amount.**

Dismissing the appeal of assessee the Court held that the terms of agreement dated September 1, 1989 revealed that it was a leave and licence agreement. Within a few days from the date of entering into the agreement, a suit was filed before the Small Causes Court at Bombay which ended with the passing of the compromise decree on the terms and conditions as mutually agreed between the parties to the suit. The appellant in the income-tax proceedings had relied on that decree. However, as evident from the order of the Special Bench in the assessee's own case, though sought for repeatedly by the Assessing Officer, Commissioner (Appeals) and the Special Bench of the Tribunal, the assessee failed to file a copy of the plaint. In such facts and circumstances, the Special Bench was justified in drawing an adverse presumption since as a Tribunal specifically adjudicating revenue matters, it had the authority to examine the plaint which led to the passing of the compromise decree to investigate the real nature of the issue involved in the suit. The written notes of submission filed by the appellant were silent why the plaint was not filed. The Tribunal was justified in holding that the amount was assessable. (AY. 1998-99)

Sushil Kumar Co. v. CIT (2016) 387 ITR 192 (Cal.)(HC)

S. 4 : Charge of income-tax – Mutuality – Amounts received by the assessee society from its members for allotment of a tenement is not taxable on the grounds of mutuality. 79

Dismissing the appeal of revenue, the High Court has noted the three tests of mutuality laid down by the Supreme Court in the case of *Bangalore Club v. CIT (2013) 350 ITR 509 (SC).* HC observed that all these three tests were satisfied in the given case. (1) Revenue had not contended that there was absence of complete identity of the contributors and participants of the Society. (2) Actions of the Society were in furtherance of the object of the Society. It was not the case of the Revenue that building tenements and giving it to its members was not the object of the Society. (3) There was no scope for profiteering in the present facts, as the members had not purchased the flat but had only got a right to occupy a tenement allotted by the Society. HC held that no substantial question of law arose on these facts. (AY. 1998-99 to 2001-02)

CIT v. Shree Parleshwar Co-operative Housing Society Ltd. (2016) 138 DTR 145 / 287 CTR 468 / 71 taxmann.com 179 (Bom.)(HC)

S. 4 : Charge of income-tax – Interest on fixed deposits-addition of interest accrued of Rs. 1.27 crore – Held, the impugned entries were journal entries for booking interest accrued for the purpose of closing of quarterly results – Held, entries were reversed and interest actually received offered to tax – Held, no suppression of income. 80

The AO found that during the year, interest income of ₹ 6.22 crores had accrued to the assessee, out of which only ₹ 4.95 crores had been offered to tax and ₹ 1.27 crores had not been offered to tax. Therefore, the said amount of ₹ 1.27 crore was added to the income of the assessee. CIT(A) and ITAT found that interest on time deposits shown by the assessee in the accounts on accrual basis was for the purpose of closing of quarterly results. The accrual entries made in the accounts were subsequently reversed and the actual interest income earned by the assessee was duly accounted for. The entries totalling to ₹ 1.27 crores were memorandum entries and had no relation with the actual interest earned. There was no suppression of income accrued on the fixed deposits and the entire income received had been offered to tax. High Court held that the finding returned by the CIT(A) and ITAT were purely factual and there was nothing perverse in the same. (AY. 2008-09)

CIT v. DLF Hilton Hotels (2016) 240 Taxman 495 (Delhi)(HC)

S. 4 : Charge of income-tax – Capital or revenue – Entertainment tax subsidy – Subsidy granted under scheme to promote construction of multiplex theatre and to boost tourism – Receipt is capital in nature. [S. 28(i)] 81

Dismissing the appeal of revenue the court held that the purpose of the scheme formulated by the State Government was to give incentive to multiplex units which were found to be highly capital incentive and the object of subsidy was to promote construction of multiplex theatre complexes and to boost tourism and therefore, the receipt of subsidy would be on capital account.

Dy.CIT v. Inox Leisure Ltd. (2016) 386 ITR 626 (Guj.)(HC)

Editorial : SLP was granted to the Department CIT v. Inox Leisure Ltd [2016] 380 ITR 3 (St.)

82 **S. 4 : Charge of income-tax – Capital or revenue – Income from sale of carbon credits – Carbon credits is not a by-product of business – Capital receipt. [S.2(24), 28(i), 263]**
Carbon credit is not an offshoot of business, but an offshoot of environmental concerns. Income received by sale of carbon credits is a capital receipt. Revision of order was held to be not justified. (AY. 2009-10)
CIT v. Subhash Kabini Power Corporation Ltd. (2016) 385 ITR 592 / 240 Taxman 514 / 287 CTR 147 (Karn.)(HC)
Editorial: Subhash Kabini Power Corporation Ltd. v. CIT [2015] 37 ITR 106 (Bang.)(Trib.) is affirmed.

83 **S. 4 : Charge of income-tax – Capital or revenue – Sum received by assessee from ex-husband on sale of property – Finding by Tribunal that money received by assessee amount to lump sum alimony – Department not preferring appeal against finding of Tribunal indicating Department satisfied with finding – Lump sum alimony in nature of capital receipt and not taxable. [S. 2(24), 260A]**
Sale proceeds were received by the assessee on account of alimony from her former husband, it was open to the assessee to contend that the receipt was capital in nature and therefore not taxable. When the alternative case, which the assessee could have made, was not only found against her but also put forward as an answer to her claim, it was not improper to grant her the benefit on the basis that alimony was not taxable. When the Department did not prefer an appeal against the finding of the Tribunal that the payment was "on account of alimony", the Department must be deemed to be satisfied by such finding. Therefore, it was to be concluded that lump sum alimony received by the assessee was in the nature of a capital receipt and was not taxable. (AY. 1997-98)
Shrimati Roma Sengupta v. CIT (2016) 385 ITR 663 / 238 Taxman 682 / 288 CTR 234 / 139 DTR 26 (Cal.)(HC)

84 **S. 4 : Charge of income-tax – Capital or revenue – Mesne profits (Amount received from a person in wrongful possession of property) is a capital receipt and not chargeable to tax either as income or as "book profits" u/s. 115JB. As the department has implicitly accepted *Narang Overseas v. ACIT (2008) 100 ITD (Mum) (SB)*, it cannot file an appeal on the issue in the case of other assesses. [S. 115JB, 260A]**
The High Court had to consider two questions in an appeal filed by the Department:
(a) Whether on the facts and in the circumstance of the case and in law, the Tribunal was correct in holding that mesne profits are capital receipts in the hands of the assessee and not revenue receipts chargeable to tax?
(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was correct in holding that mesne profits, cannot be part of book profit u/s. 115JB, as it was held as "capital assets?".
HELD by the High Court dismissing the appeal:
(i) The Tribunal has held that the mesne profits received by the assessee for the unauthorized occupation of its premises from Central Bank of India is a receipt of capital nature and thus not taxable. To reach the above conclusion, the impugned order placed reliance upon the decision of Special Bench of the Tribunal in *Narang*

Overseas Pvt. Ltd., v. ACIT 100 ITD (Mum) S.B. The issue before the Special Bench in Narang Overseas Pvt. Ltd. (supra) was whether the mesne profits received by an assessee is revenue or capital in nature. The Special Bench, in its order placed reliance upon the definition of mesne profits in Section 2(12) of the Code of Civil Procedure, 1908 which reads as under:

"Mesne profits of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession."

On the basis of above, it held that any amount received from a person in wrongful possession of its property, would be mesne profits and it is capital in nature.

(ii) We find that the issue before the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd. was to determine the character of mesne profits being either capital or revenue in nature. The Special Bench of the Tribunal in Narang Overseas Pvt. Ltd held that the same is capital in nature. There is no doubt that the issue arising herein is also with regard to the character of mesne profits received by the assessee. In this case also, the amounts are received by the assessee from a person in wrongful possession of its property i.e., after the relationship of landlord and tenant has come to an end. Once the Special Bench order of the Tribunal in Narang Overseas Pvt. Ltd. has taken a view on the character of mesne profits, then unless the Revenue challenges the order of the Special Bench of the Tribunal it would be unfair of the Revenue to pick and choose assessees where it would follow the decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd. The least that is expected of the State which prides itself on Rule of Law is that it would equally apply the law to all assessees's.

(iii) We make it clear that we have not examined the merits of the question raised for our consideration. We are not entertaining the present appeal on the limited ground that the Revenue must adopt a uniform stand in respect of all assessees. This is more so as the issue of law is settled by the decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra). The fact that even after the dismissal of its Appeal (L) No.1791 of 2008 for non-removal of office objections on 25th June, 2009, no steps have been taken by the Revenue to have the appeal restored, is evidence enough of the Revenue having accepted the decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd. Thus, the question as framed in the present facts does not give rise to any substantial question of law. (AY. 2008-09)

CIT v. Goodwill Theatres Pvt. Ltd. (2016) 386 ITR 294 / 241 Taxman 352 (Bom.)(HC)

S. 4 : Charge of income-tax – Merely because PAN of Karta was mentioned in TDS Certificate could not be a reason to tax the rental income in the hands of Karta especially when, in all the years except the present year the Department has not challenged the taxability of the said income in the hands of HUF. 85

Assessee was an individual and also Karta of his HUF. He declared rental income from a property belonging to HUF as income of HUF. AO assessed said income in the hands of the assessee on ground that TDS certificate given by tenant mentioned PAN of the

assessee. High Court held that income from the property was declared by the assessee as income of HUF for all the years and has been accepted by the Department except in the current year, therefore the stand taken by the AO in current year was not justified. High Court directed the AO to verify the rental agreement and decide the issue as per law. (AY. 2005-06)
M. Sathyanarayana v. ITO (2016) 238 Taxman 79 (Karn.)(HC)

86 **S. 4 : Charge of income-tax – Diversion by overriding title – Payments made under legal obligation cannot be assessed as income. [S.260A]**
Dismissing the appeal of Revenue the Court held that;Tribunal as well as High Court for earlier years in assessee's own case allowed the claim, hence payments made out of amounts relatable to retired/ deceased partners under the legal obligation by virtue of partnership deed to ex-partner/s or their legal heirs/ executors, should not be treated as its income. (AY.2008-09)
CIT v. Kanga & Co. (2016) 133 DTR 257 (Bom.)(HC)

87 **S. 4 : Charge of income-tax – Unutilised MODVAT credit – Not income – Interest on refund is liable to tax. [S.145]**
It is clear from the pronouncement of the Supreme Court in *CIT v. Indo Nippon Chemicals Co. Ltd. [2003] 261 ITR 275 (SC)* that the unavailed Modvat credit cannot be construed as income and there is no liability to pay tax on such unavailed Modvat credit. Interest on refund is liable to tax. (AY. 2001-02 to 2004-05)
Dy.CIT v. Wipro Ltd. (2016) 382 ITR 179 / 236 Taxman 209 / 282 CTR 346 (Karn.)(HC)

88 **S. 4 : Charge of income-tax – Capital or revenue – compensation received for cancellation of a sale deed of immovable property is held to be capital receipt – Revenue cannot be permitted to shift its stand from one forum to another. [S. 2(24), 10(3), 45, 56]**
Allowing the appeal of revenue the Court held that the Revenue cannot be permitted to shift its stand from one forum to another. The consistent case of the Revenue is to be tested at various levels for its correctness. It is possible that in the interregnum there might be decisions of the Supreme Court which might support or negate the case of the Revenue. That would then have to be taken to its logical end. In the circumstances, the Court is not prepared to permit the Revenue to urge a new plea for the first time in this Court. Having held that it could not be in the nature of capital gain it was not open to the Revenue to seek to bring it to a tax under the Revenue receipt that the above sum of ₹ 20 lakhs constituted revenue receipt in the hands of the assessees. Not a receipt taxable under Section 10(3). The settled legal position is that all receipts do not constitute income. For a receipt sought to be taxed as income, the burden lies upon the Revenue to prove that it is within the taxing provision. Among the earlier decisions of the Supreme Court is *Parimisetti Seetharamamma v. CIT (1965) 57 ITR 532 (SC)* where it was held "Whether a receipt is liable to be treated as income depends very largely upon the facts and circumstances of each case; it is open to the income-tax authorities to raise an inference that a receipt by an assembly is assessable income where he fails to disclose satisfactorily the source and the nature of the receipt. But here the source of

income was disclosed by the appellant and there was no dispute about the truth of the disclosure. Examined in light of the legal position explained in the above decisions, the Court is of the view that as far as the present case is concerned, the sum of ₹ 20 lakhs received by the assessees was in the context of the cancellation of the sale certificate and the sale deed executed in their favour in relation to an immovable property and neither assessee was dealing in immovable property as part of his business. While it could if at all be said to be in the nature of a capital receipt, what is relevant for the present case is that the Revenue has been unable to make out a case for treating the said receipt as of a casual and non-recurring nature that could be brought to tax under Section 10(3) read with Section 56 of the Act. Following the decision in Cadell Weaving Mill (supra), there can be no manner of doubt that what is in the nature of capital receipt, cannot be sought to be brought to tax by resorting to S.10(3) read with S. 56 of the Act. (AY.1993-94, 1995-96)
Girish Bansal v. UOI (2016) 384 ITR 161 (Delhi)(HC)
Gynendra Bansal v. UOI (2016) 384 ITR 161 (Delhi)(HC)

S. 4 : Charge of income-tax – Mutuality – The contributions made by the members to the assessee cannot be a subject matter of tax merely because the part of its excess of income over expenditure is invested in mutual funds. 89
The contributions made by the members to the assessee cannot be a subject matter of tax merely because the part of its excess of income over expenditure is invested in mutual funds. The concept of Mutual concerns not being subject to tax is based on the principle of no man can profit out of itself. Therefore the test to be satisfied before an association can be classified as a Mutual concern are complete identity between the members i.e. contributors and the participants, the action of the mutual concern must be in furtherance of its objectives and there must be no scope of profiteering by the contributors from a fund. (AY. 2007-08)
CIT v. Air Cargo Agents Association of India (2016) 135 DTR 169 / 286 CTR 340 / 239 Taxman 212 (Bom.)(HC)

S. 4 : Charge of income-tax – Accrual of income – Mercantile system of accounting – Waiver of income recoverable from person facing financial difficulties [S. 145] 90
Even in mercantile system of accounting an item would be regarded as accrued income only if there is certainty of receiving it and not when it has been waived, therefore non recognition of income on the ground that the income had not really accrued as the realisability of the principal outstanding itself was doubtful, is legally correct under the mercantile system of accounting, when the same is in accordance with ASI notified by the Government and the provisions of Section 145(1) are subject to, inter alia, mandate of ASI which also prescribes that 'Accounting policies adopted by an assessee should be such so as to represent a true and fair view of the state of affairs of the business, profession or vocation in the financial statements prepared and presented on the basis of such accounting policies.' In the name of compliance with Section 145(1), it cannot be open to anyone to force adoption of accounting policies which result in a distorted view of the affairs of the business. Therefore, even under the mercantile method of accounting, and, on peculiar facts of instant case, the assessee was justified in following

the policy of not recognizing these interest revenues till the point of time when the uncertainty to realize the revenues vanished. The Tribunal further referred to the fact that the various resolutions which The decision rendered by the Tribunal in the impugned order is a decision on facts and nothing has been shown to us which would warrant interference by this Court on account of any finding being perverse or arbitrary. (ITA No. 2251 of 2013 with 2360 of 2013, dt. 05.04.2016)(AY. 2007-08, 2009-10)
CIT v. Neon Solutions Pvt. Ltd. (Bom.)(HC); www.itatonline.org

91 **S. 4 : Charge of income-tax – Capital or Revenue – Compensation received in connection with termination of share purchase agreement to be taxed as Revenue receipt.**

The assessee-a company, paid certain amount as earnest money to purchase shares under SPA (Special Purchase Agreement) from shareholders of Zydus. Zydus was engaged in the same business as the assessee. The shares of Zydus had been pledged to Cadila. In the event of sale of shares by the seller, Cadila had the right of first refusal. The SPA between the provided that where Cadila was to exercise their right to purchase the shares under the right of first refusal, the purchaser would terminate the SPA. As per the SAP, the sellers had no right to terminate the agreement. Subsequently, the sellers expressed their inability to sell their shares. The assessee entered into a supplementary agreement with the seller to terminate the SPA. The supplementary provided that the seller would pay the assessee the earnest money paid by the assessee, interest, penalty and compensation for termination of SPA. The assessee claimed the compensation amount as a capital receipt. The Assessing Officer rejected assessee's claim and reassessed income by claiming the same as revenue receipt. The CIT(A), and Tribunal confirmed the order of the Assessing Officer.

The High Court observed that the intent was not to purchase the shares of Zydus, but to takeover its business for expansion and accordingly the compensation was for the loss of profit and not for the impairment of a source of income. Therefor the High Court confirmed the order of the lower authorities in holding the compensation as revenue income. (AY. 2008-09)

Avantor Performance Materials India Ltd. v. CIT (2016) 383 ITR 685 / 237 Taxman 603 / 282 CTR 494 / 130 DTR 33 (HP)(HC)

92 **S. 4 : Charge of income-tax – Capital or Revenue – Money to be used in purchase of plant and machinery temporarily placed in fixed deposits – Inextricably linked with setting up of plant – Interest on fixed deposits – Capital receipt. [S. 2(24)]**

Held, the test that is required to be employed is whether the activity which is taken up for setting up of the business and the funds which are garnered are inextricably connected to the setting up of the business. The findings of fact had been returned by the Commissioner (Appeals) and had been confirmed by the Tribunal to the effect that the funds were inextricably connected with the setting up of the power plant of the assessee. The Revenue had also not been able to point out any perversity in such finding and, therefore, interest earned by the assessee from fixed deposits in the pre-commencement period. (AY. 2009-10)

PCIT v. Facor Power Ltd. (2016) 380 ITR 474 / 237 Taxman 613 / 283 CTR 141 / 130 DTR 281 (Delhi)(HC)

93 **S. 4 : Charge of income-tax – Accrual of income – Acquisition of land – Enhanced compensation – Award disputed in appeal before High Court – Right to receive not crystallised – Status – Whether assessment in status of individual or Hindu undivided family – Disputed questions of law and fact – Matter remanded. [S. 2(31)(i), 2(31)(ii)]**
On appeal The CIT(A) annulled the assessment made in the status of individual. The Tribunal remanded the matter to the Commissioner (Appeals) to decide the issue on the merits. On appeal: Held, that the issue arising in the appeal raised a mixed question of law and fact and required to be remanded to the Tribunal to decide afresh. Accordingly, the order passed by the Tribunal was set aside and the matter was remitted to the Tribunal to adjudicate the issue afresh after hearing the parties and by passing a speaking order in accordance with law.(AY. 2000-01, 2001-02, 2002-03)
Raj Kumar Tewatia v. CIT (2016) 380 ITR 110 (P&H)(HC)

94 **S. 4 : Charge of income-tax – Capital or revenue – Excise duty refund in terms of new industrial policy and concessions formulated by Central Government for State of Jammu and Kashmir was held to be capital receipt.**
Dismissing the appeal of the revenue, the Tribunal held that; Excise duty refund in terms of new industrial policy and concessions formulated by Central Government for State of Jammu and Kashmir was held to be capital receipt. (AY. 2012-13)
DCIT v. Singla Cables. (2016) 157 ITD 617 (Amritsar)(Trib.)

95 **S. 4 : Charge of income-tax – Capital or revenue – Amount received from developer as corpus fund towards hardship caused to flat owners on redevelopment was held to be capital receipt and not assessable as income.[S.2(24)(vi), 56]**
Allowing the appeal of the assessee, the Tribunal held that ; amount received by the assessee as a flat owner in a housing society from developer as corpus fund towards hardship caused to flat owners on redevelopment, impugned amount would be in nature of capital receipt simplicitor not includible in income as per section 2(24)(vi). (AY. 2007-08)
Jitendra Kumar Soneja v. ITO (2016) 161 ITD 269 (SMC)(Mum.)(Trib.)

96 **S. 4 : Charge of income-tax – Capital or revenue – Compensation received upon settlement of a trademark dispute in which trademark itself had been cancelled would be capital receipt and not taxable as business income [S.28(va)(b)]**
Allowing the appeal of the assessee the Tribunal held that; compensation received for losing right to use trademark could not be bought to tax as business income in terms of S.28(va)(b), as the said section only deals with payment received for not sharing trademark etc., while in instant case, sharing or otherwise was not possible as trademark itself had been cancelled; said receipt was capital receipt. (AY. 2008-09 to 2010-11)
Orient Blackswan (P.) Ltd. v. ACIT (2016) 159 ITD 944 / 181 TTJ 124 (Hyd.)(Trib.)

97 **S. 4 : Charge of income-tax – Interest awarded by Court on motor accident compensation is a capital receipt not taxable as income – Tribunal directed the CBDT to issue appropriate circular to avoid hardship to the citizens. [S.56(2)(viii), 145A]**
Allowing the appeal of the assessee, the Tribunal held that ;compensation for motor accident received from the Supreme Court is a capital receipts it is not taxable. Interest

awarded by Court on said compensation in value of compensation money from day when compensation becomes payable to day when it is actually paid is also a capital receipt not liable to tax. Tribunal also directed the CBDT to issue appropriate circular to avoid hardship to the citizens. (AY.2012-13)
Urvi Chirag Sheth v. ITO (2016) 159 ITD 199 / 179 TTJ 245 / 136 DTR 345 / 51 ITR 491 (Ahd.)(Trib.)

98 **S. 4 : Charge of income-tax – Capital or revenue – Compensation arising out of a settlement agreement was to be regarded as capital receipt, not liable to tax. [S. 43(1)]**
The assessee purchased the plant and machinery from a company based in UK. The plant and machineries did not function as per the performance parameters set out by the machine supplier. So the assessee filed a claim for compensation on the said UK Company in terms of the agreement for the purchase of plant and machinery. The Assessing Officer treated the amount to be a reduction from cost of the machine and thus recomputed the depreciation allowable to assessee. In appeal CIT(A) held that the compensation was capital in nature. On appeal by revenue, dismissing the appeal the Tribunal held that ;the compensation paid was neither in form of discount nor against the price nor was it in the nature of subsidy nor was it in the nature of any reimbursement. It was not even compensation for recouping any damage caused to the plant and machinery. Thus, none of the conditions specified in section 43(1) for deducting the actual cost from value of the machines were applicable to the compensation. Therefore, compensation arising out of a settlement agreement was to be regarded as capital receipt, not liable to tax. (AY. 2005-06)
DCIT v. Xpro India Ltd. (2016) 161 ITD 93 (Kol.)(Trib.)

99 **S. 4 : Charge of income-tax – Capital or revenue – One time Entrance Fees received from members were in nature of lifetime membership fees was held to be capital receipt.**
Right from the year 1925 onwards, Entrance Fees has been accepted as capital receipt by passing orders under section 143(3). Further, the jurisdictional High Court held that any sum paid by a member to acquire the rights of a club was a capital receipt. If the issue is analyzed on the principle of consistency, in earlier years, identical claim of the assessee was decided in favour of the assessee by accepting the entrance fees as capital receipt, and therefore, unless and until contrary facts are brought on record by the Revenue, no U-turn is permissible. (AY. 2007-08, 2008-09, 2009-10)
ACIT v. Royal Western India Turf Club Ltd. (2016) 52 ITR 235 (Mum.)(Trib.)

100 **S. 4 : Charge of income-tax – Capital or revenue – Sales tax and excise duty subsidy received from State for purpose of industrialisation is capital receipt. [S.28(i)]**
Assessee engaged in business of manufacturing of CTVs, PCBs, and Washing Machines etc. received subsidy by way of sales tax benefit under scheme of Gujarat Government for setting up unit in Gujarat and as excise duty benefit under scheme of Government of India. Assessee claimed the same as capital receipt. AO treated as revenue receipt.
ITAT by following decision of *Dy. CIT v. Reliance Industries Ltd. [2004] 88 ITD 273 (Mum.)(SB)*, held that sales tax and excise duty subsidy received from State for purpose of industrialisation are capital receipts. (AY. 2006-07)
ACIT v. Genus Electrotech Ltd. (2016) 161 ITD 644 (Ahd.)(Trib.)

S. 4 : Charge of income-tax – Capital or revenue – Power subsidy received for setting up a new industrial unit in backward area is a capital receipt. [S.28(i)] 101

Power subsidy received from State Government under Power Intensive Industries Scheme, 2005, for setting up a new industrial unit in backward area is capital receipt hence not liable to tax. (AY. 2006-07 and 2007-08)

Shyam Steel Industries Ltd. v. DCIT (2016) 161 ITD 1 / (2017) 183 TTJ 304 / 145 DTR 177 (TM)(Kol.)(Trib.)

S. 4 : Charge of income-tax – Hindu undivided family – Property belong individual before his death and died intestate without execution any will – Income cannot be assessed in the hands of the – Hindu undivided family [S. 171] 102

On facts the Tribunal held that; property belong individual before his death and died intestate without execution any will, therefore income cannot be assessed in the hands of the Hindu undivided family. Accordingly the addition which was made in the assessment of HUF was directed to be deleted. (AY. 1992-93)

B. D. Gupta & Sons v. ITO (2015) 70 SOT 16 (Delhi)(Trib.)

S. 4 : Charge of income-tax – Mutuality – Transfer fee and non-occupancy charges received from the members was held to be not taxable. 103

Allowing the appeal of the assessee the Tribunal held that Transfer fee and non – occupancy charges received from the members was held to be not taxable. Followed *CIT v. Darbhanga Mansion CHS Ltd. (2015) 370 ITR 443 (Bom.)(HC) & Mittal Court Premises Co-operative Society Ltd v. ITO (2010) 320 ITR 414 (Bom.)(HC)* (ITA No. 3566/Mum/2014, dt. 15.01.2016))(AY.2009-10)

Land End Co-operative Housing Society Ltd. v. ITO (Mum.)(Trib.); www.itatonline.org

S. 4 : Charge of income-tax – Capital or revenue – Compensation for breach of promise to provide land to the assessee is not compensation for loss of profits but is for injury caused to the profit making apparatus. Such compensation is a capital receipt not chargeable to tax. [S. 28(i)] 104

Allowing the appeal of assessee the Tribunal held that Compensation for breach of promise to provide land to the assessee is not compensation for loss of profits but is for injury caused to the profit making apparatus. Such compensation is a capital receipt not chargeable to tax.(ITA No. 5054/Del/2011, dt. 12.08.2016)(AY. 2007-08)

Aerens Development and Engineers Ltd. v. ACIT (Delhi)(Trib.); www.itatonline.org

S. 4 : Charge of income-tax – Capital or revenue – Capital gains – Computation – Compensation received by flat owner from builder for hardship caused due to redevelopment of the building is a non-taxable receipt and has to be reduced from the cost of the flat. Amount received from builder to meet rental costs during the redevelopment is also not taxable as income and amount spent on rent has to be allowed. [S. 2(24)(vi), 4, 45, 48, 56] 105

Compensation received by flat owner from builder for hardship caused due to redevelopment of the building is a non-taxable receipt, However tribunal observed that "in our considered opinion and as learned counsel for the assessee fairly agrees, the

impugned receipt ends up reducing the cost of acquisition of the asset, i.e. flat, and, therefore, the same will be taken into account as such, as and when occasion arises for computing capital gains in respect of the said asset. Subject to these observations, grievance of the assessee is upheld."
Tribunal has also held that; the issue regarding addition of ₹ 8,55,800. In fact, this amount was given by Developer for paying rent while development of the project was taking place. In fact, assessee submitted before me that he has made expenditure of ₹ 6,80,000/- towards rent while development activity of the project was taken place. So, Assessing officer is directed to allow the claim of assessee to same extent because it is nothing but compensation received by assessee for paying rent. This cannot be said to be income of assessee. (ITA No. 291/Mum/2015, dt. 12.08.2016)(AY. 2007-08)
Jitendra Kumar Soneja v. ITO (Mum.)(Trib.); www.itatonline.org

106 **S. 4 : Charge of income-tax – Accrual of income – Assessee received advance on a condition to refund the same in event of not starting of film – Assessee not holding amount in his own right – Not to be treated as income.**
The assessee received an advance from Tips Industries Limited ('TIL'). The AO added the amount to the total income of the assessee holding that since the assessee was following the cash system of accounting, any income becomes assessable only when it is received and thus the advance received is also a receipt in the nature of income irrespective of the fact that when and how services are going to be performed. On appeal to Tribunal, it was held that the assessee received the amount from TIL for accepting the assignment to work as director for 2 forthcoming films. It was specifically mentioned as advance and not as remuneration and in the event of the first film not starting, the assessee was required to refund the advance forthwith to TIL. The addition made by AO was not sustainable in law because the amount is being still held by the assessee on behalf of TIL and not on his own right as per the agreed terms of conditions as agreed, *vide* mutual understanding dated February 5, 2008, as the assessee will be deemed to appropriate the said amount or hold the same amount in his own right only on the commencement of the film and till then the assessee is holding the said amount of ₹ 25,00,000/- on behalf of Tips Industries Ltd. which is refundable in case of non-starting of the film. Therefore the addition made by AO was to be deleted. (AY 2008-09)
Satish B. Kaushik v. ACIT (2016) 47 ITR 739 (Mum.)(Trib.)

107 **S. 4 : Charge of income-tax – Accrual – Carbon Emission Reduction Certificate (CERs) is taxable only when the right to receive consideration for transfer of these CERs is quantified and crystallized.**
The Tribunal held that income from Carbon Emission Reduction Certificate (CERs) is taxable only when the right to receive consideration for transfer of these CERs is quantified and crystallized. It is not the case of the AO that the sale was made in the relevant previous year. Once the sale is not effected in the relevant previous year, there cannot be any good reasons to bring the CER value to tax in this assessment year. Accordingly, the value of CERs even though quantifiable, cannot be brought to tax by the reason of accrual simpliciter. (AY. 2009-10)
Dy. CIT v. Kalpataru Power Transmission Ltd. (2016) 177 TTJ 394 / 133 DTR 113 / (2017) 162 ITD 18 (Ahd.)(Trib.)

S. 4 : Charge of income-tax – Income does not accrue if the debtor is in a precarious financial position and recovery is doubtful. [S. 145] 108

The Tribunal held that income did not accrue in the hands of the assessee owing to the precarious financial condition of the debtor notwithstanding that, services were rendered and the income was recorded in the books of account of the assessee during the relevant year and bad debts were claimed in subsequent years when the dispute was settled.(ITA No.39/07, ITA No.650/07 & CO No.122/07, dt. 30.10.2015) (AY. 2002-03)

Bechtel International Inc v. DDIT (Mum.)(Trib.);www.itatonline.org

S. 4 : Charge of income-tax – Subsidy granted to set up a windmill project is a capital receipt. [S. 41(1), 43(1), 50] 109

Subsidy granted to set up a wind project is a capital receipt. The subsidy cannot be reduced under Explanation 10 to S. 43(1) from the cost of the assets acquired though 100% depreciation is allowed on the cost of the assets. The subsidy is also not assessable either u/s. 41(1) or u/s 50.(ITA No. 3473/M/2013, dt. 26.11.2015) (AY. 2008-09)

Uni Deritend Ltd. v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 4 : Charge of income-tax – Mutuality – Co-Operative housing Society – TDR Premium received from members is not liable to tax. 110

CIT(A) relied on ITAT order for A.Y. 2006-07 (ITA No. 499/M/2011) & A.Y. 2007-08 (ITA No. 500/M/2011) and held that TDR Premium received by Society from its members was not covered by principle of Mutuality. The Tribunal for A.Y. 2008-09 reversed the order of Learned CIT(A) and held that TDR premium will be covered by the principle of mutuality. Tribunal followed the order of High Court in ITA No.427 / 428 / 590 of 2012. (ITA No. 66 & 67 /Mum/2014. Dt. 09.03.2015) (AY. 1995-96, 2008-09)

Hatkesh Co-op. Hsg. Society Ltd. v. CIT (Mum.)(Trib.); www.itatonline.org

Editorial: Order of Tribunal, in Hatkesh Co-op. Hsg. Society v. ACIT (2013) 27 ITR 494 (Mum) (Trib.) is no longer good law, High court has set a side the order of Tribunal. Hatkesh Co-op. Hsg Society Ltd. v. CIT ITA NO 328 OF 2014 dt. 22-8-2016)

S. 4 : Charge of income-tax – Mercantile system of accounting AIR information – Interest credited – tax deducted by payer – Liable to be offered as income though not received during the year.[S.5, 56, 145] 111

Assessee, in his return of income, had not shown certain amount of interest received from a party on which payer had also deducted tax at source on ground that he actually did not receive such interest. AO on the basis of AIR information added the interest income as income from other sources. CIT (A) affirmed the view of AO. On appeal the Tribunal held that since assessee was following mercantile system of accounting, once interest amount had been credited to assessee and tax had been deducted by payer, assessee could not take plea of not offering it as income on ground that he had not actually received same. However, if said amount was treated as income of assessee, then credit of TDS had to be given. (AY. 2009-10)

Girish M. Kothari v. JCIT (2016) 157 ITD 451 (Mum.)(Trib.)

112 **S. 4 : Charge of income-tax – Accrual – Advance professional fees received from clients – Not taxable as income. [S. 145]**

Assessee receiving advances from clients to meet expenses for and on behalf of its clients. Assessee keeping advance receipts in separate ledger account. Assessee transferring professional fees to Profit and Loss account and carry forward credit balance to next year as sundry creditors. Professional advance received is not taxable in the hands of the assessee.(AY. 2009-10)

Vipin Malik v. ACIT (2016) 45 ITR 589 (Delhi)(Trib.)

113 **S. 4 : Charge of income-tax – Increase or decrease in liability on account of fluctuation in foreign exchange – Capital account not taxable. [S. 263]**

In case of issue of FCCB, increase or decrease in liability on account of fluctuation in foreign exchange as on date of balance sheet would be on capital account and, therefore, any gain or loss is not taxable (AY. 2008-09)

Subex Ltd. v. CIT (2016) 156 ITD 938 / 182 TTJ 846 (Bang.)(Trib.)

114 **S. 4 : Charge of income-tax – Foreign Exchange gain – Arose due to restatement of loan balance at the end of the year – Assessee credited such gain in its P&L a/c – Loan has been utilized only on revenue account – Foreign exchange gain is taxable – Since in subsequent years, foreign exchange loss has not been claimed as deduction, AO is directed to allow deduction of notional loss in subsequent years to be in consonance with aforesaid finding.**

Borrowings were made from foreign shareholder and was utilized by advancing to its subsidiary in ordinary course of business. Loan agreement clearly specifies that the borrowings are meant for general corporate purpose. Held that even if assessee did not receive interest income from such loan, it would not shift the business purpose. Foreign Exchange gain arose due to restatement of loan balance at the end of the year at the prevailing exchange rate. Assessee credited such gain in its P&L a/c. Amount advance is meant for business purpose of the assessee and has to be construed as amounts lent in ordinary course of business. Even if no interest income is received on such advance, resultant exchange gain restated at the end of the year has to be construed as a revenue receipt. However, in subsequent years, assessee has incurred foreign exchange loss and has not claimed it as a deduction since notional in nature. Since, to be in consonance and take consistence stand AO is directed to grant deduction of notional foreign exchange loss in subsequent years. (AY. 2004-05)

ITO v. UMT Investment Ltd. (2016) 176 TTJ 53 / 136 DTR 39 (Kol.)(Trib.)

115 **S. 4 : Charge of income-tax – Capital or revenue-Subsidy received by way of exemption from sales tax was capital in nature since the object of the incentive was to develop backward areas. [S.28(i)]**

The Assessee set up a unit in backward area and it was granted benefit of deferring the payment of sales tax collected by it for 15 years. Subsequently, the Assessee opted for the Exemption Scheme wherein it was exempt from levy of sales tax. The benefit that arose was offered to tax as a capital receipt in its revised return of income. The AO held that it was a revenue receipt. The ITAT held that the subsidy was capital in nature since

the object and purpose of the incentive was to develop industries in the backward area, to remove imbalance and to maintain regional economic growth. (AY. 2006-07, 2007-08)
John Deere India P. Ltd. v. DCIT (2015) 69 SOT 45 (URO) / 172 TTJ 470 (2016) 45 ITR 389 (Pune)(Trib.)
John Deere Equipment P. Ltd. v. ITO(2015) 69 SOT 45 (URO) / 172 TTJ 470 / (2016) 45 ITR 389 (Pune)(Trib.)

S. 4 : Charge of income-tax – Penalty to be paid outside India for violation of law of other country does not attract tax in India therefore tax is not to be deducted. [S. 195] 116
The Assessee was a listed company in India and ADR of the company were also listed on carried on the New York Stock Exchange. The US Court levied a penalty of 10 million $ for violation of Securities Exchange Act, 1934. The Assessee made an application to AAR to ascertain whether it was required to deduct tax at source. The AAR held that penalty to be paid for violation of law cannot attract tax under the Income-tax Act and therefore, provisions of section 195 were not attracted.
Satyam Computer Services Ltd. (2016) 380 ITR 189 / 236 Taxman 199 / 282 CTR 41 / 129 DTR 14 (AAR)

S. 4 : Charge of income-tax – Settlement amount received in pursuance for surrender right to sue is a capital receipt and not a business income, hence not chargeable to tax in India. [S.28(i), 45] 117
The Applicant, a foreign institutional investor ('FII') alongwith its affiliates purchased shares of Satyam Computer Services Limited ('Satyam') and Satyam's American Depository Shares ('ADRs'). Subsequently, in January 2009, the CEO confessed that the accounts of the company were manipulated, pursuant to which, the Appellant and its affiliates disposed of the shares of Satyam and ADRs.
Thereafter, the Appellant filed claims against Satyam for fraudulent misrepresentation. Finally, a Settlement agreement was entered with Satyam whereby for an agreed amount, the Appellant on behalf of the Aberdeen Investors would forever waive, release, discharge and dismiss all legal claims against Satyam.
An application was filed with Authority of Advance Ruling ('AAR'), to seek a ruling in respect of the taxability of the agreed amount received from Satyam under the Settlement Agreement under the Income-tax Act, 1961.
The AAR held that the nature of settlement amount is of a capital receipt and the amount has been received against surrender of right to sue cannot be considered for the purpose of capital gains u/s.45, relying on the AAR decision in the case Qualified Settlement Fund (QSF), In re (2016) 130 DTR (AAR) 367. In the said case, under similar situation, AAR held that if right to sue is considered as a capital asset, its cost of acquisition cannot be determined and in the absence of such cost of acquisition, the computation provisions fails. Therefore, right to sue cannot be subjected to income tax under the head 'capital gains'.
Further, it was held that the settlement amount have been received not as part of business profit or to compensate the future income but as a result of surrender of the

claim. Thus, even in accordance with the principle of surrogatum such amount is not assessable as income because it does not replace any business income.
Aberdeen Asset Management Plc., In re (2016) 381 ITR 55 / 283 CTR 387 / 65 taxmann.com 246 / 131 DTR 1 (AAR)]
Aberdeen Claims Administration Inc., In re (2016) 381 ITR 55 / 283 CTR 387 / 65 taxmann.com 246 / 131 DTR 1 (AAR)]

S. 5 : Scope of total income

118 **S. 5 : Scope of total income – Accrual – Co–operative bank is also a banking company; not liable to pay tax on NPA interest on accrual basis in view of RBI norms relating to income recognition and assets classification. [S. 4, 145, Reserve Bank of India Act, 1934 S.45O, Banking Regulation Act, 1949]**
Dismissing the appeal of the revenue, the Court held that; Co-operative bank is also a banking company; not liable to pay tax on NPA interest on accrual basis in view of RBI norms relating to income recognition and assets classification. (AY. 2010-11)
PCIT v. Shri Mahila Sewa Sahakari Bank Ltd. (2016) 242 Taxman 60 / 289 CTR 225 (Guj.)(HC)

119 **S. 5 : Scope of total income – Accrual – Interest receivable from non-performing assets, which were not reflected in profit and loss account, would not be liable to tax. [S.145]**
Dismissing the appeal of the Revenue, the Court held that; interest receivable from non-performing assets or from, bad and doubtful debts, which were not reflected in profit and loss account, could not be liable to tax.
CIT v. Shri Basaveshwara Sahakari Bank. (2016) 242 Taxman 411 (Karn.)(HC)

120 **S. 5 : Scope of total income – Disputed liability – When contractee disputed liability to pay amount under contract, entire disputed amount would not be taxable in current year. [S. 4, 145]**
Assessee carried out contractual work and raised bill at agreed rate. ONCG disputed liability and undertook to make interim payment - assessee offered only 50% of the bill amount as income. AO taxed the entire income on accrual basis. Court held that since ONGC had disputed its liability, it could not be said that there was any corresponding liability on ONGC to pay assessee full amount and therefore, the said amount was not chargeable to tax.
Deep Industries Ltd. v. ACIT (2016) 241 Taxman 355 (Guj.)(HC)

121 **S. 5 : Scope of total income – Interest on compensation under dispute – chargeable to tax only upon resolution of dispute by High Court [S.4]**
Allowing the appeal, High Court held that only upon receipt of the final order, the assessee became entitled to withdraw even the interest, which had accrued on such compensation amount which was kept as deposit with the bank and the same would then alone be liable to tax.
Shivanna, M. v. ACIT (2016) 142 DTR 319 (Karn.)(HC)

S. 5 : Scope of total income – Interest accrued on non-performing assets could not be brought to tax on notional basis even if Assessee had adopted mercantile system of accounting. [S. 4, 145] 122

During the assessment proceedings, the AO made an addition of interest income accrued on non-performing assets. The AO was of the view that as the Assessee follows mercantile system of accounting, therefore the interest accrued should be chargeable to tax.

On appeal before the High Court, the High Court after placing reliance on case of *CIT v. Canfin Homes Ltd. (2012) 347 ITR 382 (Karn.)(HC)* held that interest on non-performing asset cannot be brought to tax on notional basis. Further the High Court held that the nomenclature 'non-performing asset' would also include bad loans and advances. As a result the Revenue's appeal challenging the Tribunal's order was dismissed. (AY. 2009-10, 2010-11)

CIT v. Shri Siddeshwar Co-Operative Bank Ltd (2016) 388 ITR 588 / 240 Taxman 588 (Karn.)(HC)

S. 5 : Scope of total income – A non-resident, rendered services as a marine engineer, salary received by him in India by fund transfer from foreign companies directly in NRE account in India is held to be taxable in India [S. 5(2)(a)] 123

The assessee claimed that he had to float on foreign water to render services during the course of voyage and, when he would stay more than 182 days outside India or on foreign water, his residential status would be treated as 'non-resident' as per provision of law and his salary income which were received outside India in foreign currency would not be taxable u/s. 5. Dismissing the appeal of the assesse, the Tribunal held that; where assessee, a non-resident, rendered services on board a ship outside territorial waters of any country, salary received in India by way of transfer of funds in his NRE account in India, would be taxable in India u/s. 5(2)(a). (AY. 2010-11)

Tapas Kr. Bandopadhyay v. Dy.CIT (2016) 159 ITD 309 / 180 TTJ 702 (Kol.)(Trib.)

S. 5 : Scope of total income – Accrual of income – Method of accounting – The income cannot be said to have accrued when the realization was uncertain. 124

The Tribunal held that the income cannot be said to have accrued to assessee though following mercantile system of accounting as the assessee contractor had terminated the contract for non-payment of earlier bills and realization was uncertain. (AY. 2002-03)

Bechtel International Inc. v. Dy. DIT (2016) 177 TTJ 58 (UO)(Mum.)(Trib.)

S. 6. Residence in India

S. 6 : Residence in India – Installation project continuing only for 178 days in fiscal year, less than 183 days – No permanent establishment of applicant in India – Business profits from execution of project taxable only in country where applicant was resident – DTAA-India-Singapore. [S.6(3), Art. 7(1)] 125

Since the project executed by the applicant in India continued only for 178 days in a fiscal year, less than 183 days in a fiscal year, there was no permanent establishment of the applicant in India and that the business profits accruing or arising to the applicant

by way of the execution of the project under reference were taxable only in the country where the applicant was a resident in terms of Article 7(1) of the Double Taxation Avoidance Agreement between India and Singapore. (AY.2013-14)
Tiong Woon Project and Contracting (Pte) Ltd. In, re (2016) 380 ITR 187 / 282 CTR 39 / 129 DTR 16 (AAR)

126 **S. 6 : Residence in India – Individual – Capital gains – Resident in India who earned capital gains on sale of immovable property situated in Sri Lanka shall be chargeable to tax only in Sri Lanka DTAA-India-Sri Lanka [S.6(1)), Art. 4, 13]**
Assessee, a Sri Lankan National, was married to an Indian National and was living in India after her marriage. She had sold her immovable property and claimed that capital gain arising on sale of said property fell within purview of Article 13. Assessing Officer rejected the contention of the assessee on the ground that as per provisions of S. 6 and Article 4, assessee was resident in India during relevant previous year as she stayed for more than prescribed period u/s. 6 in India and had personal and economic relations with India, therefore any income arising in India or outside India was fully taxable under section 5 of the Act. On appeal Tribunal held that ; capital gains earned on sale of immovable property situated in Sri Lanka would be chargeable to tax only in Sri Lanka while same income would be included in income of assessee chargeable to tax in India under provisions of Act and relief would be granted in manner laid down in Notification No. 91 of 2008, dated 28-8-2008.(AY. 2007-08)
Shalini Seekond (Mrs.) v. ITO (2016) 159 ITD 905 / 180 TTJ 1 (Mum.)(Trib.)

S. 9 : Income deemed to accrue or arise in India

127 **S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Income arising by way of slot chartering, would form a part of income from operations of ships, is exempt under article 8 of India Singapore DTAA – DTAA-India-Singapore [Art.8]**
Revenue, on appeal filed against order of Tribunal, raised following question for consideration of High Court: whether Tribunal was justified in holding that income of assessee, arising by way of slot chartering, would form a part of income from operations of ships, exempt under article 8 of India Singapore DTAA. Dismissing the appeal of revenue the Court held that above question stood concluded against revenue by a decision of Bombay High Court rendered in case of DIT (IT) v. Balaji Spg. UK Ltd. [2012] 211 Taxman 535, therefore, said question did not give rise to any substantial question of law. (AY. 2004-05)
DIT v. APL Co. Pte. Ltd. (2016) 243 Taxman 84 (Bom.)(HC)
Editorial : SLP is granted to the revenue, DIT v. APL Co. Pte Ltd. (2016) 243 Taxman 141 (SC)

128 **S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – When under offshore contract, equipment was transferred outside India, necessarily taxable income also accrued outside India and, hence, no portion of such income was taxable in India, writ petition of revenue was dismissed.**
Revenue filed writ petition against an order passed by Authority for Advance Rulings. Whether as point arising under section 9 sought to be urged was covered against

revenue by two decisions of Delhi High Court rendered in assessee's own case, i.e., *DIT v. LG Cables Ltd. [2011] 197 Taxman 100 and DIT v. L.S. Cables Ltd. [IT Appeal No. 707 of 2011, dated 30-9-2011],* wherein it has been held that (i) since there was no material to show that accrual of income under offshore supply contract was attributable to any operations carried out by assessee, a Korean company, in India and furthermore scope of work under onshore contract was under a separate agreement and for separate consideration, there was no justification to treat onshore contract and offshore contract as a composite contract, and (ii) when under offshore contract, equipment was transferred outside India, necessarily taxable income also accrued outside India and, hence, no portion of such income was taxable in India, writ petition was liable to be dismissed

DIT v. LS Cable Ltd. (2016) 243 Taxman 427 (Delhi)(HC)

Editorial : SLP is granted, DIT v. L S Cable Ltd. (2016) 243 Taxman 435 (SC)

S. 9(1)(i) : Income deemed to accrue or arise in India – Non-resident – Apportionment of such income – Non-resident company assigned rights and obligations to sell and deliver equipment manufactured by its parent non-resident company – Equipment supplied outside India – No installation or commissioning activity by assessee – No part of income from transaction assessable in India. 129

The task of installation, commissioning and testing was contracted to assessee's subsidiary in India and thus, the operations pertaining to installation and commissioning were not performed by that subsidiary on behalf of the assessee but on its own behalf. Thus, the assessee could be stated to have performed any installation or commissioning activity in India. The equipment contract also indicated that the vendor had other obligations such as coordinating its efforts with the sub-contractors, etc. The supplier was liable to deliver the equipment to the carrier at the port of shipment or the airport of departure which would be outside India. The assessee only assumed the obligation to sell, supply and deliver equipment in terms of the equipment contract and was paid in terms of the pricing mechanism as agreed to under the equipment contract. The income from installation, commissioning and testing activities as well as any function performed by expatriate employees of the group companies seconded to Indian subsidiary would be subject to tax in the hands of the subsidiary and could not be considered income of the assessee. (AY. 2003-04, 2004-05, 2005-06)

Nortel Networks India International Inc. v. DIT (2016) 386 ITR 353 / 241 Taxman 464 / 288 CTR 383 (Delhi)(HC)

S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Transfer of trade mark "Foster" in India – Since it was transfer of intangible asset and the assessee was not located in India at time of transaction, income accruing to assessee from transfer of its right, title or interest in trade mark was not taxable in India – DTAA-India-Australia. [Art. 13] 130

AAR has answered the question by holding that the income "accrued" to the applicant, from the transfer of its right title and interest in and the trade mark and Foster's Brand Intellectual Property is taxable in India under the Income-tax Act, 1961. The issue in HC was whether the receipt arising to the applicant from the transfer of its right, title

and interest in and to the trademark foster's brand Intellectual Property was taxable in India under the IT Act, 1961. Insofar as the income attributable to brewing IPR was concerned, the same was not liable to be taxed under the I.T. Act? Allowing the appeal of the assessee the court held that the situs of the Trademarks & ITR, which were assigned pursuant to the owner thereof was not located in India at the time of the transaction, receipt arising to the assessee from the transfer of its right, title and interest in and to the trademarks' Foster's brand IPR and grant of exclusive perpetual licence of Foster brewing IPR was not taxable in India.
CUB Pty Ltd. v. UOI (2016) 388 ITR 617 / 139 DTR 113 / 241 taxman 278 / 288 CTR 361 (Delhi)(HC)

131 **S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Shipping company – "international traffic" India-Singapore DTAA][Art. 3(h), 8]**
Transportation of goods from Kandla port to Vizag Port in a vessel from Singapore bound to Dubai falls within the definition of the term "international traffic" under Article 3(h) of India-Singapore DTAA and cannot be said to be operating solely between the places in India and therefore, as per the provisions of Article 8 of India-Singapore DTAA, the profits arising out of the same is not taxable in India.
CIT v. Tarus Shipping Services (2016) 236 Taxman 555 / 288 CTR 718 (Guj.)(HC)

132 **S. 9(1)(i) : Income deemed to accrue or arise in India – Business income – UK-based non-resident company was not having permanent establishment in India and received non-compete fee, same would not be taxed in India – DTAA-India-UK [S. 28(va), 55, Art. 7]**
Tribunal held that; UK-based non-resident company was not having permanent establishment in India and received non-compete fee, same would not be taxed in India. (AY. 2008-09)
Trans Global PLC v. DIT (IT) (2016) 158 ITD 230 (Kol.)(Trib.)

133 **S. 9(1)(i): Income deemed to accrue or arise in India – Business profits – Foreign subsidiaries performed its operations outside India and no technical knowledge was made available to assessee amount paid to subsidiary was held to be not taxable in India – DTAA-India USA [Art, 7, 12]**
Assessee-company was engaged in business of software development and other allied activities. Assessee parcelled out a portion of its work to its foreign subsidiaries. The AO held that the amount paid by assessee to foreign subsidiaries was in nature of technical service fee liable to tax in India. On appeal allowing the appeal, the Tribunal held that; since no operations had been undertaken by foreign subsidiaries in India and they even did not have permanent establishment in India, amount paid to said companies was not taxable in India. The Tribunal also held that since no technical knowledge was made available to assessee, by its foreign subsidiary which was the requirement under the DTAA for payment to qualify as technical services fee, payment in question was not taxable in India. (AY. 2002-03, 2004-05, 2005-06)
Cyient Ltd. v. Dy.CIT (2015) 70 SOT 741(Hyd.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Revenue from 'software sale' by assessee shall be taxable – Receipts from annual maintenance contract would also be covered as 'business profits – Training of personnel of endusers for which this consideration had been received was ancillary and subsidiary to sale of software, was assessable as business profits – DTAA-India-UK [Art. 7, 13] 134

Assessee was a tax resident of UK having a PE in shape of branch office in India, declared 'software sales' in its profit & loss account as business receipts, however Assessing Officer treated Revenue from 'software sales' as 'royalty' which was subjected to tax accordingly. Tribunal held that; the assessee simply purchased shrink-wrapped software or off-the-shelf software from UK company without any right to use copyright of such software, thus Revenue from 'software sale' by assessee shall be taxable under article 7 as 'business profits' and not royalty under Article 13 of India-UK DTAA and the consideration for sale of copyrighted product and not use of any copyright. Tribunal also held that since the receipts from sale of original software had been held to be in nature of business profits covered under Article 7 and not as royalty under article 13 of DTAA, following this, receipts from annual maintenance contract would also be covered under Article 7 'business profits'. As regards training of personnel of end users for which this consideration had been received was ancillary and subsidiary to sale of software, assessee's stand of including such receipts under Article 7 of DTAA was to be allowed. (AY. 2007-08)

Datamine International Ltd. v. ADIT(IT) (2016) 158 ITD 84 / 178 TTJ 560 / 48 ITR 229 (Delhi)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – In absence of Permanent Establishment of foreign subsidiaries in India, amount received by said companies could not be brought to tax in India as business income – DTAA-India-UK-Singapore [S.195, Art. 5, 7] 135

As per Article 7 of UK and Singapore Treaty, in the absence of PE in India, the business income also would not get taxed in India. Hence the payment made by the assessee to its subsidiaries is not chargeable to tax in India in the hands of the subsidiaries in India. The provisions of section 195(1) mandate a requirement that the income should be chargeable to tax in India to assume jurisdiction in India. It is proved beyond doubt that the subsidiaries do not have any income chargeable to tax in India. (AY. 2008-09, 2009-10)

Batlivala & Karani Securities (India) (P.) Ltd. v. Dy.CIT (2016) 159 ITD 924 / 180 TTJ 558 (Kol.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – liaison office in India not authorized to do core business activity or sign or execute contracts – no permanent establishment – no attribution of profits – DTAA-India-Japan [Art. 5] 136

AO held that the assessee had a fixed place PE and the core business activities were carried out though the liaison office and the conditions laid down in RBI permission were violated. The Tribunal held that, there was no PE, as the Liasion office and its employees were not authorized to do core business activity or sign or execute contracts, they were only authorized to engage in preparatory/auxiliary activities and not carry out

entire business activity. The power of attorney gave restricted and specific authority to the Liasion office. All purchase orders were raised directly on the head office by Indian customers, and the head office directly sent quotations/invoices to the customers without any involvement of Liasion office in India. As no PE in India the question of attribution of income from off-shore supplies does not arise. (AY. 2011-12)
Kawasaki Heavy Industries Ltd. v. ACIT (2016) 157 ITD 847 / 46 ITR 739 / 177 TTJ 90 (Delhi)(Trib.)

137 **S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Supply of software was integrally connected to supply of hardware – Receipts from supply of software could not be taxed as royalty**
Where supply of software was integrally connected to supply of hardware, receipts from supply of software could not be taxed as royalty. (A.Y. 2004-05 to 2009-10)
Addl. DIT (IT) v. ZTE Corporation (2016) 140 DTR 81 / 179 TTJ 424 (Delhi)(Trib.)

138 **S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Where project of assessee did not have work duration of more than 9 months during year, a back-up-cum-support office simpliciter would not constitute PE of assessee.**
Where only activities carried out by assessee in India were through various construction projects meant for exploration and production of mineral oil, and no other business activities had been carried out which could be called as independent business activities yielding separate/independent business profits, aforesaid activity of construction project were to be considered primarily under article 5(2)(i) and not under any other clause. PE of assessee had to be determined, keeping in view work carried out at its project sites and since project of assessee did not have work duration of more than 9 months during a year, an activity of maintenance of back-up cum support office simpliciter would not constitute PE of assessee. (AY. 1998-99, 2004-05, 2005-06, 2008-09)
Addl. DIT(IT) v. J. Ray McDermott Eastern Hemisphere Ltd. (2016) 180 TTJ 660 (Mum.) (Trib.)

139 **S. 9(1)(i) : Income deemed to accrue or arise in India–Permanent Establishment– For purpose of attribution of profits to Permanent Establishment, Permanent Establishment's participation in economic life of source country is to be considered, Accordingly, 35 per cent of net global profits as per published accounts out of transactions of assessee with India were attributed to Permanent Establishment in India – Receipts from supply of software could not be taxed as royalty – DTAA-India -China [S. 9(1)(vi), Art. 5, 7]**
Assessee a Chinese Company, supplied telecom equipment's to Indian Telecom Operators. For the purpose of attribution of profits to PE, most important aspect to be kept in mind is level of PE's participation in economic life of Source Country and for this, level of operations carried out by PE in India are to be considered to arrive at a reasonable percentage of profit to be attributed to PE in India. Level of operations carried out by assessee, a Chinese Company, through its PE in India, were considerable enough to conclude that almost entire sales functions including marketing, banking

and after sales were carried out by PE in India, it would meet ends of justice if 35 per cent of net global profits as per published accounts out of transactions of assessee with India were attributed to PE in India. In respect of both hardware and software supplied by assessee to Indian customers. Since supply of software was integrally connected to supply of hardware, CIT(A) had rightly held that receipts from supply of software could not be taxed as royalty. (AY. 2004-05 to 2009-10)
ZTE Corporation v. ADIT (2016) 159 ITD 696 / 179 TTJ 424 (Delhi)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India – Permanent Establishment – Entire relationship was principal to principal basis and Indian subsidiary acting independently, it did not constitute an agency PE in terms of article 5(4), distribution income could not be taxed in India – DTAA-India-Mauritius. [Art. 5(4)] 140
Assessee engaged in business of broadcasting of sports all across globe including India. Since assessee did not have any branch or business premises in India, it had formed a subsidiary, namely 'Taj India' as its advertising sales agent. A distribution agreement was entered into by assessee with Taj India for distribution of paid channel to various cable operators and ultimately to consumers in India. Distribution revenue collected by Taj India was to be shared between assessee and 'Taj India' in ratio. Entire relationship qua distribution revenue was that of principal to principal basis and Subsidiary was acting independently, not constitute an agency PE in terms of Article 5(4) of DTAA. (AY. 2003-04 to 2005-06)
ADIT v. Taj TV Ltd. (2016) 161 ITD 339/ (2017) 184 TTJ 202 / 147 DTR 30 (Mum.)(Trib.)

S. 9(1)(i): Income deemed to accrue or arise in India – legal fees to a firm in UK for creating/earning a new source of income outside India by way of establishment of new bank branch or acquisition of a bank is not taxable in India – DTAA-India-UK [S.195, Art. 13] 141
Assessee engaged in banking business, paid legal fees to a firm in UK for creating/ earning a new source of income outside India by way of establishment of new bank branch or acquisition of a bank. Payments fall under the exceptions of S. 9(1)(vi)/(vii) and therefore not taxable under Indian law. Firm had neither any business connection nor any PE in India, payment was not taxable as per S. 9(1)(i) (AY. 2012-13)
Kotak Mahindra Bank Ltd. v. ITO (IT) (2016) 161 ITD 304 / (2017) 183 TTJ 414 / 150 DTR 16 (Mum.)(Trib.)

S. 9 (1)(i) : Income – Deemed to accrue or arise in India – Corporate guarantee – Extended credit facilities by branch of said bank, guarantee commission received by assessee did not accrue in India – DTAA-India-France. [Art. 23] 142
Assessee, a French company, had given corporate guarantee to French bank on behalf of its Indian subsidiaries. Extended credit facilities by branch of said bank, guarantee commission received by assessee did not accrue in India. Article 23 had no applicability-India-France. (AY. 2012-13)
Capgemini SA v. DCIT (2016) 160 ITD 13 (Mum.)(Trib.)

143 **S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – A "power of attorney" holder of a non-resident can constitute a "dependent agent", "fixed place of business" and a "permanent establishment" under Article 5 of the DTAA. The fact that the physical presence of the non-resident in India is nominal is irrelevant – DTAA-India-Swiss. [S. 195, Art. 5, 7]**

Dismissing the appeal of assessee the Tribunal held that ; the reference by AO to Article 5 draws special importance. While business constitutes continuous activity in organized manner it is often a question of fact & law. "Place of business" usually means a premises of the enterprise used for carrying on the business, whether or not exclusively used for business. The residence of the country Manager was held to be a fixed place of business as the same was used as an office address in Sutron Corporation In re 268 ITR 156 AAR. Similarly an office space of 3 x 6 metres in Motorola Inc & Ors 95 ITD 269 (Del). To constitute a PE, the business must be located at a single place for a reasonable length of time. The activity need not be permanent, endless or without interruptions. It may not be out of place to mention that functions performed by Sri V. Subramanian or the Indian subsidiary could not be classified as preparatory or auxiliary in character. The facts strongly indicate towards Sri V. Subramanian constituting a dependent agent/ PE for reasons brought on record by the AO and as discussed in foregoing paragraphs. There were no presence of a number of principals who exercised legal and or economic control over the agent Sri V. Subramanian. The principal i.e. the assessee has failed to demonstrate this aspect when confronted by the AO. The principal i.e. the assessee was relying on the special skills and knowledge of the agent Sri V. Subramanian the Managing Director of the Indian entity by the same name and rendering similar functions. Sri V. Subramanian was acting exclusively or almost exclusively for and on behalf of the assessee during the currency of the contracts in question. To that extent it was not in furtherance of his ordinary course of business. Finally the refuge taken of Article 5(2)(j) on the short period of contracts and the interregnum does not offer any solace to the assessee either. The assessee has not demonstrated it was a mere passing, transient or casual presence for its activity in India. In view of this, we confirm the order of the lower authorities. This ground is therefore dismissed. (ITA No. 1742/ Mad/2011, dt. 24.08.2016) (AY. 2008-09)

Carpi Tech SA v. ADIT (2017) 145 DTR 17 (Chennai)(Trib.)

144 **S. 9(1)(i) : Income deemed to accrue or arise in India – Permanent Establishment– Continuous period of stay of its employees in India which had to be taken into consideration and not entire contract period– DTAA-India-Germany. [S. 115A, Art.5, 7, 12(2)]**

The assessee filed the return of income wherein amount received from Indian companies for providing technical consultancy services was offered to tax under Article 12(2) of the DTAA at 10%. The AO taxed at 30% and in respect of two contracts at 20%. On appeal the Tribunal held that ;in order to determine as to whether assessee, a German company, rendering services in field of exploration, mining and extraction to Indian companies, had PE in India, it was continuous period of stay of its employees in India which had to be taken into consideration and not entire contract period. Since assessee

had deputed one of its employees to India and he did not stay in India for more than 180 days, it could not be concluded that assessee had PE in India. Therefore, provisions of S. 115A would not be applicable to assessee. (AY. 2002-03)
Rheinbraun Engineering Und Wasser GmbH v. Dy. CIT (2016) 158 ITD 359 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India – Business profits – Assessee secured order on behalf of its Indian entity and outsourced work thereto, such entity constituted assessee's business connection in India hence liable to be assessed. [Art. 7 of OECD Model Convention] 145
Assessee a UK based company secured orders on behalf of its Indian entity and outsourced work thereto. Responsibility of assessee vis-a-vis its customer was concluded in India. Responsibility of assessee could not be segregated and would not complete unless Indian entity provided services to customers. Assessee had continuous revenue generating business activities with Indian entity and there was real and intimate relationship between activities of assessee outside India and those inside India therefore, assessee had business connection in India, hence liable to be assessed. (AY. 2004-05)
Dy.CIT v. Vertex Customer Management Ltd. (2016) 158 ITD 365 / 178 TTJ 580 (Delhi) (Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India – Permanent establishment – Assessee received BPO services from its Indian entity, it did not constitute fixed place PE in India hence cannot be assessed – DTAA-India-UK.[Art. 5] 146
Assessee received BPO services and back office operations from its Indian entity. Back office services did not constitute permanent establishment in India. As assessee had no right to occupy premises but was merely given access for purposes of works, disposal test was not satisfied and, therefore, assessee did not have fixed place PE in India, hence cannot be assessed. (AY.2004-05)
Dy.CIT v. Vertex Customer Management Ltd. (2016) 158 ITD 365 / 178 TTJ 580 (Delhi) (Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India – Permanent establishment – AO held that expatriate employees of assessee were providing services in India but he could not render any evidence in this regard, it did not constitute service PE in India – DTAA-India-UK [Art. 5] 147
The assessee, a UK based company, outsourced certain work to its Indian entity. It received reimbursement from Indian entity for certain expenses. It claimed said amount was on cost to cost basis and therefore was not taxable. The A.O. held that reimbursement had an effect of reducing income of the Indian entity. He, therefore, taxed said reimbursement and also held that assessee had business connection and PE in India. The honourable ITAT held that AO. did not produce any evidence in this regard to reimbursement amount pertaining to third party cost directly relatable to Indian entity, amount allocated to Indian entity was taxable as royalty. Therefore, assessee did not have service PE in India.
Dy.CIT v. Vertex Customer Management Ltd. (2016) 158 ITD 365 / 178 TTJ 580 (Delhi) (Trib.)

148 **S. 9 (1)(i) : Income deemed to accrue or arise in India – Part of business operations in India – Only part of income reasonably attributable to operations carried on in India shall be deemed to accrue or arise in India – DTAA-India-Mauritius. [Art. 5, 7]**
As per Explanation 1 to section 9(1)(i), income from business would be deemed to be only such part of income, as was reasonably attributable to operations carried out in India. Thus where part of business operations of assessee were carried out outside India, only part of income reasonably attributable to operations carried on in India shall be deemed to accrue or arise in India. (AY. 2005-06 to 2007-08)
ADIT(IT) v. J. Ray McDermott Eastern Hemisphere Ltd. (2016) 158 ITD 923 / 180 TTJ 660 (Mum.)(Trib.)

149 **S. 9(1)(i) : Income deemed to accrue or arise in India – Permanent establishment – Project of assessee did not have work duration of more than 9 months during year, a back-up-cum-support office simpliciter would not constitute Permanent establishment of assessee – DTAA-India-Mauritius. [S.5(2)(i), 90, Art. 5, 7]**
Where only activities carried out by assessee in India were through various construction projects meant for exploration and production of mineral oil, and no other business activities had been carried out which could be called as independent business activities yielding separate/independent business profits, aforesaid activity of construction project were to be considered primarily under article 5(2)(i) and not under any other clause. PE of assessee had to be determined, keeping in view work carried out at its project sites and since project of assessee did not have work duration of more than 9 months during year, an activity of maintenance of back-up cum support office simpliciter would not constitute PE of assessee. (AY. 1998-99, 2004-05, 2005-06, 2008-09)
ADIT (IT) v. J. Ray McDermott Eastern Hemisphere Ltd. (2016) 158 ITD 923 / 180 TTJ 660 (Mum.)(Trib.)

150 **S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Commission – Services of non-resident companies for running duty free retail shops – Matter remanded – DTAA-India-UK-UAE. [Art. 7, 13]**
Assessee company was engaged in business of operation and maintenance of an International Airport. It had established duty free retail outlet shop at international terminals of Airport. Assessee engaged services of two non-resident companies namely Alpha and Kreol in running duty free retail outlet shop. In consideration of services rendered by Alpha and Kreol, assessee agreed to pay 'commission fee' at 2 per cent of gross sales from duty free retail outlet. Assessing Officer held that commission fees was to be considered as business income deemed to accrue or arise in India through a 'business connection' in India under section 9(1)(i). CIT(A) also confirmed the order of AO. On appeal the Tribunal held that; revenue authorities had not examined existence of 'business connection' as per statutory definition mentioned in Explanation 2 to section 9(1)(i). Moreover, authorities below failed to conclude under which clause of relevant DTAAs existence of PE was satisfied. Therefore in aforesaid circumstances, impugned order was to be set aside and, matter was to be remanded back for disposal afresh. Matter remanded. (AY. 2005-06, 2009-10)
Cochin International Airport Ltd. v. ITO (IT) (2016) 157 ITD 310 / 136 DTR 241 / 177 TTJ 578 (Cochin)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Indian Liaison Office and agents of US money transfer company, rendering services to Indian relations of American residents in India, were not its PE in India; profit attributable to Indian activities was not liable to tax in India – DTAA-India-USA [Art. 5, 7] 151

Assessee-US company was engaged in business of transfer of money across countries through specialised software. It set up Liaison Office which appointed agents in India for rendering said services to Indian relations of American resident. Assessee provided software enabling agents to access its mainframes in USA. No copyright over software was given to agents. Agents owned computer system independently and assessee had no control over them. Further, activities of agents were not wholly or almost wholly devoted on behalf of assessee. Transaction in question/compensation was under arm's length price. The assessee filed its return declaring 'nil' income by contending that it was not liable to pay any tax in India on income arising from money transfer services as it did not have any permanent establishment in India. The Assessing Officer held that income arising to the assessee from money transfer services was taxable in India, both under the Income-tax Act and the DTAA between India and the USA. The Commissioner (Appeals) set aside the order of the Assessing Officer. On appeal by revenue the Tribunal held that; Indian Liaison Office and agents of US money transfer company, rendering services to Indian relations of American residents in India, were not its PE in India; profit attributable to Indian activities was not liable to tax in India.(AY. 2004-05, 2009-10)

Dy. CIT v. Western Union Financial Services Inc (2016) 156 ITD 882 (Delhi)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Branch office – Compensated at arm's length for performing services–No part of assessee's profit could be taxed in India as profits attributable to PE – DTAA-India-USA [Art. 5, 7] 152

Allowing the appeal assessee the Tribunal held that where assessee's branch office, which was considered as assessee's PE in India, was compensated at arm's length for performing services in respect of direct sales made by assessee in India, no part of assessee's profit could be taxed in India as profit attributable to Indian PE. (AY. 2002-03 to 2004-05)

St. Jude Medical Inc v. Dy.CIT (2016) 156 ITD 387 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Composite contract to supply, install and implement retail automation system would be taxable in India through the project office in India. The sub-contract of service component could not be used to split the composite contract. 153

Assessee entered into a composite contract to supply, install and implement retail automation system. The installation of systems was sub-contracted to another party in India. Assessee alleged that the income from supply of equipment was not taxable in India since it was supplied outside India and payments were received outside India. The AO alleged that the contract could not be split into supply of equipment and service income, and held that the project office was PE in India. ITAT held that the project office opened in India to oversee the implementation of the project would constitute a PE in India. Further, it was held that the income could not be split by the Assessee since it had entered into a composite contract and was responsible for both the supply

of equipment as well as installation services. The sub-contract was only of the methods of executing the project and could not be used to split the composite contract. (AY. 2008-09)
Orpak Systems Ltd. v. ADIT(IT) (2016) 176 TTJ 655 / 133 DTR 137 (Mum.)(Trib.)

154 **S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Power of attorney – Liaison office – Does not constitute permanent establishment – DTAA – India-Japan. [S. 90, Art. 5]**
A Power of Attorney executed by the Head Office in favour of the Liaison Office in India does not create a Permanent Establishment if the powers are specific to the liaison office and are not unfettered powers to enable to Liaison Office to act on behalf of the enterprise. (AY 2011-12)
Kawasaki Heavy Industries Ltd. v. ACIT (2016) 157 ITD 847 / 132 DTR 81 / 177 TTJ 90 / 46 ITR 739 (Delhi)(Trib.)

155 **S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Intention of parties that property in goods would pass only when installation and erection of entire works completed – Entire amount received from contractor taxable in India – DTAA-India-Singapore [Art.7]**
Authority held that nowhere in the agreement was contractual bifurcation available. There was no mention of two transactions. The clause in the agreement dealing with the scope of work was not divisible in two parts. The payment schedule depended upon the stages of completion of the project and not on shipment of goods or completion of services. Intention of parties that property in goods would pass only when installation and erection of entire works completed. Entire amount received from contractor taxable in India.
MERO Asia Pacific Pte Ltd., In re (2016) 387 ITR 274 / 243 Taxman 322 / 289 CTR 1 / 140 DTR 394 (AAR)

156 **S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Lease of cranes in mineral oil project – Section 44BB applicable – Business profits taxable at 40 per cents – DTAA-India-Singapore. [S.44BB, Art.5(3), 7]**
The applicant was a tax resident of Singapore engaged in the business of renting/ leasing of heavy lifting cranes for use and providing erection and installation of heavy equipment such as furnaces, boilers, coke drums, fractionators, chimneys, turbines and generators in many countries in Asia. It rented out a crane having a capacity to lift 1600 metric tons in terms of a work order for a period of 7 months from February 17, 2015 to GR for use at the refinery of Bharat Petroleum at its integrated refinery expansion project site at its Kochi refinery, which was engaged in refining of mineral oils. The total consideration was ₹ 19.45 crores. It sought an advance ruling on the questions whether it could be held to have earned any income taxable in India from its activities renting out of its cranes for use in India, under the provisions of the Income-tax Act, 1961 and if so, how the total income of the applicant should be computed in terms of the provisions of the Act. The Department contended that the installation of project was carried out by the applicant commencing on February 16, 2015 and expected it to end

on January 31, 2016 and this constituted a permanent establishment of the applicant in India in terms of article 5(3) of the Double Tax Avoidance Agreement between India and Singapore (DTAA) and hence, the business profits attributable to the permanent establishment were the applicant's income arising in India under section 9(1)(i) of the Act and assessable as such in India in terms of Article 7 of the DTAA for assessment years 2015-16 and 2016-17, which were the years where the applicant had not exceeded 183 days and that for the purpose of computing the business profits, section 44BB of the Act being applicable to the case of the applicant, such business profits were taxable at the rate of 40 per cent. The applicant not having any dispute with the inferences raised by the Department, the Authority, on the stated facts, disposed of the application in terms of the conclusions drawn by the Department in its response. (AY. 2015-16, 2016-17)
Tiong Woon Contracting Pte Ltd., In re (2016) 387 ITR 350 / 243 Taxman 58 / 289 CTR 353 (AAR)

S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Program fee received by applicant from Northwest is neither taxable as royalty nor as business profits – DTAA-India-USA. [Art. 5, 7] 157
Program fee received by applicant from Northwest is not taxable in India either as royalty or as business profits
Regents of the University of California UCLA Anderson School of Management Executive Education, USA, In re (2016) 243 Taxman 122 (AAR)

S. 9(1)(i): Income deemed to accrue or arise in India – Management programmes for senior executives – Fees received was held to be not liable to tax in India – DTAA-India-USA [Art. 5,12(5)] 158
Applicant, a US based non-profit corporate organisation, has entered into an agreement with an Indian company to launch management programmes for senior executives of various companies in India, since applicant manages to prove that it is an educational institution, programme fees received by applicant from Indian concern will be covered by Article 12(5)(c) of India, USA DTAA and, thus, it is not liable to tax in India
UC Berkeley Center for Executive Education, USA, In re (2016) 242 Taxman 360 / 289 CTR 106 (AAR)

S. 9(1)(ii) : Income deemed to accrue or arise in India – Salaries – Assessee rendered services in USA, salary received by him for such services in India from sister concern of US employer would be exempt from Indian taxation – DTAA-Indo-US [S. 5, Art. 16(1)] 159
Assessee was transferred from Indian company to its American sister concern to act as a lead software engineer and accordingly he left India on 30-5-2007 in connection with his US employment. However, for internal facilitation, his salary for relevant period was paid by Indian company in India. Since services in question were rendered by assessee in USA, his salary income during relevant year was exempt from tax under Article 16(1). Applicability of article 16(1) depends on country where services were rendered and merely because salary was paid by Indian entity, application of Article 16(1) could not be denied. (AY. 2008-09)
Neeraj Badaya v. ADIT (2016) 157 ITD 1016 / 137 DTR 283 / 179 TTJ 387 (SMC)(Jaipur) (Trib.)

160 **S. 9(1)(iv) : Income deemed to accrue or arise in India – Dividend by Indian company – Mere reduction in capital occurred due to transfer of shares under scheme of buy back which was approved by High Court does not fall under definition of 'reorganization' specified in Article 13(5) – Held that gain was taxable in India – DTAA-India-Netherlands [Art. 13(5)]**

The assessee tendered equity shares of a public listed Indian company under a scheme of arrangement by way of buy back of own shares as per approval of High Court which resulted in capital gain. The AO and CIT(A) rejected the claim of the assessee that as per paragraph 5 of Article 13 of India Netherlands DTAA, the transaction felt under the definition of 'reorganization' as specified in Article 13(5) and that the gain was not taxable. On appeal to ITAT, it was held that the object of arrangement was not financial restructuring but to enable assessee to transfer its shareholding and there was only reduction in share capital and security holders continued to enjoy same types of rights and interests. It further held thatthe attempt of the assessee to bring transferring of shares within the ambit of the term 'reorganization' may not be correct, since the objective of the arrangement was not financial restructuring, but to provide an exit route to the non-resident shareholders. (AY. 2006-07)

Accordis Beheer B V v. DIT (IT) (2016) 157 ITD 373 / 176 TTJ 406 / 136 DTR 65 (Mum.) (Trib.)

161 **S. 9(1)(vi) : Income deemed to accrue or arise in India – Broadcasting payment was held to be not in the nature of royalty – DTAA-India-Thailand [Art. 12]**

Assessee was a producer of tele-programmes and engaged in the operation of Satellite T.V. Channel. It entered into an agreement for hiring of transponder for transmitting the TV programmes through satellite with Thailand based company. Said company broadcast said contents through its satellite. In lieu of such broadcasting, it was paid various sums from time-to-time. AO held the payments to be in the nature of royalty. On appeal by the revenue, the Court held that; as per the agreement the assessee facilitated transmission and broadcasting of various programs in India and earned the income mainly from advertisement as it was a free to Air Channel. The AO held that payment made to non-resident company was from the source in India and was in the nature of Royalty within the meaning of sub clause (b) of section 9(1)(vi) read with clause (iii) of explanation 2 of the said section. The High Court held that, the issue is decided in favour of the assessee by the *Delhi High Court in case of Asia Satellite Telecommunications Co. Ltd. v. DIT [2011] 332 ITR 340/197 Taxman 263 (Delhi) and DIT v. New Skies Satellite B.V. [2016] 382 ITR 114 (Delhi)* and they agreed with the views expressed therein. (AY. 2001-02 to 2003-04)

DIT v. ATN International Ltd. (2016) 242 Taxman 8 (Cal.)(HC)

162 **S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Payments received by assessee amounted to royalty as defined under Explanation 2 to section 9(1)(vi) and under Article 12 of applicable DTAA thereby giving rise to an income chargeable to tax in India – Held liable to deduct tax at source – DTAA-India-USA [S.195, 90, Art. 12]**

Tribunal held that payments received by assessee amounted to royalty as defined under Explanation 2 to section 9(1)(vi) and under article 12 of applicable DTAA thereby giving rise to an income chargeable to tax in India. Assessee raised following questions

of law for consideration of High Court: (i) whether Tribunal was right in disposing of assessee's appeal by placing reliance on judgment of Karnataka High Court in case of *CIT v. Samsung Electronics Co. Ltd. [2012] 345 ITR 494* and on its earlier order made in assessee's own case [IT Appeal No. 550 (Bang.) of 2011, dated 31-10-2012], and (ii) whether Tribunal was justified in holding that payments received by assessee amounted to royalty as defined under Explanation 2 to section 9(1)(vi) and under Article 12 of applicable DTAA thereby giving rise to an income chargeable to tax in India. High Court held that said questions were already covered by decision of Karnataka High Court in case of *CIT v. Synopsis International Old Ltd. [2013] 212 Taxman 454* and, therefore, no substantial question of law arose for consideration. (AY. 2007-08)
Synopsys International Ltd. v. DDIT (IT) (2016) 76 taxmann.com 18 (Karn.)(HC)
Editorial: SLP was to be granted to the assesse, Synopsys International Ltd. v. DDIT (IT) (2016) 243 Taxman 512 (SC)

S. 9(1)(vi) : Income deemed to accrue or arise in India – Fees for technical services – Payment for pre-packed software is neither royalty nor fees for technical services – As between provisions of agreement or Act which ever more beneficial to assessee is applicable – DTAA-India-USA. [S.9(i), 90(3), Art. 12] 163

The Court had to consider whether the consideration received by the Assessee on sale of pre-packaged software was "royalty" or "fee for technical services" and was, therefore, not taxable as business income. HELD by the High Court dismissing the Department's appeal:

(i) It is not in dispute that Article 12(3) of the Double Taxation Avoidance Agreement ("DTAA") between India and the United States of America (USA) is relevant for deciding the above issue.

(ii) The short question considered by the Court in *Director of Income Tax v. Infrasoft Limited (2014) 220 Taxman 273 (Del)* was whether the term "royalty" covered by Article 12(3) of the DTAA would apply in the context of sale of pre-packaged copyrighted software. The Court stated that it has not examined the effect of the subsequent amendment to Section 9 (1) (vi) of the Act and also whether the amount received for use of software would be royalty in terms thereof for the reason that the Assessee is covered by the DTAA, the provisions of which are more beneficial.

(iii) Section 90(3) of the Act makes it clear in the context of an agreement ('treaty') for avoidance of double taxation, that it is only when the provisions of the Act are more beneficial to the Assessee the Act will prevail over the treaty. Conversely, where the provision of the treaty is more beneficial to the Assessee, the treaty would prevail over the Act. This legal position has been reiterated in *Director of Income Tax v. Infrasoft Limited (supra)* which was followed in dismissing the Revenue's appeal in the Assessee's own case for AY 2008-09 i.e. ITA No. 477 of 2014.

(iv) The Court is not persuaded to re-examine the above issue which stands answered against the Revenue by the aforementioned order.(AY. 2009-10, 2010-11)

CIT v. Halliburton Export Inc (2016) 386 ITR 123 (Delhi)(HC)

164 **S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Non-resident – Providing data transmission services were not taxable in India – Amendment inserted by Finance Act, 2012 have no effect unless DTAA is amended jointly by both parties – DTAA-India-Thailand-Netherlands. [S. 2(30), Art. 12]**

The assessees derived income from the "lease of transponders" of their respective satellites. This lease was for the object of relaying signals of their customers ; both resident and non-resident television channels that wished to broadcast their programs for a particular audience situated in a particular part of the world. The assessees were chosen because the footprint of their satellites, i.e. the area over which the satellite could transmit its signal, included India. Having held the receipts taxable under section 9(1)(vi) of the Act, the Assessing Officer also held that the assessees would not get the benefit of the Double Taxation Avoidance Agreements between India and Thailand and between India and Netherlands. The Tribunal held that they were not taxable in India. On appeals to the High Court: Unless DTAA is jointly amended by both parties to incorporate income from data transmission services as partaking of the nature of royalty or amend definition in a manner so that such income automatically becomes royalty, Finance Act, 2012 which inserted Explanation 4, 5, and 6 to section 9(1)(vi) by itself would not affect the meaning of term 'royalties' as mentioned in article 12 of India -Thailand DTAA, hence the receipts of the assessees from providing data transmission services were not taxable in India. (AY. 2007-08, 2009-10)

DIT v. New Skies Satellite BV (2016) 382 ITR 114 / 238 Taxman 577 / 285 CTR 1 / 133 DTR 185 (Delhi)(HC)

DIT v. Shin Satellite Public Co. Ltd. (2016) 382 ITR 114 / 238 Taxman 577 / 285 DTR 1 / 133 DTR 185 (Delhi)(HC)

Editorial: SLP is granted to the Revenue; DIT v. New Skies Satellite B. V. (2016) 242 Taxman 3 (SC)

165 **S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Payment made to data relating to the geophysical and geological information about the east and west coast of India was held to be not royalty hence not liable to deduct tax at source – DTAA-India-USA-UK [S. 195, [Art. 12]**

Allowing the appeal the Tribunal held that the licence is for a fixed period and that on the expiry of the licence, the assessee is required to return the product or destroy the data accessed by the assessee during the licence period but is not required to destroy the product produced by the assessee by use of such data. Thus, it is clear that access to the technical knowledge is granted to the assessee in order to enable it to process the same and use such data for furtherance of its objects. All that is provided by the licensor was the data relating to the geophysical and geological information about the east and west coast of India and it was not responsible for the accuracy or usefulness of such data. Thus, licensors had only made available the data acquired by them and available with them but was not making available any technology available for use of such data by the assessee and hence payments made were not in nature of 'Royalty' as per DTAAs with USA and UK. (AY. 2009-10)

GVK Oil & Gas Ltd. v. ADIT (IT) (2016) 158 ITD 215 (Hyd.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Sale of copyrighted software to customer along with licence ley – No copyright to use software or licence given either to Indian distributor or customer – No royalty – One Contracting State cannot unilaterally alter domestic provision and enlarge or amend scope under Agreement – Amendment to S. 9 enlarging scope of royalty will not affect scope of royalty under Article 12 of Treaty – DTAA-India-Netherlands [Art. 7, 12] 166

The Tribunal on Revenue's appeal held that under the terms of the agreement specifically prohibited decompiling, reverse engineering, disassembling of the software, modifying in any manner or sub-licensing of the software. The sine qua non for payment to be royalty is that the payment must fall within scope of Article 12(4) of the Treaty. The sale of software cannot be held to be covered under the words "use of process" because the customer does not have any access to the source code. The software product is available for use, but not the process embedded within. None of the conditions mentioned u/s 14 of the Copyright Act, 1957 were applicable to the said transfer. The consideration received by the assessee was for sale of shrink wrapped software and not royalty within Art. 12(a) of the Tax Treaty. Moreover, amendment in the definition of "royalty" u/s. 9(1)(vi) *vide* Finance Act 2012 could not be read into the Tax Treaty as the Treaty had not been correspondingly amended in line with the enlarged definition. If a term has not been defined in the Treaty but under the domestic law, then definition under the latter will be used to interpret the Agreement. However, if a term has been specifically defined under the Treaty, then any reference to the domestic law or any amendment to such term thereunder will have no bearing on the definition under the Treaty, as one contracting State cannot unilaterally alter its domestic provision to later the scope of the term under the Treaty except by corresponding negotiation between the two States. Thus amended and enlarged scope of "royalty" u/s. 9(1)(vi) has no bearing on the Tax Treaty. (AY. 2008-09)

ADIT (IT) v. Baan Global BV (2016) 49 ITR 73 (Mum.)(Trib.)
ITO v. SSA Global Technologies (I) P. Ltd. (2016) 49 ITR 73 (Mum.)(Trib.)
INFOR Global Solutions (Barneveld) BV v. DDIT (IT) (2016) 49 ITR 73 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Services was not rendered by employees of branch office, hence royalty income earned on account of technical agreement was chargeable to tax as 'royalty' income and not as business income – DTAA-India-Italy [S.9(1)(i), Art. 13(1), (13(2)] 167

AO held that royalty income was effectively connected to permanent establishment of assessee in India and, therefore, same was not chargeable to tax as royalty income but as business income. On appeal Tribunal held that; in absence of any positive and substantive material to effect that services had been rendered by employees of branch office of assessee, royalty income earned by assessee on account of technical agreement was not effectively connected with branch office of assessee and therefore, same was chargeable to tax as 'royalty' income as per Article 13(1) and (2) at 20% and not as business income at 41.82%. (AY. 2007-08, 2009-10)

Iveco Spa v. ADIT (IT (2016) 160 ITD 348 / 182 TTJ 464 / (2017) 147 DTR 353 (Delhi) (Trib.)

168 **S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Fees for technical services – Payments received by the assessee from Indian entities on account of connectivity charges are not taxable in India either as royalty or as fees for technical services – DTAA-India-UK [S. 90, Art. 13]**

The Tribunal held that, use of virtual voice network is standard facility provided by the assessee in the course of its business of providing international telecommunication network connectivity to various telecom operators with the help of certain scientific equipment whereby no technology is made available. Therefore, the payments received by the assessee from Indian entities on account of connectivity charges are not taxable in India either as royalty or as fees for technical services under Art.13 of Indo-UK DTAA. (AY. 2009-10)

Interroute Communication Ltd. v. DDIT(IT) (2016) 179 TTJ 355 / 139 DTR 175 / 68 taxmann.com 160 (Mum.)(Trib.)

169 **S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – 10% and rate of tax cannot be enhanced by including surcharge and education cess separately – DTAA-India-French. [Art. 2, 13]**

Provisions of Article 13 of Indo-French DTAA prescribing a cap of 10% on rate of tax, read with article 2 thereof, would prevail over provisions of domestic income-tax and thus tax liability on royalty income shall be capped at 10% and rate of tax @ 10% cannot be enhanced by including surcharge and education cess separately. (AY. 2012-13)

Capgemini SA v. DCIT (2016) 160 ITD 13 (Mum.)(Trib.)

170 **S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Embedded software on hardware supplied is not royalty.**

The Tribunal held that where the assessee, engaged in the business of development of proprietary technology for automated evaluation of internal features of diamond, sold to its customers machines used in the diamond industry along with operating application software which was an integral part of the machine, payments received for the same could not be treated as royalty since the software loaded on the hardware did not have any independent existence and could not be used independently. The software was supplied predominantly as a part of equipment and was an integral part thereof and therefore the transaction was to be treated as a sale and purchase of machine and not a sale and purchase of computer software. Consideration received by assessee for sale of software supplied as part of machine to end user was not royalty under article 12 of DTAA between India and Israel as there was no transfer of copyright or any rights therein nor was there any situation giving rise to any type of infringement of copyright by customers of assessee. It held that the amendment made in section 9(1)(vi) by way of insertion of an Explanation by Finance Act, 2012, for extending scope of term 'Royalty', could not be read into provisions of Article 12(3) of the Indo-Israel tax treaty as amendment made in provisions of Act cannot be automatically read into articles of treaty unless corresponding amendment is made in treaty as well. Since the payment was not taxable as FTS and the assessee did not have a PE in India, the receipts from sale of machinery could not be taxed in India. (AY.2011-12)

Galatea Ltd. v. DCIT (IT) (2016) 157 ITD 938 / 46 ITR 690 / 179 TTJ 265 / 138 DTR 161 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Assessee received reimbursement from its India entity for use of equipment situated outside India and it could not be established that same was on cost to cost basis, it was taxable as royalty in India – DTAA-India-UK. [Art. 13] 171

Assessee, a UK based company, outsourced certain work to its Indian entity. It received reimbursement from Indian entity for certain expenses. The A.O imposed tax on said reimbursement. Total reimbursement, (a) one part pertained to third party costs directly relatable to Indian entity and (b) balance part pertained to costs allocated to Indian entity. Amount allocated to Indian entity pertained to use of equipment outside India and, therefore, it constituted royalty as defined under article 13(3)(b). It could not be said with certainty that said amount was on cost to cost basis, as it was taxable as royalty in India. (AY. 2004-05)

Dy.CIT v. Vertex Customer Management Ltd. (2016) 158 ITD 365 / 178 TTJ 580 (Delhi) (Trib.)

S. 9(1)(vi): Income – Deemed to accrue or arise in India – Royalties and fees for technical services/Software) – Consideration received by assessee for sale of software claimed to have been supplied as part of machine to end user is not royalty – DTAA-India-Israel. [Art. 12] 172

Assessee non-resident company sold to its customers machines and operating software. In invoice issued by Assessee Company, consideration was mentioned separately for machine and operating software. However, there was no separate transaction of sale of software. Dominant character and essence of transaction was sale of machine by assessee and software, independently, had no value for customer. Thus it was predominantly transaction of sale of machine and therefore, it could not have been brought within definition of 'Royalty' as envisaged in s. 9(1)(vi). Further in absence of there being any P.E. of assessee in India, income arising from sale of machine could not have been taxed in its hands in India. (AY.2010-11)

Galatea Ltd. v. Dy. CIT (2016) 157 ITD 938 / 46 ITR 690 / 179 TTJ 265 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India – Fees for technical services – Consideration received for sale of computer software programme in CD Rom is not assessable as "royalty". The retrospective amendment in Explanation 4 to section 9(1)(vi) to tax such receipts as royalty has no application to DTAA if the definition of the term "royalty" in the DTAA has remained unchanged – DTAA-India-Netherland. [Art. 23(4)] 173

Dismissing the appeal of revenue the Tribunal held that (i) From the plain reading of Article 23(4) of the India-Netherlands DTAA it can be inferred that, it refers to payments of any kind received as a consideration for the use of, or the right to use any 'copyright' of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience. Thus, in order to tax the payment in question as "royalty", it is *sine qua non* that the said payment must fall within the ambit and scope of Para 4 of Article 12. The main emphasis on the payment constituting 'royalty' in Para 4 is for a consideration for the 'use of' or the 'right to use' any copyright……. The key phrases "for the use" or "the right to use any copyright of"; "any patent…….; "or process", "or for information……,"; "or scientific experience",

etc., are important parameter for treating a transaction in the nature of "royalty". If the payment doesn't fit within these parameters then it doesn't fall within the terms of "royalty" under Article 12(4). The Computer software does not fall under most of the terms used in the Article barring "use of process" or "use of or right to use of copyrights". Here first of all, the sale of software cannot be held to be covered under the word "use of process", because the assessee has not allowed the end user to use the process by using the software, as the customer does not have any access to the source code. What is available for their use is software product as such and not the process embedded in it. Several processes may be involved in making computer software but what the customer uses is the software product as such and not the process, which are involved into it. What is required to be examined in the impugned case as to whether there is any use or right to use of copyright? The definition of copyright, though has not been explained or defined in the treaty, however, the various Courts have consistently opined that the definition of "copyright" as given in the 'Copyright Act, 1957' has to be taken into account for understanding the concept.

(ii) The definition of 'copyright' in section 14 is an exhaustive definition and it refers to bundle of rights. In respect of computer programming, which is relevant for the issue under consideration before us, the copyright mainly consists of rights as given in clause (b), that is, to do any of the act specified in clause (a) from (i) to (vii) as reproduced above. Thus, to fall within the realm and ambit of right to use copyright in the computer software programme, the aforesaid rights must be given and if the said rights are not given then, there is no copyright in the computer programme or software. As noted by the CIT(A), under the terms of the agreement between the assessee and INFOR India, the agreement specifically forbids them from decompiling, reverse engineering or disassembling the software. The agreement also provides that the end user shall use the software only for the operation and shall not sub-license or modify the software. None of the conditions mentioned in section 14 of the Copyright Act are applicable. If the conclusions of Ld. CIT(A) are based on these facts and agreement, then he has rightly concluded that the consideration received by the assessee is for pure sale of "shrink wrapped software" off the shelf and hence, cannot be considered as "royalty" within the meaning of Article 12(4) of the DTAA, as the same is consideration for sale of copyrighted product and not to use of any copyright.

(iii) One of the issue which was raised by the Ld. DR before us is that, the Explanation 4 to section 9(1)(vi) which has been brought by Finance Act 2012 with retrospective effect in section 9(1)(vi), therefore, the meaning and definition of 'royalty' as given therein should be read into the DTAA. We are unable to appreciate this contention of the Ld. DR because the retrospective amendment brought into statute with effect from 01.06.1976 cannot be read into the DTAA, because the treaty has not been correspondingly amended in line with new enlarged definition of 'royalty'. The alteration in the provisions of the Act cannot be *per se* read into the treaty unless there is a corresponding negotiation between the two sovereign nations to amend the specific provision of "royalty" in the same line. The limitation clause cannot be read into the treaty for applying the provisions of domestic law like in Article 7 in some of the treaties, where domestic laws are made applicable. Here in this case, the 'royalty' has been specifically defined in the treaty and amendment to the definition of such term under the Act would not have any bearing on the definition of such term in the

context of DTAA. A treaty which has entered between the two sovereign nations, then one country cannot unilaterally alter its provision. Thus, we do not find any merit in the contention of the Ld. DR that the amended and enlarged definition should be read into the Treaty. (ITA No. 7048/Mum/2010, dt. 13.06.2016) (AY. 2006-07)
ADIT v. Baan Global BV (Mum.)(Trib.) www.itatonline.org

S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Consideration paid for use of computer software cannot be considered as royalty – Not liable to deduct tax at source – DTAA-India-Singapore. [Art. 12, Copyright Act, 1957, S.52] 174
Allowing the appeal of assessee the Tribunal held that; the assessee cannot be said to have paid the consideration for use of or the right to use copyright but has simply purchased the copyrighted work embedded in the CD- ROM which can be said to be sale of 'good' by the owner. The consideration paid by the assessee thus as per the clauses of DTAA cannot be said to be royalty and the same will be outside the scope of the definition of 'royalty' as provided in DTAA and would be taxable as business income of the recipient. The assessee is entitled to the fair use of the work/product including making copies for temporary purpose for protection against damage or loss even without a license provided by the owner in this respect and the same would not constitute infringement of any copyright of the owner of the work even as per the provisions of section 52 of the Copyright Act,1957.(AY.2007-08)
Capgemini Business Services (I) Ltd. v. ACIT (2016) 158 ITD 1 / 178 TTJ 129 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Consideration received for providing access to internet and other e-mail and networking facilities to Indian entity – Amounts to use of embedded software – Taxable as Royalty – DTAA-India-USA [Art. 12] 175
The assessee entered into agreement called Communication Agreement with Cincom Systems India Private Limited ('CS India'). As per the said agreement the assessee had to provide access to internet and other e-mail and networking facilities. It was like a gateway that facilitated call centers to incoming and outgoing calls from India to the people of USA. On appeal to Tribunal, it held that consideration received by the assessee for providing services to CS India was royalty under Article 12(3) of the India-US DTAA observing that such payment was for the use of embedded secret software enabling Indian customers to call residents of the USA and *vice versa*. Following the AAR Ruling in the case of ABC (238 ITR 296), it held that the transaction would to related to scientific work and would partake the character of intellectual property. (AY.2002-03, 2003-04, 2006-07)
Cincom System Inc v. DDIT (2016) 176 TTJ 245 / 131 DTR 345 (Delhi)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Consideration not royalty and cannot be characterised as fees for technical services – No part of income taxable in India. [DTAA-India-Singapore [Arts. 5(3), 7, 12(4)(a)]. 176
Assessee not having permanent establishment in India. Control of equipment with assessee and not transferred. Contract for rendering services and not for hiring equipment. Services not involving transfer of technology, skill, experience or know-how and constituting integral part of contract. Consideration not royalty and cannot

be characterised as fees for technical services. No part of income taxable in India. (AY. 2009-10)
Technip Singapore Pte Ltd v. DIT (2016) 385 ITR 408 / 240 Taxman 373 / 137 DTR 113 / 289 CTR 421 (Delhi)(HC)
Editorial: Ruling of the Authority for Advance Rulings in Global Industries Asia Pacific Pte. Ltd., In re [2012] 343 ITR 253 (AAR) set aside

177 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Liaison office not involved in supervisory activities and not allowed to do trading, commercial or industrial activity – Not supervisory permanent establishment in India – Income not taxable as business income but as fees for technical services – DTAA-India-Japan. [Art. 7, 12(2), (5)]**
On appeals: Held, dismissing the appeals, that on examination of the purchase orders, a common feature that emerged was that the supervisors were to come from Japan and MUL had to bear the cost of their air tickets as well as their boarding and lodging in India. The period of supervision in the case of the individual contracts did not exceed a period of 180 days. They did not constitute a supervisory permanent establishment in terms of Article 5(4) of the Double Taxation Avoidance Agreement. There was no effective connection between the execution of the purchase orders for supply of equipment and supervision of their installation, and the project office for the paint and assembly shop of the car project of MUL. Additionally, the supervisory fee paid by MUL was on the basis of "man days". The number of days per supervisor was calculated by dividing the man days by the number of supervisors. If 10 supervisors had stayed for 100 man days, the supervision period would be 10 days only, though the man days were 100. Thus, the period of stay would be only of 10 days and not 100 days. The liaison offices only facilitated the communication between the head office and MUL. The explanation that its letter on the rate of tax deducted at source was given only to expedite the payment from MUL, was tenable. The assessee offered the fees for technical services to be taxed at 20% and claimed refund. The communication of the assessee to MUL could not be viewed as an estoppel against the assessee from claiming to be taxed in accordance with law. The fees for technical services was liable to be taxed at 20% under article 12(2) of the Agreement. (AY. 1992-93 to 1996-97)
CIT v. Sumitomo Corporation (2016) 382 ITR 75 / 137 DTR 94 / 287 CTR 420 (Delhi)(HC)
Editorial : Order in Sumitomo Corporation v. Dy.CIT (2014) 31 ITR 310 (Delhi)(Trib.) is affirmed.

178 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services– Geophysical services in connection with exploration of oil, would not be in nature of fees for technical services.**
Held, that the Appellate Tribunal was not justified in holding that the activity of two dimensional and three dimensional seismic survey carried on by the assessee in connection with the exploration of oil was in the nature of "fees for technical services" in terms of Explanation 2 to section 9(1)(vii) of the Act. (AY. 2008-09)
PGS Exploration (Norway) AS v. Addl. DIT (2016) 383 ITR 178 / 239 Taxman 333 / (2017) 291 CTR 146 (Delhi)(HC)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Payments made for carrying out clinical trial and R&D pursuant to Product Development Agreement with Cipla was held to be fees for technical services and liable to deduct tax at source – DTAA-India-Malaysia [S. 195, 201, Art. 13] 179

Dismissing the appeal of the assessee, the Tribunal held that payments made for carrying out clinical trial and R&D pursuant to Product Development Agreement with Cipla was held to be fees for technical services and liable to deduct tax at source. (AY. 2011-12, 2012-13)

Stempeutics Research (P.) Ltd. v. (2016) 161 ITD 677 (Bang.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Payment made to Event Management Company for IPL hosted in South Africa was held to be fees for Technical Services – DTAA-India-UK [Art. 13] 180

Dismissing the appeal of the assessee, the Tribunal held that; payment made to Event Management Company for IPL hosted in South Africa was held to be fees for Technical services, in terms of Article 13(4)(c) as it made available technology to recipient of services. (AY 2010-11)

International Management Group (UK) Ltd. v. ACIT (IT) 2016) 51 ITR 372 / 182 TTJ 1 / (2017) 162 ITD 219 / (Delhi)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Interpretation report of data provided by assessee – Remittances to non-resident is not liable for deduction of tax at source. [S.195] 181

There was no obligation for withholding tax on any person making payment to non-resident, if payment made to non-resident was not chargeable under the provisions of the I.T. Act, hence Assessee could not be treated as assessee in default

Adani Welspun Exploration Ltd. v. ITO (IT) (2016) 48 ITR 533 (Ahd.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical Services – Payment to foreign agent – Not liable to deduct tax at source. 182

It was held that nature of services mentioned in the case above will come not within the definition of "fees for technical services" given under explanation 2 to Section 9(1)(vii) of the Act. By virtue of such services, the concerned recipients had not made available to the assessee any new technic or skill which assessee could use in its business. The services rendered by the said parties related to clearing, warehousing and freight charges, outside India. The logistics service rendered was essentially warehousing facility. In our opinion, this cannot be equated with managerial, technical or consultancy services. Even if it is considered as technical service, the fee was payable only for services utilized by the assessee in the business or profession carried on by the said non-residents outside India. Such business or profession of the non-residents, earned them income outside India. Thus, it would fall within the exception given under sub-clause (b) of Section 9(1) of the Act. In any case, under Section 195 of the Act, assessee is liable to deduct tax only where the payment made to non-residents is chargeable to tax under the provisions of the Act. In the circumstances mentioned above, assessee was justified in having a *bona fide* belief that the payments did not warrant application of Section 195 of the Act.

Dignity Innovations v. ITO (2016) 49 ITR 4 (Chennai)(Trib.)

183 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Presumptive taxation for fees for technical services u/s. 44D could not be invoked if services fell within Explanation 2 to section 9(1)(vii) and since service in question was related to construction activity being specifically excluded from said Explanation, presumptive taxation for said service could not be invoked – DTAA-India-USA [S.44D, Art. 12]**

Tribunal held that in case of receipts through permanent establishment in respect of which profits are to be computed under Article 12(3) of the DTAA, section 44D was not to be applied for the purpose of deduction of expenses. The Court further held that section 44D and for that matter explanation 2 to section 9(1)(vii) do not apply.

This controversy has now been laid to rest by insertion of new section 44DA in the Act w.e.f. 1.04.2004 by the Finance Act, 2003 where assessee has been given explicit option to compute its income on net basis if it has maintained books of account. The explanatory memorandum to the finance act stated that the section 44DA was inserted with a view to harmonize the scheme of taxation of royalty and fee for technical services under the Act with the provisions of the treaty with various countries. It means that even prior to the insertion of section 44DA, the fee for technical services provided through a PE in India was to be taxed on net basis under the provisions of the treaty, if there existed such a clause in the treaty, i.e., similar to Article 12(6) in the India-US treaty or India-Singapore Treaty etc. (AY. 2006-07, 2008-09)

DDIT (IT) v. MSV International Inc. (2016) 157 ITD 757 / 143 DTR 249 / 181 TTJ 480 / 51 ITR 428 (Delhi)(Trib.)

184 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Make available – Global market survey – Not liable to deduct tax at source – DTAA – India-UK [S. 195, Art 13]**

Assessee entered into an agreement with a U.K. based company, to undertake evaluation of business opportunities to carry out projects in India. U.K. based company had carried out global market survey to determine demand for repairs, conversions, new builds and to determine short/medium/long term business prospects in India. Since these services were neither geared to nor did they 'make available' any technical knowledge, skill or experience to assessee or consisted of development and transfer of a technical man or technical design to assessee, payments made by assessee for these services were not taxable as per Article 13. (AY. 2004-05 to 2006-07)

ITO v. Skill Infrastructure Ltd. (2015) 70 SOT 186 (Mum.)(Trib.)

185 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Payments made for providing network connectivity to its customers, it made arrangements with Authorized International Gateway Providers (AIGP) was not in the nature of technical services hence not liable to deduct tax at source. [S.194J, Art. 12 of OECD]**

Assessee was engaged in business of providing integrated network solutions, which included internet service. For providing network connectivity to its customers, it made arrangements with Authorized International Gateway Providers (AIGP) and having acquired bandwidth from them, it made payment to AIGP. Since payment was made for utilizing standard facilities which were provided by way of use of technical gadgets, it

did not involve any technical services as there was only interconnection of networks to equipment's of other service providers. Payments made for utilizing such services was not in nature of technical services hence not liable to deduct tax at source. (AY. 2009-10)
ITO v. Primenet Global Ltd. (2016) 48 ITR 451 (Delhi)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – There is a difference between "effectively connected" with the permanent establishment and "legally connected" with it. Only those activities necessary for the functioning of the PE are "effectively connected" with the PE – Concept of "make available" technical knowledge etc. – DTAA-India-UK [S. 44DA, Art. 4, 7, 13] 186

Dismissing the appeal of assessee, the Tribunal held that; the appeal of the assessee as under:

(a) with respect to ground No. 2,3, 4, 5 and 6 of the appeal of the assessee we hold that that (a) the receipts from the services rendered outside India of ₹ 23,77,50,181/- are chargeable to tax as Fees for Technical Services in terms of Article 13(4)(c) as it makes available the technology to the recipient of services and further the provisions of article 13(6) of the Indo UK Double Taxation Avoidance Agreement does not apply to this sum, as it does not "arise through" and also not "effectively corrected" with the permanent establishment of the appellant.

(b) With respect to the ground No. 7 and 8 of the appeal we hold that income of ₹ 23,77, 50, 181/-is chargeable to tax under section 9(1)(vii)(b) of the Income Tax Act as fees for technical services and it does not fall into the exception thereof.

(c) With respect to ground No. 9 of the appeal we hold that receipt of the appellant satisfies the "make available" test as provided under article 13 (4) (c) of the India UK DTAA as fees for technical services. (ITA No. 1613/Del/2015, dt. 04.10.2016) (AY. 2010-11)

International management Group (UK) Ltd. v. ACIT (Delhi)(Trib.), www.itatonline.org

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Liable to deduct tax at source – DTAA-India-USA.[S. 195] 187

The Tribunal held that the payment made by the assessee with regard to managerial, technical and consultancy services is liable to be taxed in India since the services are utilized in the business for earning income in India. Therefore, the income accrued to an associate concern of the assessee in India is liable for taxation under the Indian Income-tax Act. Hence, the assessee was liable to deduct tax while making the payment to its associate concern. (AY. 2008-09, 2009-10)
Foster Wheeler France SA v. Dy. DIT (2016) 178 TTJ 354 (Chennai)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Payment in the nature of interconnection charges was not in the nature of fees for technical services and hence tax was not to be deducted. [S. 195, 201(1), 201(IA)] 188

The Assessee made payment in the nature interconnection charges, port / access charges on which tax was not deducted at source. In the proceedings u/s. 201, the AO claimed that tax ought to be deducted since the payments were in nature of fees for technical services, but did not raise any demand u/s. 201(1) since the payee had paid tax on the same. However, interest u/s. 201(1A) was levied by the AO. The matter reached the SC,

which had remanded the matter to the AO to verify whether the process of carriage of calls required any manual intervention. In the second round of proceedings, the AO held that there was human intervention and hence payments were covered within the meaning of 'technical services'. Further, the AO also claimed, in separate proceedings u/s 201, that similar payments made to foreign telecom operators was taxable as fees for technical services u/s. 9(1)(vii) or royalty u/s. 9(1)(vi). The ITAT allowed the appeal of the Assessee and held that the payments were not taxable in India since there was no human intervention involved in the process of transportation of calls. Further, there was no 'make available' of technology since no knowledge was imparted to the Assessee. Further, it was also observed by the ITAT that there was no human intervention in the services received by the Assessee and hence no tax was required to be deducted.
The ITAT also rejected the additional evidence that was sought to be submitted by the Assessee which was written opinion of retired Chief Justice of India, who had also written the judgement in the case of the assessee. (AY. 2008-09 to 2011-12)
Bharti Airtel Ltd. v. ITO (TDS) (2016) 47 ITR 418 / 178 TTJ 708 (Delhi)(Trib.)

189 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Royalty – Payment received for providing web hosting services, though involving use of certain scientific equipment, cannot be treated as 'consideration for use of, or right to use of, scientific equipment' which is a *sine qua non* for taxability – DTAA-India-USA. [Art. 12]**
Use of a scientific equipment by assessee, in course of giving a service to customer, is something very distinct from allowing customer to use a scientific equipment and consideration for rendition of services, even though involving use of scientific equipment is not taxable under section 9(1)(vi), read with Explanation 2(iva) thereto. Therefore, payment received by assessee, an American company for providing web hosting services, though involving use of certain scientific equipment, could not be treated as 'consideration for use of, or right to use of, scientific equipment' which is a *sine qua non* for taxability under s. 9(1)(vi), read with Explanation 2(iva) thereto as also article 12 of Indo-US DTAA. (AY. 2009-10)
Dy. DIT v. Savvis Communication Corporation (2016) 158 ITD 750 / 178 TTJ 116 / 134 DTR 140 (Mum.)(Trib.)

190 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Broadcasting of television programmes and advertisements in India – Right to distribute channels telecast by assessee through any means to intermediaries in assigned territory – Matter remanded – DTAA-India-USA [Art.5, 12]**
Assessee, a US based company, was engaged in business of broadcasting of television programmes and advertisements in India. It appointed NGC, an Indian company, to procure advertisements for telecasting in its channels. Assessing Officer as well as DRP held that advertisement revenues were taxable in India since NGC constituted permanent establishment of assessee in India. It was found from records that 'advertisement airtime' did not give purchasers any right of universal use and same was restricted to channels owned by assessee only, further, assessee's involvement till completion of telecasting of advertisement material was essential in order to maintain value of advertisement airtime - In view of above, 'advertisement airtime' could not be categorised as 'goods' sold by assessee to NGC on principal-to-principal basis. Moreover,

in view of fact that NGC habitually exercised in India an authority to conclude contracts on behalf of assessee and same was binding on assessee, it was rightly regarded as 'dependent agent' of assessee in terms of Article 5(4)(a) of India-USA DTAA.
Assessee a US company entered into distribution agreement with NGC India - In terms of agreement, NGC India was given right to distribute channels telecasted by assessee through any means to intermediaries in assigned territory. Assessing Officer treated distribution fee paid by NGC India as 'royalty' liable to tax in India. It was undisputed that Assessing Officer had not examined Explanation 6 while passing assessment order. Moreover, fact that assessee was having dependent agent PE in India was also required to be taken into consideration while examining issue in dispute, Hence, impugned order passed by Assessing Officer was to be set aside and, matter was to be remanded back for disposal afresh. (AY. 2007-08, 2008-09)
NGC Network Asia LLC v. Jt. CIT (2016) 47 ITR 162 / 175 TTJ 403 / 131 DTR 145 (Mum.) (Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Foreign company deputed its employees in India rendering managerial services to assessee-company – Payment being FTS or royalty is made to non-resident, then concept of total income becomes irrelevant and provisions of section 44D recognize gross payment chargeable to tax – DTAA-India-Hong Kong. [S. 44DA, 192] 191
On appeal, the Tribunal held that, the employees were deputed at high level managerial/ executive positions which shows that they are deputed because of expertise and managerial skills in the field which in fact was also evident from the agreement. The secondees are assigned by DFCL and there is no separate contract of employment between the assessee and the secondees. The secondees are under the legal obligation as well as employment of DFCL and assigned to the assessee only for a short period of time. In the absence of any contract between the assessee and the secondees, the parties cannot enforce any right or obligation against each other. The secondees can claim their salary only from the parent company i.e. DFCL and not from the assessee. Thus, the expatriates were performing their duties for and on behalf of the DFCL.
In the case of payment being FTS or royalty as per section 9(1), it is irrelevant whether there is any profit element in the income or not. It is not only a matter of computation of total income when the concept of profit element in payment is relevant. If the payment being FTS or royalty is made to non-resident, then the concept of total income becomes irrelevant and the provisions of section 44D recognize the gross payment chargeable to tax. Thus, all the payments made by the assessee to non-resident on account of FTS or royalty are chargeable to tax irrespective of any profit element in the said payment or not. However, there is an exception to this rule of charging the gross amount when the non-resident is having fixed place of business or PE in India and the amount is earned through the PE, then the expenditure incurred in relation to the PE for earning said amount is allowable as per the provisions of section 44DA of the Act. Therefore, in view of the judgment of Delhi High Court in the case of *Centrica India Offshore (P.) Ltd. v. CIT [2014] 364 ITR 336*, the payment made to foreign company DFCL partakes the character of FTS as per the definition under Explanation 2 to section 9(1)(vii).
An alternative point was raised by the assessee that the secondment of employees constitute a service PE and secondly the amount would be chargeable to tax as per the

provision of section 44DA of the Act. Admittedly there is no DTAA between India and Hong Kong and under the provision of Act there is no concept of service PE. Since this plea was raised before the Tribunal for the first time and since there is no DTAA between India and Hong Kong, the concept of service PE requires proper examination and hence the issue was remitted to the files of the Assessing Officer for adjudication on the issue as to whether the secondment of the employees constitute a service PE and the applicability of the provisions of section 44DA. (AY. 2008-09)
Food World Supermarkets Ltd. v. Dy. DIT (2015) 174 TTJ 859 / (2016) 129 DTR 137 (Bang.) (Trib.)

192 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Assessee entered into an agreement with US company for providing technical and engineering services – In view of Expl. 2 to S. 9(1)(vii), payment made by assessee with regard to managerial, technical and consultancy services liable to tax since services utilized in the business for earning income in India – Under DTAA, foreign company reviewed the executions plans, with emphasis on key milestones, provided the best practices available in form of written procedures, specifications and details – Assessee can use the specifications and procedures for other projects also – foreign company has made available its technical knowledge to assessee as it is capable of deploying such technology in future – Assessee liable to deduct TDS [India-USA [S.195, Art. 12]**
Assessee entered into an agreement with RPL in India for providing technical and engineering services. For providing such services, the assessee-company had entered into another agreement with Foster Wheeler USA (Foster), an associate of the assessee-company. AO found that the payment made by the assessee to Foster (USA) was liable for deduction of tax at source under section 195. Since tax was not deducted, AO disallowed the entire payment by applying provisions of section 40(a)(i). On appeal, assessee contended that the U.S. company did not make available any technical knowledge, expertise, and know-how to the assessee. Therefore, the payment made by the assessee could not be construed as fee for technical services under India-US DTAA. Held that, as per Explanation 2 to section 9(1)(vii) payment made by the assessee with regard to managerial, technical and consultancy services was liable to be taxed in India since the services were utilized in the business for earning income in India. Under DTAA, the beneficial clause is used by invoking the concept of "make available". Therefore, to consider the payment as fee for technical services, the technical knowledge, expertise or know-how shall be made available to the assessee. It is an admitted position that the assessee was engaged in the business of engineering and construction contract, engineering equipment and power equipment supplier. For the purpose of carrying out the business in India, the assessee received the above services from Foster Wheeler USA and assessee had received execution plans with schedules, specifications, etc. Foster Wheeler USA reviewed the working of the assessee in respect of its plans, execution and also provided time schedule with emphasis on key milestones and assessee had also received systems for meeting the project budget and client satisfaction. The job specification was also given by Foster Wheeler USA. Assessee was an expertise company in engineering and construction works and specifications and other procedures were made available to the assessee-company and the foreign company was reviewing and tracking the execution plans periodically, not only the execution but also the project budget and client satisfaction, said foreign

company had made available its technical knowledge, expertise, know-how in execution of the contract by the assessee in India. Hence, assessee is liable to deduct tax at source. (AY. 2008-09, 2009-10)
Foster Wheeler France SA v. DDIT(IT) (2016) 157 ITD 793 / 176 TTJ 521 / 137 DTR 265 (Chennai)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Where assessee made payment to a China based company for designing, drawing, supply and installation of three passenger boarding bridges at airport, matter was to be remanded back to determine as to whether said payment was taxable in India in terms of 'fee for technical services'– DTAA-India-China. (Art. 12(3)] 193
Assessee made payment to a China based company for designing, drawing, supply and installation of three passenger boarding bridges at Airport without deducting tax at source. Assessing Officer was of view that tax had to be deduct at source. It was noted from records that revenue authorities did not consider as to whether payments in question fell within definition of 'royalty' under Article 12(3) of India-China DTAA. Moreover, question as to whether aforesaid payments could be regarded as 'fee for technical services' under section 9(i)(vii) was also not a subject matter of examination before lower authorities. In view of above, impugned order was to be set aside and, matter was to be remanded back for disposal afresh. (AY.2006-07)
Cochin International Airport Ltd. v. ITO(IT) (2016) 157 ITD 310 / 136 DTR 241 / 177 TTJ 578 (Cochin)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Article 12 of Model OECD Convention – Explanations to section 9(2) were inserted by Finance Act, 2010, with retrospective effect from 1-6-1976 by which payments made by assessee to non-residents were taxable in India as 'fee for technical services'; however in view of law as it existed at an earlier point of time when payments were made, it was not possible to comply with tax withholding liability. 194
The assessee was an advocate specialized in Intellectual Property Laws (IPR). The services of assessee were utilized by its clients in India which included multinational major corporate etc. During the year under consideration, assessee's clients expressed interest in protecting their IPR in foreign territories, he acted as a facilitator and entrusted work to a foreign attorney in respective jurisdictions who rendered services to clients of assessee. The fees of foreign attorneys were remitted by assessee upon receipt of payment/instructions from his clients and such amounts including fees of assessee for facilitation were borne by clients. The AO held that the payments made by assessee to non-residents were taxable in India as 'fee for technical services 'in view of insertion of Explanation 2 to Section 9(1)(vii)(b) by Finance Act, 2010 with retrospective effect from 1-6-1976. On appeal to Tribunal, it held that even though law amended was retrospective in nature but so far as tax withholding liability was concerned, it depended on law as it existed at point of time when payments from which taxes ought to have been withheld were made. Assessee therefore could not be faulted for not deducting TDS.(AY. 2006-07, 2008-09, 2009-10)
DDIT v. Subhotosh Majumdar (2016) 156 ITD 708 / 176 TTJ 600 / 142 DTR 285 (Kol.) (Trib.)

195 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – "Startup services", though technical in nature, are not assessable as "fees for technical services" if they do not involve any "construction, assembly mining or like projects". The services are also not taxable under Article 12 as they do not "make available" technical knowledge – DTAA-India-USA. [S.195(2), Art. 12]**

"Startup services", though technical in nature, are not assessable as "fees for technical services" if they do not involve any "construction, assembly mining or like projects". The services are also not taxable under Article 12 as they do not "make available" technical knowledge- DTAA-India-USA. (AY. 1998-99)

Raytheon Ebasco Overseas Ltd. v. DCIT (2016) 158 ITD 200 / 178 TTJ 39 (UO) (Mum.) (Trib.)

196 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – In view of Most favoured Nation (MFN) clause in Treaty of India and Netherlands, to decide scope of 'fee for technical services' under India – Netherland DTAA, one has to see scope of taxability of similar payment as explained in DTAA of India and USA – DTAA-India-Netherland [S. 195, Art. 12]**

Assessee, a Netherland based company, rendered services towards agreement for basic refinery package (BRP) to an Indian company. AO held that the assessee has provided technical services hence taxable at the rate of 10 percent as PER THE India Dutch DTAA. CIT (A) held that agreement for basic refinery package being a composite one, any bifurcation of services rendered under said agreement would be self-contradictory. On appeal Tribunal held that ;as long as Assessing Officer could demonstrate after collecting necessary details that only a part of service was taxable and non-taxable consideration component (i.e. consideration for physical deliverables, consideration for services other than technical services and consideration for services which do not transmit technical know-how etc.) was less than 50 per cent of overall consideration paid for basic refinery package, he could certainly conclude that only a part of total services was taxable on account of its being composite contract. In favour of assesessee. In view of Most favoured Nation clause set out in Treaty between India and Dutch, to decide scope of 'fees for technical services' under Article 12 of India Dutch treaty one has to see scope of taxability of similar payments in treaty of India and USA and unless Indo-Netherlands treaty is more beneficial to assessee, provisions of Indo-US tax treaty will apply. Fees for non-technical consultancy services cannot be treated as covered by scope of 'fees for technical services'. (AY. 2005-06)

Shell Global Solutions International BV v. ITO (2016) 157 ITD 24 / 175 TTJ 286 / 129 DTR 217 (Ahd.)(Trib.)

197 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Product promotion service agreement between Indian company and its Russian subsidiary to promote sales in Russia – Not taxable in India – DTAA-India-Russia. [Art. 7, 12]**

Product promotion service agreement between Indian company and its Russian subsidiary to promote sales in Russia is not taxable in India. The product promotion agreement could not be related with the distribution agreement signed two years earlier, under which exports were made. Therefore it could not be said that service fees

under the product promotion agreement were paid in order to promote its products for enhancing export in the Russian market.
Dr. Reddy Laboratories Ltd., In re (2016) 387 ITR 337 / 243 Taxman 127 / 289 DTR 24 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Activities of providing education not business activity – No permanent establishment – Program fee not chargeable to tax in India as "fees for included services" – Not subject to withholding tax – DTAA-India-USA. [S.195, Art. 5, 12] 198

That the activity of the applicant could not be said to be a business activity particularly because the applicant was registered in the United States as a non-profit public benefit corporation formed for the purpose of providing education. Its activities of providing education could not be said to be business activity of the applicant. Article 7 of the DTAA specifically deals with business income. There was no permanent establishment of the applicant in India as defined in article 5. Every time a program was undertaken in India, it was N which arranged for the place for conducting the programs. N need not every time arrange for the same place and arrange different locations for conducting the program. There could not be any fixed place of business on the part of the applicant. What the applicant did was to make available the programs of Harvard Publishing University which published material for all over the world. Therefore, it could not be covered in royalty also. Therefore, the program fee received by the applicant in terms of the agreement was not chargeable to tax in India as "fees for included services" within the meaning of the term under article 12 of the DTAA or the provisions of section 9(1)(vii) of the Act, 1961 and, therefore, was not subject to withholding tax under section 195 of the Income-tax Act, 1961
The Regents of the University of California UCLA Anderson School of Management Executive Education, USA, In re (2016) 387 ITR 398 / 243 Taxman 122 / 290 CTR 10 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Conducting courses of short duration in India for senior corporate executives is educational institution, as there is no permanent establishment in India, Program fee not chargeable to tax in India as "fees for included services" – DTAA-India-USA. [S.9(1)(i), 195, Art. 5, 12(5)] 199

Authority held that ; the objections raised by the Department that the applicant was not an educational institution and that it was merely a facilitating institution were not tenable. The certificate of its incorporation showed that it was an educational institution for carrying on charitable and educational activities allowed by law. The certificate issued by the Department of the Treasury, Internal Revenue Service, Philadelphia, showed that the applicant was an exempt organization under the United States Internal Revenue Code. The objection that all the faculties provided for educating were provided by Berkeley University and not by the applicant was also not tenable. The fact that the professors who came for a short period were well accommodated by N did not create a permanent establishment of the applicant in India. The programme fee received by the applicant from N would be governed by Article 12 of the DTAA and would be free from

tax. There would, therefore, be no necessity to withhold the tax under section 195 of the Income-tax Act, 1961. There would be no permanent establishment in India.
UC Berkeley Center for Executive Education, USA, In re (2016) 387 ITR 385 (AAR)

200 **S. 9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Supply management service fees received by Applicant – Not liable to deduct tax at source – DTAA-India-UK [S. 195, Art. 13]**
The applicant is a company incorporated in UK. The Indian affiliate is engaged in the business of manufacture and sale of turbo-chargers and purchases turbo-charger components directly from third party in UK and US and in relation to such purchases, the applicant provides supply management services *vide* material suppliers management service agreement. AAR ruling was sought on question whether the supply management service fees received by applicant from Indian affiliate is in the nature of "fees for technical services" (FTS) or "royalties" within the meaning of the term Article 13 of the India-UK DTAA.
The AAR held that, the Applicant is not imparting its technical knowledge and expertise to the Indian Company based on which the Indian company will acquire such skills and will be able to make use of it in future. Therefore, the 'Make available' clause under India-UK DTAA is not satisfied and hence such fee is not FTS under the Article 13 of the India-UK Treaty.
AAR further held that the nature of services related to the identification of products and competitive pricing cannot qualify as royalties under the provisions of Article 13 under India-UK DTAA because it is not related with the use of, or the right to use any copyright, patent, trademark, design, or modal, plan secret formula or process etc. Thus, Indian affiliate is not required to withhold tax under section 195 of the Act.
Cummins Ltd., In re (2016) 381 ITR 44 / 237 Taxman 693 / 283 CTR 241 / 130 DTR 353 (AAR)

CHAPTER III
INCOMES WHICH DO NOT FORM PART OF TOTAL INCOME

S. 10 : Incomes not included in total income

S. 10(1) : Agricultural income – Lease deed and certificate of Wakf Board transferring lease in favour of assessee are sufficient to prove that the claim of agricultural income was valid. 201

The assessee declared agricultural income being income from sale of poplar tree. The AO did not allow the claim of the assessee since proof of ownership of the land and cultivation. The CIT(A) allowed the claim based on the copy of the lease deed, certificate issued by the Wakf Bard transferring the lease in favour of the assessee and that the income was received in cheque. The ITAT upheld the order of the CIT(A) and held that the adequate evidences were filed by the Assessee to prove the agricultural activity. (AY. 2006-07)

DCIT v. Davinder Kumar Bhasin (2015) 174 TTJ 844 / 128 DTR 218 / (2016) 45 ITR 232 (Chd.)(Trib.)

S. 10(3) : Casual and non-recurring receipts – Sum received as compensation as a result of the settlement arrived at in pursuance of the order of the Supreme Court annulling the auction is neither in the nature of capital receipt nor is the same assessable under section 56. [S. 4, 56] 202

The High Court held that the Sum received as compensation as a result of the settlement arrived at in pursuance of the order of the Supreme Court annulling the auction is neither in the nature of capital receipt nor is the same assessable under section 56 following the decision in the case of *Cadell Weaving Mill Co. Ltd v. CIT (2001) 249 ITR 265 (Bom) (HC)* (AY 1993-94, 1994-95)

Girish Bansal, Gynendra Bansal v. UOI (2016) 142 DTR 138 / 289 CTR 514 (Delhi)(HC)

S. 10(10) : Gratuity – Leave Salary – Employee of the Central Government or State Government – Whether Gratuity and leave encashment are to be governed by definition of salary [S. 10(10AA)] 203

The assessee had retired from a Government bank under the 'Exit Option Scheme' floated by the bank. He filed his return after claiming certain deductions under section 10(10) and 10(10AA) of the Act in respect of gratuity and leave encashment. The Assessing Officer disallowed the excess amount of gratuity and excess amount of leave encashment claimed by the assessee. The CIT(A) as well as the Tribunal had upheld the order of the Assessing Officer by stating that the definition of salary as per Rule 2(h) Part A, Fourth Schedule, no other payment or allowance other than dearness allowance can be taken into consideration.

The main question under consideration was whether any benefit or allowance other than dearness allowance was to be included in the basic salary of the assessee for computation of exemption on gratuity and leave encashment. The CIT(A) referred the circular No. 46 dated 14th September 1970 issued by CBDT which said that salary would include periodical payments made to the employee by the employer as

compensation for the services and payment made by way of allowances or perquisites will not be taken into consideration as salary. However when DA is merged with salary it no longer remains DA but becomes part of salary. The assessee relied on the definition of salary as laid down in the 8th Bipartite Settlement agreement on wage revision between Indian Banks Association and their workmen. However the High Court held that the definition of salary is to be governed by the Rule 2 of part A of the Fourth Schedule and cannot be imported and applied from other agreements and acts.
Thus the High Court held that the assessee was not able to demonstrate the approach of the below authorities was erroneous or perverse or that the findings of fact recorded were based on misreading or misappreciation on record so as to warrant any interference. Thus the High Court held that there was no merit found in the appeal and hence the same was thereby dismissed. (AY. 2008-09)
Harbans Singh v. CIT (2016) 382 ITR 600 / 237 Taxman 596 (P&H)(HC)

204 **S. 10(10) : Gratuity – Charan Singh Haryana Agricultural University (CCSU) which was established by an Act of Parliament and entirely funded by State Government would be treated as State, therefore entire amount of gratuity received therefrom would be exempt from tax.**
Allowing the appeal of the assessee Tribunal held that Charan Singh Haryana Agricultural University (CCSU) which was established by an Act of Parliament and entirely funded by State Government would be treated as State, therefore entire amount of gratuity received therefrom would be exempt from tax. (AY. 2010-2011)
Ram Kanwar Rana v. ITO (2016) 159 ITD 431 (Delhi)(Trib.)

205 **S. 10(10D) : Life insurance policy – Keyman insurance policy – Amounts received under Keyman insurance policy prior to assessment year 2014-15 was held to be not taxable.**
Dismissing the appeal of revenue, the Court held that amendment in Explanation I to section 10(10D) has specifically came into force only from 1-4-2014; it would not govern/apply to amounts received under Keyman insurance policy prior to assessment year 2014-15 so as to make receipts taxable. Circulars and Notifications: Circular No. 762, dated 18-2-1998. (AY. 2010-11)
CIT v. Prashant J. Agarwal (2016) 243 Taxman 119 (Bom.)(HC)

206 **S. 10(10D) : Life insurance policy – Insurer – Foreign Insurgency – Amount received amount on account of maturity of life insurance policy taken by her husband from American Insurance Company in Abu Dubai,was entitled to exemption. [S2(28BB)]**
The AO disallowed claim of assessee on ground that insurance policy was not taken from Indian insurance company and, therefore, provisions of S. 10(10D) were not applicable. Allowing the appeal of the assesse, Tribunal held that when no such condition had been specified in S. 10(10D) that insurance policy be taken from Indian insurance company, assessee was entitled for exemption u/s. 10(10D) on sum received.
Taragauri T. Doshi v. ITO (2016) 160 ITD 343 (Mum.)(Trib.)

S. 10(14) : Special allowance or benefit – Deduction at source – Amounts paid to meet expenses wholly and exclusively for discharging duties of employment – Payments need not be verified – Tax not deductible at source on such payments. [S.17(2), 192] 207

Dismissing the appeal of revenue the Court held that A perusal of section 10(14) of the Income-tax Act, 1961, shows that if any allowance or benefit not being in the nature of perquisite is granted to meet the expenses wholly, necessarily or exclusively incurred in performance of duties, to the extent to which such expenses are actually incurred they would be exempt. Circulars No. Q/FD/695/1/90 and Q/FD/695/2/2000 have been issued by the Ministry of External Affairs, Government of India, instructing that if the amount which is stated to have been paid as *per diem* allowance was not highly disproportionate or not unreasonable, the further verification of the actual expenditure is not to be considered. The resultant effect is that the amount is to be treated as by way of reimbursement of expenses. When the payment is made to meet the expenses incurred and when it is not taxable under section 10(14), merely because the actual expenses were not verified, the character or nature of the payment would not change so as to fall under section 17(2) of the Act. Held accordingly, that the Commissioner (Appeals) and the Tribunal came to the conclusion that the *per diem* allowance of $ 50 to $ 75 paid by the assessee to its employees on official trips to the USA and Europe to be reasonable and that it would be covered as exempt under section 10(14). The Tribunal was correct in holding that tax was not deductible on such payment. (AY. 2009-10, 2010-11, 2011-12)

CIT v. Symphony Marketing Solutions India P. Ltd. (2016) 388 ITR 457 / (2017) 150 DTR 172 (Karn.)(HC)

S. 10(14) : Special allowance or benefit – Where no uniform for employees was prescribed by company, payment made to employees in name of uniform allowance could not be said to be exempt, hence liable to deduct tax at source. [S. 17, 192, rule 2BB] 208

Dismissing the appeals of the assessee the Court held that assessee's submission that dress code at work place would qualify as uniform was unacceptable because term 'uniform' in context of dressing carries a vastly different connotation and would necessarily include precise instructions as to dress, design, and also colours which will achieve a uniformity in dressing at a work place or at place of study or some such collection of group of persons belonging to by and large a common class and was entirely different from a far more broader concept of a general dress code.(AY. 2010-11)

Oil & Natural Gas Corporation Ltd. v. ACIT (2016) 243 Taxman 105 / 289 CTR 403 / 142 DTR 57 (Guj.)(HC)

S. 10(19A) : Palace – Annual value – Occupation of a Ruler – Rental income was held to be exempt – Though principles of *res judicata* do not apply, the Department should not endlessly pursue matters which have attained finality in earlier years. [S.23, Wealth-tax Act, 1957 S. 5(iii)] 209

Allowing the appeal the Court held that (i) No reliance could be placed on section 5(iii) of the Wealth-tax Act while construing Section 10(19A) of the I.T. Act. It is due to marked difference in the language employed in both sections. In Section 10(19A)

of the I.T. Act, the Legislature has used the expression "palace" for considering the grant of exemption to the Ruler whereas on the same subject, the Legislature has used different expression namely "any one building" in Section 5 (iii) of the Wealth-tax Act. We cannot ignore this distinction while interpreting Section 10(19A) which, in our view, is significant.

(ii) If the Legislature intended to spilt the palace in part(s), alike houses for taxing the subject, it would have said so by employing appropriate language in Section 10(19A) of the I.T. Act. We, however, do not find such language employed in Section 10(19A). Section 23(2) and (3), uses the expression "house or part of a house". Such expression does not find place in Section 10(19A) of the I.T. Act. Likewise, we do not find any such expression in Section 23, specifically dealing with the 24 cases relating to "palace". This significant departure of the words in Section 10(19A) of the I.T. Act and Section 23 also suggest that the Legislature did not intend to tax portion of the "palace" by splitting it in parts.

(iii) It is a settled rule of interpretation that if two Statutes dealing with the same subject use different language then it is not permissible to apply the language of one Statute to other while interpreting such Statutes. Similarly, once the assessee is able to fulfill the conditions specified in section for claiming exemption under the Act then provisions dealing with grant of exemption should be construed liberally because the exemptions are for the benefit of the assessee.

(iv) The question involved in this case had also arisen in previous Assessment Years' (1973-74 till 1977-78) and was decided in appellant's favour when Special Leave Petition(c) No. 3764 of 2007 filed by the Revenue was dismissed by this Court on 25.08.2010 by affirming the order of the Rajasthan High Court referred supra. In such a factual situation where the Revenue consistently lost the matter on the issue then, in our view, there was no reason much less justifiable reason for the Revenue to have pursued the same issue any more in higher Courts.

(v) Though principle of *res judicata* does not apply to income-tax proceedings and each assessment year is an independent year in itself, yet, in our view, in the absence of any valid and convincing reason, there was no justification on the part of the Revenue to have pursued the same issue again to higher Courts. There should be a finality attached to the issue once it stands decided by the higher Courts on merits. This principle, in our view, applies to this case on all forces against the revenue. (AY. 1978-79)

Maharao Bhim Singh of Kota v. CIT (2016) 290 CTR 601 / 144 DTR 249 / (2017) 390 ITR 532 / 244 Taxman 139 (SC)

210 **S. 10(22A) : Medical institution – Private limited company could register under section 25 of the Companies Act and therefore such company was an eligible institution for claiming exemption. [Companies Act, 1956, S. 25]**

The Tribunal directed grant of exemption and rejected the reference application of the Department. On a reference :

Held, (i) that the finding of the Tribunal that the objects of the assessee as found in its Memorandum of Association were solely for philanthropic purposes and not for profit and the objects were not violated was one of the facts which had not been challenged. The Court therefore would not answer the question whether the Tribunal was justified in directing the grant of exemption under section 10(22A) to the assessee.

(ii) That under section 25 of the Companies Act, 1956 a charitable or other company could have the word "limited" or "private limited" dispensed with in its name. On that basis it could not be said that a private limited company was not within the purview of the word "institution" used in section 10(22A) of the Income-tax Act, 1961. When the Legislature did not restrict the meaning of the word "institution" there was no reason for the Court to restrict it. (AY. 1986-87, 1987-88)
CIT v. Apeejay Medical Ltd. (2016) 383 ITR 297 / 68 taxmann.com 10 (Cal.)(HC)

S. 10(22A) : Medical institution – Interest – Interest utilised to reimburse medical expenses of three companies in group – Amount not exempt. 211
The Assessing Officer rejected the claim of exemption in respect of interest income, but the Tribunal allowed it. On appeal to the High Court:
Held, that the assessee had not undertaken any of the five activities. The claim for exemption was based on (a) the objects contained in the Memorandum of Association and (b) the reimbursement of medical expenses to three companies incurred by them in advancing medical facilities to their employees. The income did not arise from any of the five activities. The income arose out of interest. The predominant object of the activity in the relevant year was not to carry out any act of charity or goodwill or benevolence. It was on the contrary to earn interest. The income admittedly had no nexus with any one of the five activities. Therefore the income was not an income of any hospital or an institution engaged in any one of the five activities. It was not entitled to exemption. (AY. 1988-89)
CIT v. Apeejay Medical Research and Welfare Association (P) Ltd. (2016) 383 ITR 79 / 239 Taxman 266 / 286 CTR 182 / 135 DTR 145 (Cal.)(HC)

S. 10(23C) : Educational institution – University – Condition that university must be wholly or substantially financed by Government – Review petition was dismissed. 212
From the decision of the Supreme Court affirming the Dharwad Bench of the Karnataka High Court (see [2016] 384 ITR 37 (SC)) holding that the assessee did not satisfy the second requirement spelt out by section 10(23C)(iiiab) and that the assessee was neither directly nor even substantially financed by the Government so as to be entitled to exemption from payment of tax under the Act, the assessee filed a review petition:
The Supreme Court rejected the prayer for oral hearing and dismissed the review petition holding that no case for review was made out. Decision of the Supreme Court in *Visvesvaraya Technological University v. Asst. CIT (2016) 384 ITR 37 (SC)* reaffirmed. (AY. 2004-05 to 2009-10)
Visvesaraya Technological University v. ACIT (2016) 389 ITR 10 / 242 Taxman 247 (SC)

S. 10(23C) : Educational institution – That institution makes profit does not necessarily mean it exists for profit – Exemption cannot be denied. 213
Dismissing the appeal of revenue the Court held that 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. The predominant object test must be applied. The purpose of education should not be submerged by a profit making motive. 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. 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. 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. Considering the overall facts and circumstances of the case, the object of the petitioner institution, we are of the opinion that the petitioner institution is established for the sole purpose of imparting education in a specialised field.
CCIT v. St. Peter's Educational Society (2016) 385 ITR 66 / 240 Taxman 392 / 287 CTR 132 / 137 DTR 37 (SC)

214 **S. 10(23C) : Educational institution – To consider a university as wholly or substantiallay financed by Government as contemplated under section 10(23C)(iiiab), funds received from Government must be direct grants/contributions from Government source and not fees collected from students under statute. University existing solely for the purpose of education and without any profit motive, though huge surplus is entitled to exemption. [S. 10(23C(iiiab)]**
Court held that there was huge surplus (in excess of 6 to 15%) and minimal expenditure implies profit motive. Court also held that ,therefore, be more appropriate to hold that funds received from the Government contemplated under Section 10(23c)(iiiab) of the Act must be direct grants/contributions from Governmental sources and not fees collected under the statute. The view of the Delhi High Court in *Mother Dairy Fruit & Vegetable Private Limited v. Hatim Ali & Anr [(2015) 217 DLT 470]* which had been brought to the notice of the Court has to be understood in the context of the definition of 'public authority' as specified in Section 2(h)(d)(ii) of the Right to Information Act, 2005. Reliance has been placed on the judgment of the High Court of Karnataka in *Commissioner of Income-tax, Bangalore v. Indian Institute of Management (2014) 49 Taxmann.com 136 (Karnataka).* The situation before us, on facts, is different leading to the irresistible conclusion that the University does not satisfy the second requirement spelt out by Section 10(23c)(iiiab) of the Act. The appellant University is neither directly nor even substantially financed by the Government so as to be entitled to exemption from payment of tax under the Act. (AY. 2004-05 to 2009-10)
Visvesvaraya Technological university v. ACIT (2016) 384 ITR 37 / 239 Taxman 395 / 286 CTR 1 / 134 DTR 215 (SC)
Editorial: Decision in Visvesvaraya Tecnological University v. ACIT (2014) 362 ITR 279 (Karn)(HC) is affirmed.

215 **S. 10(23C) : Educational institution – Charging of high fees cannot be a ground to reject the application as the institution exists solely for educational purpose. [S. 10(23C)(vi)]**
The High Court held that it is a settled law that earning of profits/surplus or charging of high fees cannot be a ground to deny the claim of exemption under section 10(23C) (vi) and consequently, reject the application as long as the university exists solely for educational purpose. Further, it was held that the requirement of filing audit report

obviously would arise at the time of filing of the return and not at the time of filing of application for approval and was therefore the 10th proviso to Section 10(23C) was wrongly invoked by the Commissioner for rejecting the application.
Ganpat University v. Arvind Shankar (2016) 242 Taxman 496 / (2017) 293 CTR 113 / 147 DTR 335 (Guj.)(HC)

S. 10(23C) : Educational institution – No revenue authority has power to condone delay in filing exemption application – Writ petition was dismissed. [S. 10(23C)(vi), Constitution of India, Art. 226] 216
On a writ petition, the Court held that the Chief Commissioner was right in holding that the assessee's application could not be considered as it was time barred. However the finding with regard to the objectives of the society by the Department holding that the society could not be said to be solely for education purpose was to be set aside. Since there was no power to condone the delay in filing an application under section 10(23C) of the Act, the Court would not exercise its extraordinary jurisdiction to condone the delay. Since the assessee could not have made an application for the Assessment Year 2013-14 since its application for the Assessment Year 2012-13 was still pending consideration the matter was remanded to the Department to consider the application for exemption for the Assessment Year 2013-14 taking into consideration the amendments made to the objectives of the assessee.(AY. 2012-13)
All Angels Educational Society v. CCIT (2016) 388 ITR 475 / 241 Taxman 421 / 289 CTR 637 (Mad.)(HC)

S. 10(23C) : Educational institution – Filing of application prematurely – In terms of 14th proviso to section 10(23C), application for exemption of income can be filed even prior to 1st April of relevant assessment year, from which exemption is sought. 217
The assessee trust was constituted with the purpose of facilitating the charitable, social, cultural, educational, vocational and economic development of the society. It was registered under the provisions of Societies Registration Act, 1860. Since in the relevant assessment year, its receipts exceeded ₹ 1 crore, it applied to the Chief Commissioner seeking exemption under section 10(23C)(vi). As required, Form No. 56-D, prescribed under rule 2CA of the Income-tax Rules, 1962, was also filed.
In pursuance to the said application, the department sought from the assessee certain information including its accounts for the year ending 31-3-2014, objects of the trust and returns of income filed earlier which were duly submitted.
During the course of the hearing it was pointed out that the assessee had prematurely filed the application on 24-3-2014 and that the same could only have been filed after the expiry of financial year 2013-14 and before 30-9-2014. Accordingly, assessee's application was rejected
On writ: allowing the petition the Court held that In terms of 14th proviso to section 10(23C), application for exemption of income can be filed even prior to 1st April of relevant assessment year, from which exemption is sought. In view of the above, the impugned order passed by the Chief Commissioner is set aside with a direction to the Chief Commissioner to consider the application filed by the assessee for grant of exemption under section 10(23C), on merits. (AY. 2014-15)
Shri Guru Ram Dass Ji Educational Trust v. CCIT (2016) 389 ITR 423 / 243 Taxman 94 / (2017) 147 DTR 108 / 293 CTR 144 (P&H)(HC)

218 **S. 10(23C) : Educational institution – Chief CIT has no power to condone the delay in filing the application for approval of exemption u/s. 10(23C)(iv) except in exceptional circumstances – Delay of one day was directed to be condoned. [S. 10(23C)(iv), Art. 226]**

A writ was filed before the HC challenging the powers of CIT to condone the delay in filing the application for approval of exemption u/s. 10(23C)(iv). The single bench of HC, relying on various judicial decisions, held that the Chief CIT has inherent power to condone the delay in filing the application.

However, the Division Bench of HC held that the Chief CIT had no power to condone the delay in filing the said application. Further, the HC observed that as there was a delay of only one day in presenting the application, the said delay could be condoned by the this Court, exercising extraordinary jurisdiction under Article 226 of the Constitution and therefore, the matter was remanded back to Chief CIT for consideration of application on merits.

CCIT v. Shri Anand Rishi Jain Society (2016) 141 DTR 58 (Mad.)(HC)

219 **S. 10(23C) : Educational institution – An Educational Charitable Institution had multiple objectives for the impugned assessment year and did not exist solely for educational purpose would not qualify for exemption benefit under section 10(23C)(vi) [S.10(23C)(vi), 11, 12AA]**

Rejecting the petition the Court held that; an Educational Charitable Institution had multiple objectives for the impugned assessment year and did not exist solely for educational purpose would not qualify for exemption benefit under section 10(23C)(vi). (AY. 2014-15)

B. S. Abdur Rahman Institute of Science & Technology v. CCIT (2016) 141 DTR 60 / 289 CTR 631 / 78 taxmann.com 336 (Mad.)(HC)

220 **S. 10(23C) : Educational institution – Application for exemption can be made by the Registered Society running the Educational Institution and not necessarily to be made by the Educational Institution itself. While disposing the application for exemption ancilliary objects are not to be considered separately. [S. 2(15), 10(23)(vi), 12A]**

Assessee, a registered society, was running an Educational Institution in the name and style of Doon College of Agriculture Science and Technology. It was registered as a charitable society u/s. 12A of the Act. It made an application for exemption u/s. 10(23C)(vi) which was rejected by the Commissioner of Income-tax on the ground that Object No.3,4 and 5 are not "solely for education purposes". On Writ Petition, the Single Judge held that Object No.3, 4, and 5 are ancilliary to the main object of running and Educational Institution and directed the authority to decide the application in light of the above observation. The revenue filed an appeal to the Division Bench and contended that the application u/s 10(23C) is to be filed by the Education Institution itself and object No.3,4, and 5 are not ancilliary. The High Court held that Form 56D prescribed for the purpose of section 10(23C)(vi) requires the person running the institution to certify the facts which in the instant case is the registered society. Further, the society is making the application for and on behalf of the Institution and in case benefit of section 10(23C)(vi) is denied it is the society which will be assessed to tax under the Act,

therefore, the contention of the revenue is to be rejected. With regard to Object No.3,4 and 5, it is held that they are ancilliary to the main object of running the Educational Institution.
CCIT v. Maharani Luxmi Bai Memorial Education Society (2015) 235 Taxman 556 / (2016) 287 CTR 109 / (Uttarakhand) (HC)

S. 10(23C) : Educational institution – Institution getting 45 percent aid from Government – Entitled to exemption. [S.10(23C)(iiiab)] 221
A plain reading of section 10(23C)(iiiab) of the Income-tax Act, 1961, shows that any university or other educational institution existing for educational purposes and not for profit and wholly or substantially financed by the Government is entitled to claim exemption from income-tax under the Act.
Held accordingly, dismissing the appeals, that there had been financing by the Government when examined on individual institution basis ranging from 41 percent to 82 percent whereas when the percentage was taken for the society as a whole it came to 44.52 percent and 45.15 percent for two years. The Tribunal after appreciation of evidence held that the Government was substantially financing and interested in the management of the assessee and, therefore, the assessee was eligible for exemption under section 10(23C)(iiiab). The Tribunal was right in holding that the aid given by the Government to the assessee constituted substantial finance by the Government which had entitled the assessee to claim exemption under section 10(23C)(iiiab). (AY.2007-08)
CIT v. Jat Education Society (2015) 64 taxmann.com 312 / (2016) 383 ITR 355 (P&H)(HC)

S. 10(23C) : Educational institution – Exemption granted u/s. 10(23C)(vi) for AY 2007-08 – CCIT dismissed the application seeking exemption of income for next year as barred by limitation – Held, order not valid as being contrary to clause (4) of Circular No. 7 dated 27-10-2010 which provides that approval granted u/s. 10(23C)(vi) after 1-12-2006 shall be valid till they are withdrawn. [Circular No. 7 dated 27-10-2010] 222
Assessee-society was granted exemption u/s. 10(23C)(vi) for AY 2007-08. Assessee-society filed an application on 30-03-2008 seeking exemption for AY 2008-09 but instead of receiving a decision in that regard the assessee-society was served with a notice u/s. 147 of the Act, seeking to assess the assessee-society to tax for AY 2008-09, on the premise that no order has been passed u/s. 10(23C)(vi). The AO, however, dropped assessment proceedings, when it was brought to his notice that the CBDT has issued Circular No.7/10, dated 27-10-2010 clarifying that approval issued under section 10(23C)(vi) shall be a onetime approval valid till it is withdrawn, provided it is granted on or after 1-12-2006. The assessee-society filed an application to withdraw applications seeking exemption dated 30-03-2009 and 11/06/2010, but the CCIT ignored the circular and dismissed the applications as barred by time and held that the assessee-society was not entitled to exemption for AY 2008-09 and 2009-10. High Court held that, the case of the assessee-society was covered by clause (4) of the said circular and not clause (5) and, accordingly the High Court quashed the order of the CCIT being contrary to clause (4) which provides that approval granted u/s. 10(23C)(vi) after 1-12-2006 shall be valid till they are withdrawn and directed him to pass an order in accordance with the Circular. (AY. 2008-09, 2009-10)
Param Hans Swami Uma Bharti Mission v. CCIT (2016) 238 Taxman 538 / 138 DTR 102 / 287 CTR 350 / (2017) 391 ITR 131 (P&H)(HC)

223 **S. 10(23C) : Educational institution – At the stage of registering the assessee society, the prescribed authority is only required to examine the nature, activity and genuineness of the institution and nothing more – Conditions set out in the third proviso to section 10(23C) were to be seen at the time of assessment and not at the stage of approval.**
Assessee, a Society registered under the Societies Registration Act had one of the objects of establishing an educational institution. Assessee's application for registration under section 10(23C)(vi) was denied on the ground that the assessee did not exist solely for educational purpose, it generated profits over the years which established the profit motive, it incurred huge expenditure on advertisement like a commercial activity to promote the business activities and that it had given huge loans to interested persons. High Court held that the prescribed authority, at the stage of registration, is only required to examine the nature, activity and genuineness of the institution. Mere existence of some profit does not disqualify the assessee if the sole purpose of existence is not profit making but educational activities. The authority has to find out the predominant object of the activity and determine whether the institution exists solely for education and not to earn profit. Further, High Court held that the conditions set out in the third proviso to section 10(23C) were to be seen at the time of assessment and not at the stage of approval. (AY. 2008-09, 2010-11, 2011-12)
Manas Sewa Samiti v. CCIT (2016) 282 CTR 302 / 236 Taxman 546 (All.)(HC)

224 **S. 10(23C) : Educational institution – Approval from Scientific and Industrial Research Organisation which function under Department of Science & Industrial Research is not necessary for claiming exemption.[S. 10(23C)(iiiab), 35(1)(ii)]**
Dismissing the appeal of the Revenue, the Tribunal held that an educational institution established for purpose of managing science museums and drawing funds from Government of India and Government of West Bengal for maintenance and to achieve its objects, was entitled to exemption u/s.10(23C)(iiiab) and it was not required to take approval u/s.35(1)(ii) for claiming such exemption. (AY. 2009-10)
ITO v. National Council of Science Museum (2016) 159 ITD 180 (Kol.)(Trib.)

225 **S. 10(23C) : Educational institution – Rejection of application on the ground that it was empowered to collect funds and accept funds was held to be not valid. [S.12A, 10(23(vi)]**
Assessee was formed with an object to carry out various activities in field of education. It was registered u/s. 12A. During relevant year, assessee filed an application seeking issuance of exemption certificate u/s. 10(23C)(vi). CIT rejected application on ground that it was empowered to collect funds and accept funds and it could also manage other institutions. The honourable ITAT held that since assessee had not taken up any other object mentioned in trust deed, and exclusively carried out activities of education, then approval u/s.10 (23C) could not be denied. Accordingly order passed by Commissioner was not sustainable. (AY. 2013-14)
Dharmaj Kelvani Mandal v. CCIT (2016) 161 ITD 841 (Ahd.)(Trib.)

S. 10(23C) : Educational institution – Trust running two colleges – Annual receipt of each college had to be considered for purpose of exemption. [S. 10(23C)(iiiad), 11, 12] 226
Assessee an educational trust was running two colleges, annual receipt of each college which was a separate educational institution, had to be considered for purpose of exemption u/s. 10(23C). (AY. 2004-05 to 2007-08)
ACIT v. Shushrutha Educational Trust (2016) 161 ITD 565 (Bang.)(Trib.)

S. 10(23C) : Educational institution – Assessee, a school, managed by educational board and filing returns in the name of association of persons – 'Institution' includes school – Qualified for exemption 227
The assessee-school submitted an application for the grant of exemption under section 10(23C)(vi) of the Act. Director of School Education, Chennai, granted permission to run the school, i.e. to open a matriculation school. The assessee was filing the return of income under the status 'association of persons'. The Revenue objected that assessee was not having independent existence with clear cut objectives. On appeal to Tribunal, it was held that the primary condition under Section 10(23C)(vi), the assessee shall exist solely for educational purpose and not for purposes of profit. The CCIT went on proposition that the assessee was not having Memorandum of Association or trust deed so as to carry function of the assessee. The assessee was an 'association of persons' managed by an educational board which was a registered body under the Societies Registration Act, 1860. And it was managing the assessee school with the committee members of the board and constituted the office bearers of the institution and duly filing return of income. There is no express definition for 'institution' under the Income-tax Act. The word 'institution' is wide enough to include a school, which has been established for imparting education. The assessee was an 'institution' qualified for exemption under Section 10(23C)(vi) of the Act. (AY. 2014-15)
Sengunthar Matriculation Higher Secondary School v. CCIT (2016) 47 ITR 107 (Chennai) (Trib.)

S. 10(23C) : Educational institution – Assessee has not received approval from the prescribed authority – It cannot be said that non-disposal of an application u/s. 10(23C)(vi) would result in deemed grant of approval. 228
Assessee had not received the approval from the prescribed authority under section 10(23C)(vi) of the Act. It could not be said that non-disposal of an application under section 10(23C)(vi) of the Act would result in deemed grant of approval to the assessee, enabling it to claim deduction under section 10(23C)(vi) of the Act. Reliance placed on the ratio laid down by Larger Bench of Hon'ble Allahabad High Court *CIT v. Muzafar Nagar Development Authority [2015] 57 taxmann.com 8 (All.)*. The assessee is not entitled to the aforesaid deduction under section 10(23C)(vi) of the Act, in the absence of approval being granted by the prescribed authority.
Mercedes Benz Education Academy v. ITO (2016) 156 ITD 488 / 176 TTJ 365 / 131 DTR 302 (Pune)(Trib.)

229 **S. 10(23C) : Educational institution – Notification of the Government of Himachal Pradesh has been violated – Not entitled for exemption.**
Assessee has been incorporated with the purpose of publication of books, prescribing syllabus and conducting examination upto secondary level. Secretary of the board admitted that assessee has not received any financial support from State Government other than funds for distribution of free textbooks to the students. Secretary admitted to have sold the textbooks and also admitted to the fact that board has earned surplus over the expenditure from the activities of printing, publishing and sale of books also, it was admitted that assessee is not imparting any education. Funds given by the State Government has been violated by the assessee. Notification of the Government of Himachal Pradesh has been violated. Himachal Pradesh Board of School Education Act does not authorize the assessee to earn profit in violation of notification. Assessee's contention that assessee can print and publish the textbooks for other students out of the same amount received for a specific purpose has to be rejected. Requirements of Sec. 10(23C)(iiiab) not fulfilled and assessee not entitled for exemption. (AY. 2011-12)
Himachal Pradesh Board of School Education Act v. DCIT (2016) 176 TTJ 580 / 138 DTR 105 (Chd.)(Trib.)

230 **S.10(23C) : Educational institution – Advance to sister Trust for educational purposes – Rejection of exemption was held to be not justified. [S. 11, 12AA]**
Allowing the appeal of assessee, the Tribunal held that where the assessee-society which was running a school, advanced an amount to its sister-trust for construction of building for educational purpose and Assessing Officer could not prove that said amount advanced was for non-charitable purpose, rejection of exemption under section 10(23C) (iiiad) was not justified (AY.2010-11).
Vairams Kindergarten Society v. ITO (2015) 40 ITR 694 / (2016) 156 ITD 381 (Chennai)(Trib.)

231 **S. 10(23C) : Educational institution – Receipts being less than one crore – Mentioning other objects – Exemption cannot be denied – There is no need to file Form No. 10BB.**
Dismissing the appeal of revenue the Tribunal held that; where assessee-trust was carrying out sole activity of education during relevant year and its receipt from said activity was less than Rs. one crore, assessee's claim for exemption under section 10(23C) (iiiad) could not be rejected on ground that it had mentioned other objects also in trust deed. Section 10(23C)(iiiad) cases, there is no need to file Form 10BB. (AY. 2009-10, 2010-11)
ITO v. Shri Balaji Prem Ashram & Nikhil Vidyalaya (2016) 156 ITD 479 (Chd.)(Trib.)

232 **S. 10(23FB) : Venture capital – Exemption – In terms of SEBI (Alternative Investment Funds) Regulation, 2012, 'corpus' means amount committed by investors and, thus, where assessee fund did not invest more than 25 per cent of amount so committed by investors in only one venture capital undertaking, its claim for exemption under section 10(23FB) was to be allowed – Interest income earned by assessee fund from deposits kept with banks would be eligible for exemption under section 10 (23FB). Interest income earned by assessee fund from deposits kept with banks would be eligible for exemption under section 10 (23FB). [SEBI (Alternative Investment Funds) Regulation, 2012]**
Assessee, a venture capital fund, claimed exemption under section 10 (23FB). Assessing Officer held that since assessee had invested more than 25 per cent of contributions in

one venture capital undertaking, it had violated provisions of Regulation 12(b) of SEBI Guidelines (Venture Capital Fund) Regulations, 1996 hence rejected assessee's claim. According to Assessing Officer, 'corpus' literally meant collection and in financial terms, it meant actual collection of funds. On appeal Tribunal held that in terms of SEBI (Alternative Investment Funds) Regulations, 2012, assessee was justified in contending that total amount of funds committed by investors would be taken as 'corpus' for purpose of Regulation 12(b) of SEBI (Venture Capital Funds) Regulation, 1996. Even otherwise, since there was no material to show that SEBI alleged or stated that assessee had not fulfilled any of prescribed conditions, Assessing Officer could not make his own interpretation of term 'corpus'. Therefore the assessee's claim for exemption under section 10(23FB) was to be allowed. Tribunal also held that interest income earned by assessee fund from deposits kept with banks would be eligible for exemption under section 10 (23FB) (AY. 2007-08)

DHFL Venture Capital Fund v. ITO (2016) 157 ITD 60 (Mum.)(Trib.)

S. 10(23G) : Infrastructure undertaking – definition of expression interest under section 2(28A) is exhaustive – liquidated damages/debt syndication fees/debenture trusteeship fees can be included in the definition. [S. 2(28A)] 233

The assessee claimed exemption under section 10(23G) in respect of liquidated damages payable by a borrower to the assessee in the event of a borrower committing default in repayment of the loan advanced by the assessee. The AO, held that the liquidated damages were a sort of compensation in nature received from defaulters and hence could not be treated like income arising from the activities of the assessee in respect of infrastructure financing. The Tribunal and CIT(A) affirmed the decision of the AO.

The High Court held that under the terms of a loan agreement, a borrower was imposed with a primary obligation to repay the principal together with interest. An additional obligation was cast upon a borrower to pay interest on interest or penal interest, in the event of borrower committing a default upto a particular level. Irrespective of what the finance company itself may choose to term it, such liquidated damages cannot be excluded from the definition of the expression 'interest' under section 2(28A), as the definition is so exhaustive. The definition is so exhaustive as to include even any service fee or other charge that is levied in respect of the monies that remain unutilised. In certain cases, the lenders imposed an obligation on the borrowers to pay the commitment charges, if after the sanction of the loan, the borrower could not make use of the funds upto a particular point of time. The definition of the word 'interest' under section 2(28A) includes even such commitment charges. Therefore all the three authorities committed a mistake in understanding the scope of the expression 'liquidated damages' and in coming to a conclusion that the same would not come within the purview of the word 'interest' under section 2(28A).

The AO held that the debt syndication fee is a fee charged by the assessee from the borrower, when the assessee funded the project not only from out of their own monies, but also by arranging finance from others. Therefore, in his order, the AO held that though what was charged as debt syndication fee may be a service fee, the same would not come within the purview of section 10(23G), on account of the fact that the said fee is not charged for the money that was lent by the assessee themselves. The same was upheld by the CIT(A) and Tribunal. The High Court held that if the second part of the

definition in section 2(28A) was carefully looked into, it could be seen that what was included therein is 'any service fee'. By itself, section 2(28A) does not make a distinction between a service fee charged in respect of the loans advanced by the assessee and those in respect of the loans organised from other financial institutions. In the absence of any indication either in section 2(28A) or in 10(23G), the distinction made out by the revenue could not be approved.

The next issue was whether debenture trusteeship fee would be included in the meaning of the term interest under section 2(28A) of the Act. The AO held that the income derived was not primary business but was derived from ancillary services. The CIT(A) held that this service would come under the definition but from AY 2002-03 and not prior to it. The Tribunal upheld the findings of AO and CIT(A). High Court held that the findings of CIT(A) that the fees would be included in one assessment year and not for other was not proper and hence was ruled in favour of the Assessee. (AY. 2001-02, 2001-02)

Infrastructure Development Finance Co. Ltd. v. ACIT (2016) 238 Taxman 212 (Mad.)(HC)

234 **S. 10(26B) : Scheduled Tribes/Castes – Central/State financial bodies for promoting interest of Sweepers – State corporation established and formed 'for promoting interest of Safai Kamadar' is eligible exemption as beneficiaries of this State Scheme were members of Scheduled Castes or Scheduled Tribes or Backward Classes.**

State corporation established and formed 'for promoting interest of Safai Kamdar' is eligible for benefits of section 10(26B) as beneficiaries of this State Scheme were members of Scheduled Castes or Scheduled Tribes or Backward Classes. (AY. 2008-09)

Gujarat Safai Kamdar Vikas Nigam Ltd. v. Dy. CIT (2016) 158 ITD 900 (Ahd.)(Trib.)

235 **S. 10(34) : Dividend – Company with which venture capital fund (VCF) had been invested, had already paid additional income-tax, again at time of distribution of said income as dividend, VCF was not required to pay additional tax.[S. 115O, 115R, 115U]**

Assessee a Japanese Government Financial Institution made investment in a SEBI registered Venture Capital Fund (VCF). VCF had object to provide equity assistance to venture capital undertakings in India. Said fund was invested in a company. Dividend income received from VCF was claimed as exempt u/s. 10(34). The A.O. held that assessee could not grow tax-free income u/s. 10(34) unless additional tax had been paid as per provisions of S. 115O and 115R. The ITAT held that conditions laid down u/s. 115O to avail exemption under section 10(34) are to be complied with by venture capital undertakings and not by investor at time of receiving dividend from company in which VCF was invested. Further held that since company with which VCF was invested, had already paid additional income-tax u/s. 115U, VCF itself was not required to pay additional tax second time on same income at time of distribution of dividend. Therefore, claim of exemption u/s. 10(34) on its share of dividend income out of dividend income received by VCF was to be allowed. (AY. 2006-07 and 2007-08)

Japan International Cooperation Agency v. DDIT (2016) 158 ITD 62 / 139 DTR 185 / 180 TTJ 152 (Delhi)(Trib.)

S. 10(37) : Capital gains – Agricultural land – Land not used for agricultural purposes during two years immediately preceding the date of transfer, would disentitle the Appellant claim benefit of exemption u/s. 10(37). 236

The assessee, an individual, purchased certain land in a village in the year 2006. The said land was notified for compulsory acquisition under the provisions of Karnataka Industrial Development Act, 1956. The final agreement for sale was entered into in 2008 in pursuance of the final notification published in 2007. While filing the return of income for the AY 2009-10, the assessee claimed the compensation received thereon as exempt u/s. 10(37) of the Act.

The AO denied the exemption on the ground that such land was not used for agricultural purposes during two years immediately preceding the date of transfer and accordingly, the compensation received by the assessee was taxed as short-term capital gains. On appeal, the CIT(A) and Tribunal confirmed the action of the AO.

On further appeal, the assessee argued that there were Eucalyptus trees grown on the said land and that Eucalyptus trees would be crop and would be included for agricultural purposes. In this regard, the HC held that plantation of Eucalyptus would be plantation for trees which would not be for agricultural purpose as it does not give any agricultural produce. Further, the HC also observed that, the assessee was not able to produce any evidence such as expenditure incurred and revenue generated from agricultural produce which indicated the fact that the assessee did not carry on any agricultural activity on the land in question. The HC further observed that, there was a clear finding of fact recorded by all the three lower authorities that the assessee did not carry out any agricultural activity on the plot. Therefore, the assessee would not be entitled to the benefit of S. 10(37) of the Act. (AY. 2009-10)

B. M. Maniraju v. CIT (2015) 126 DTR 348 / (2016) 282 CTR 108 / (Karn.)(HC)

S. 10(38) : Long term capital gains from equities – Loss on sale of equity shares – cannot be allowed as deduction. 237

In view of S. 10(38) any income arising from transfer of a the long term capital asset being equity share is exempt from tax and, therefore, loss incurred on sale of long term capital asset being equity shares cannot be allowed as deduction. (AY. 2009-10)

ITO v. LGW Ltd. (2016) 130 DTR 201 (Kol.)(Trib.)

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

S. 10A : Free trade zone – The deduction of the profits and gains of the business of an eligible undertaking has to be made independently and before giving effect to the provisions for set off and carry forward contained in Sections 70, 72, and 74 [S.10B, 70, 72, 74] 238

Dismissing the appeal of revenue the Court held that; Section 10A/10B were amended by FA 2000 w.e.f. 01.04.2001 to change "exemption" to "deduction", the "deduction" contemplated therein is *qua* the eligible undertaking of an assessee standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly

flows to the assessee. The deduction of the profits and gains of the business of an eligible undertaking has to be made independently and before giving effect to the provisions for set off and carry forward contained in s. 70, 72 and 74. The deductions u/s 10A/10B are prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. (AY. 2001-02 to 2006-07)
CIT v. Yokogawa India Limited (2017) 391 ITR 274 / 145 DTR 1 / 291 CTR 1 / 244 Taxman 273 (SC)
Editorial: Decision of Karnata High Court in CIT v. Yokogawa India Limited (2012) 341 ITR 385 (Karn)(HC) is affirmed.

239 **S. 10A : Free trade zone – Hundred per cent export oriented unit – Electronic transmission of software developed from branch office to head office outside India-Entitled to exemption.[S. 10A(7), 80HHC, 80IA(8)]**
The absence of a "deemed export" provision in section 10A similar to the one in section 80HHC did not logically undercut the amplitude of the expression "transfer of goods" under section 80IA(8) which was part of section 10A. Such an interpretation would defeat section 10A(7). The transfer of computer software by the Indian branch to the head office was a sale to the head office out of India and the assessee was entitled to claim benefit of section 10A.(AY. 2002-03)
Dy. DIT v. Virage Logic International (2016) 389 ITR 142 / 143 DTR 385 (Delhi)(HC)
Editorial : Order of Tribunal in Virage Logic International v. Dy.CIT (2007) 13 SOT 270 (Delhi)(Trib.) is affirmed.

240 **S. 10A : Free trade zone – Total turnover – Sale proceeds not realised within six months granted by Reserve Bank of India without any extension – Cannot be excluded from total turnover while computing deduction.**
Court held that the appellate authorities were correct in holding that the sale proceeds not realised within the period of six months granted by the Reserve Bank of India without there being any extension could not be excluded from the total turnover when computation of deduction under section 10A of the Act was made. (AY. 2002-03)
CIT v. Wipro GE Medical System Ltd. (2016) 387 ITR 77 (Karn.)(HC)

241 **S. 10A : Free trade zone – Provision permitting assessee to opt out of exemption for any year or years – Loss or unabsorbed depreciation of those years available for future set off. [S. 10A(7), 72]**
The amended provisions of section 10A(8) provide for an assessee opting out of the provisions under section 10A for any of the relevant AYs. The provisions of section 10A would not apply to him for these years. In the year of opting out, the entire section 10A which *inter alia* includes the provisions of sub-section (6) would not apply to the assessee. If in any year of loss, the assessee opts out of section 10A, the prohibition contained in sub-section (6) in respect of carry forward of such loss would not apply. In other words, the loss suffered by such assessee in such year of opting out would be available to him for further set off as per the normal provisions of the Act like section 32(2) in respect of depreciation and section 72(1) in respect of business loss. (AY. 1998-99, 2000-01)
Max Healthscribe Ltd. v. ITO (2016) 386 ITR 479 (Karn.)(HC)
Editorial : SLP is granted CIT v. Max Healthscribe Ltd. (2016) 380 ITR (St.) 6]

S. 10A : Free trade zone – Delay in receiving foreign remittances – Application to condone delay pending before Reserve Bank of India – Entitled to benefit in respect of such remittance. [S. 80HHC] 242

The assessee was an exporter. The export had been done strictly in accordance with law. Foreign exchange remittances, which should have been received within six months from the end of the financial year, had not been received. Therefore, an application was filed seeking extension of time to the Reserve Bank of India. Even to this day the Reserve Bank of India had not rejected the said request. On the contrary, after the period of 6 months, foreign exchange remittances were received and credited to the assessee's account. Hence the assessee was entitled to the exemption under section 10A. (AY. 2001-02 to 2004-05)

Dy.CIT v. Wipro Ltd. (2016) 382 ITR 179 / 236 Taxman 209 / 282 CTR 346 (Karn.)(HC)
Editorial: SLP is granted, CIT v. Wipro Ltd. (2016) 240 Taxman 299 (SC)

S. 10A : Free trade zone – Expansion of units with STP approval and commencing production before 1-4-1993 – Entitled to exemption – Export – Loss in undertaking can be carried forward and adjusted against other income – Income from sale of scrap, export incentives, interest income and gains on exchange rate fluctuation is includible in profits – Value added tax and goods and services tax payable in foreign country is includible – Gains from sale of STP units in India is includible – Allocation of expenses among various units accepted by income-tax authorities for long period is held to be justified. 243

Dismissing the appeal of revenue, the Court held that ;

(i) That units which had got approval from STPI as expansion of old undertakings commenced operations prior to April 1, 1993 would also be entitled to claim under section 10A of the Act as new industrial undertakings.

(ii) That in view of the amendment to section 10A(6)(ii) with effect from April 1, 2001 the loss of the STP units should be carried forward at the end of the 10 years, tax holiday period under section 10A of the Act and should be set off against profits in respect of other units.

(iii) That income from sale of scrap, export incentive, rent received, interest income and gain on exchange rate fluctuation should be treated as profits and gains derived from export and exempted under section 10A.

(iv) That computer software sales made to STP units in India was includible in "export turnover" for the purposes of section 10A.

(v) That the assessee had allocated the corporate expenses on the basis of the actual expenditure incurred by the units. The assessing authority taking into consideration that in the earlier year 57% expenditure was allocated to the section 10A units, was not willing to accept the case of the assessee. Therefore, the assessee by a letter dated March 4, 2004 agreed to allocation of only a part of the expenditure relating to salary, wages and allowances and directors' fee at 20% to W, a section 10A unit and which had generated 57% of the revenue of the assessee. The assessing authority did not agree with the assessee's submission and allocated expenses of the corporate division in the ratio of revenue of the section 10A units. When the Department did not accede to the allocation of the actual expenditure, the assessee had come forward to distribute the entire expenditure equally to all

the units and the procedure was followed consistently by the assessee for more than a decade. This had to be followed in the relevant years.(AY. 2001-02 to 2004-05)

Dy.CIT v. Wipro Ltd. (2016) 382 ITR 179 / 236 Taxman 209 / 282 CTR 346 (Karn.)(HC)

244 **S. 10A : Free trade zone – Export turnover – Expenses incurred in foreign currency not to be excluded from export turnover.**

The expenses of the assessee incurred in foreign currency are not to be excluded from the export turnover for the purpose of computation of deduction under section 10A of the Act. (AY. 2006-07 to 2008-09)

CIT v. Tata Elxi Ltd. (2016) 382 ITR 654 (Karn.)(HC)

245 **S. 10A : Free trade zone – Computation of deduction – Services relating to development of computer software – Deemed to be part of export turnover of computer software outside India – Expenses incurred in foreign currency for providing software development services outside India cannot be excluded from export turnover.**

Held, (i) that the services rendered by the assessee relating to the development of computer software were deemed to be part of export turnover of computer software outside India. Therefore, the expenses incurred in foreign currency for providing software development services outside India could not be excluded from the export turnover while computing deduction under section 10A. *CIT v. Motor Industries Co. Ltd. [2016] 6 ITR-OL 84 (Karn.)* applied.

(ii) That the exchange fluctuation loss was to be reduced from the total turnover while computing the deduction under section 10A. (AY.2004-05)

CIT v. Kshema Technologies Ltd. (2016) 381 ITR 435 / 66 taxmann.com 165 (Karn.)(HC)

246 **S. 10A : Free trade zone – Subsidy received from parent company to be excluded from total turnover.**

On a question raised by the Department whether the subsidy received from the parent company of the assessee was to be included in the total turnover for the purposes of computation of deduction under section 10A of the Tribunal held that the subsidy could not be included in the total turnover for the reason that the amount had nothing to do with the rendering of services or export of services of the software. Held, dismissing the appeal, that there was nothing to indicate that the finding of fact by the authorities below was perverse and therefore no substantial question of law arose for consideration. (AY 2007-08)

CIT v. Sun Life India Service P. Ltd. (2016) 381 ITR 516 (P&H)(HC)

247 **S. 10A : Free trade zone – Export of computer software – Matter remanded.**

Held, that the Assessing Officer had no occasion to go into the claim of the assessee that the services rendered related to the development or production of computer software since the assessee on its own had reduced expenses in foreign currency from the export turnover and the total turnover and thereafter had taken a different stand before the appellate authority, that the services were an integral part of development of computer software. The Tribunal's finding was not based on examination of available and relevant material to come to a conclusion whether the activity related to the computer software

as defined under Explanation 2 to section 10A or involving technical services which was to be excluded from the export turnover in accordance with Explanation 4 to section 10A. Therefore, the Tribunal was to examine the material on record and to record a finding as to the nature of the activity. What was required to be excluded in the export turnover were only freight, telecommunication charges or insurance attributable to the delivery of computer software outside India or expenses, incurred in foreign exchange in providing the technical services outside India which could not be confused with the services rendered for the development of computer software, an integral part of export turnover of computer software. Matter remanded. (AY. 2002-03)
CIT v. Hewlett Packard Global Soft Ltd. (2016) 381 ITR 99 / 283 CTR 410 / 66 taxmann.com 152 / 130 DTR 362 (Karn.)(HC)

S. 10A : Free trade zone – Main activity was providing IT enabled services and not marketing of products of parent company hence distribution was held to be eligible deduction. 248

The assessee had two units eligible for deduction u/s. 10A. Unit 1 had already exhausted the period of deduction and during the year, deduction was claimed for the profit of Unit 2. The DRP alleged that excess deduction was claimed by the assessee since 46% of its income was derived from distribution income, which was earned for marketing and distribution of products owned by Amadeus Spain, and consequently, no software was being exported to claim deduction u/s. 10A. The ITAT held that the primary activity of the assessee was provision of IT enabled services which was approved by the STPI authorities. Accordingly, it was held that the Assessee was eligible for deduction u/s 10A. (AY. 2009-10)
Amadeus India P. Ltd. v. ACIT (2016) 52 ITR 83 (Delhi)(Trib.)

S. 10A : Free trade zone – Profits from undertaking – Interest on deposits 249

The Assessing Officer treated the interest earned on deposits with banks, as chargeable to tax under the head "Income from other sources" as against the assessee's claim that such interest income was chargeable to tax under the head "Profits and gains of business or profession". The authorities held that such interest was not "derived from" the eligible undertakings under section 10A and, thus, not eligible for deduction under section 10A. The Tribunal held that the orders of the Tribunal for the Assessment Years 2004-05 and 2005-06 showed that interest was assessed as income from business in the earlier years. There was no change in facts in the present year as nothing could be brought on record by the Department to show that there was any change in facts in this year. Therefore, the interest would be assessable under the head "Income from business". Since the income from interest was treated as part of the business income, it shall be included for determining the total turnover of the business and, accordingly, the benefit of deduction under section 10A shall be provided on the amount of interest proportionately, in terms of the mechanism provided in sub-section (4). In other words, the profits eligible for deduction under section 10A shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover bears to the total turnover of the business of the undertaking of the assessee. The Assessing Officer was directed to grant the benefit of deduction under section 10A by recomputing the

income. In case, the clear mandate of sub-section (4) is not followed and full deduction is allowed under section 10A on the interest, then it may yield absurd results and also provide benefits to assessees which were not intended to have been provided by the Legislature, keeping in view the objective of the enactment of section 10A. At times, there may be situations where interest would be of sizeable amount, sometimes even more than amount of profits, and in such a situation, if 100 per cent deduction is granted to the assessee, on the interest or any other similar income, without following the mandate of sub-section (4), it may frustrate the objective of section 10A. Therefore, to avoid any such situation, a clear mechanism has been provided under subsection (4) for computation purposes. (AY. 2006-07, 2007-08)
J.P. Morgan Services Pvt. Ltd. v. DCIT (2016) 46 ITR 561 / 70 taxmann.com 228 (Mum.) (Trib.)

250 **S. 10A : Free trade zone – Deduction before brought forward unabsorbed depreciation.**
The lower authorities held that the unabsorbed depreciation had emanated from the exempt unit and accordingly exemption under section 10A should be computed after setting off the unabsorbed depreciation. Tribunal held that the Assessing Officer was to allow the deduction under section 10A before setting off the brought forward unabsorbed depreciation.(AY. 2006-07, 2007-08)
J.P. Morgan Services Pvt. Ltd. v. DCIT (2016) 46 ITR 561 70 taxmann.com 228 (Mum.) (Trib.)

251 **S. 10A : Free trade zone – For the purpose of claiming exemption the assessee had to necessarily file the return of income within the time prescribed under section 139(1) of the Act.[S. 139(1), 139(4)]**
The Tribunal held that for the purpose of claiming exemption under section 10A of the Act, the assessee had to necessarily file the return of income within the time prescribed under section 139(1) of the Act. Where the assessee filed the return of income within the extended period under section 139(4) of the Act it would not be eligible to claim exemption under section 10A of the Act. The Commissioner (Appeals) was not justified in allowing the exemption under section 10A of the Act on the ground that the assessee had filed the return of income within the period specified under section 139(4) of the Act. Since it was not clear from the orders of the authorities whether the assessee had filed the return within the due date for filing the return of income under section 139(1) of the Act, the matter was remanded to the Assessing Officer for verification. (AY .2006-07, 2008-09, 2009-10, 2010-11)
DCIT v. Helios and Matheson Information Technology Ltd. (2016) 46 ITR 172 (Chennai) (Trib.)

252 **S. 10A : Free trade zone – Foreign currency expenses excluded from export turnover – Should be excluded from total turnover also**
The Tribunal held that in respect of the foreign currency expenses, what was excluded in the export turnover was also to be excluded from the total turnover. Since the Assessing Officer had excluded the foreign expenses from the export turnover, it had to be excluded from the total turnover too. (AY. 2006-07, 2008-09, 2009-10, 2010-11)
DCIT v. Helios and Matheson Information Technology Ltd. (2016) 46 ITR 172 (Chennai) (Trib.)

S. 10A : Free trade zone – Profits & gains derived from export – Interest on short term deposit is eligible for benefits. [S. 10B] 253

Tribunal held that interest on short term deposit is profit of business eligible for benefits of sections 10A & 10B. (AY. 2006-07)

American Express (I) (P) Ltd. v. Dy. CIT (2016) 177 TTJ 33 (UO) (Delhi) (Trib.)

S. 10A : Free trade zone – Addition on account of suppression of stock and difference in books of accounts – Exemption is allowable. [S. 133A] 254

Assessee is a manufacturer & Exporter of Gold Jewellery. Survey u/s. 133A was carried out on assessee's premises. Assessee surrendered certain sum on account of various discrepancies. AO made addition of sum surrendered. CIT(A) sustained addition. On appeal Tribunal held that assessee is entitled to deduction. (AY. 2007-08)

Bridal Jewellery Manufacturing Co. v. ITO (2016) 45 ITR 119 / 175 TTJ 257 (Delhi)(Trib.)

S.10A : Free trade zone – Only condition for software exported from India to be considered in an year is receipt of consideration of sale proceed within six months from end of previous year (or within period extended by RBI) in convertible foreign exchange and importing of any other condition such as furnishing of SOFTEX Form or obtaining of STPI clearance is completely unwarranted 255

Assessee carried on its business through a unit in Software Technology Park ('STP') which was entitled for claim of tax holiday under section 10A. While computing exemption under section 10A, Assessing Officer excluded an invoice raised by assessee on 31-3-2010 on ground that said invoice was cleared by STPI authority on 6-5-2010, i.e. in financial year 2010-11. Tribunal held that; for purpose of section 10A only condition for software exported from India to be considered in an year is receipt of consideration of sale proceed within six months from end of previous year (or within period extended by RBI) in convertible foreign exchange and furnishing of SOFTEX Form and certification of said form by STPI is only a post facto procedure prescribed by Reserve Bank of India to ensure timely and appropriate collection of export proceeds. Therefore, procedural non-compliance in course of collection of such export proceeds, i.e., furnishing of SOFTEX Form and certification by STPI authority within stipulated period six months from end of financial year, should not result in revenue from export of software made in financial year 2009-10 to be treated as 'export turnover' of subsequent year. (AY. 2010-11)

Microsemi India (P.) Ltd. v. Dy.CIT (2016) 157 ITD 220 (Hyd.)(Trib.)

S. 10A : Free trade zone – Computer software – Assessee earlier claiming deduction u/s. 80HHE was entitled to claim deduction u/s. 10A – Deduction to be computed after reducing expenditure already reduced from export turnover, from total turnover. [S. 80HHE] 256

The AO did not allow the assessee the deduction u/s. 10A of the Act on the ground that section 80HHC(5) of the Act prohibited the claim under any other section of the Act, once deduction was claimed under this section. The Commissioner (Appeals) allowed the claim. On appeal, the Tribunal held that there was no justification to hold that the assessee being an old unit and having once claimed deduction u/s. 80HHE, was not

entitled to claim deduction u/s. 10A on the profits of its units. The claim of deduction u/s. 10A was supported by requisite audit certificate. There was no error in the order of the CIT(A).(AY. 2005-06)
Dy. CIT v. Tata Consultancy Services Ltd. (2016) 46 ITR 394 / (2015) 174 TTJ 570 (Mum.)(Trib.)

257 **S. 10A : Free trade zone – Disallowed expenditure – Eligible deduction on enhanced income – Application under Rule 27 of the ITAT Rules was permitted. [S. 40(a)(ia)], ITATR, 27]**
Held that it would be unnecessary to go into the question whether the payment in question is reimbursement of expenses or in the nature of FTS or the question whether the services rendered made available technology because even assuming the sum in question is to be disallowed u/s. 40(a)(ia), disallowance will only go to enhance the profits derived by the assessee from the business of export of computer software and on such enhanced profits deduction u/s. 10A has to be allowed. Further, application under rule 27 of ITAT Rules was permitted to take the above plea. (AY. 2007-08)
ITO v. Cerner Healthcare Solutions (P) Ltd. (2016) 176 TTJ 63 / 140 DTR 191 (Bang.)(Trib.)

258 **S. 10A : Free trade zone – Expenses reduced from the export turnover should be reduced from the total turnover also.**
The Assessee had incurred expenses in foreign currency towards data communication and travelling. The AO reduced them from export turnover for the purpose of deduction under s. 10A, but did not reduce the same from total turnover. The ITAT held that if any item was to be reduced from export turnover, then it had to be reduced from the total turnover also. The ITAT observed that merely because the Department had filed an appeal against the jurisdictional High Court judgment, it would not lose its precedential value. (AY. 2008-09)
ITO v. Cerner Health Care Solutions P. Ltd. (2016) 45 ITR 207 (Bang.)(Trib.)

259 **S. 10A : Free trade zone – Total turnover – Telecommunication charges and Insurance charges have been excluded from export turnover – Also to be excluded from total turnover**
Following the decision rendered by Karnataka High Court in case of Tata Elxsi Ltd. 349 ITR 98, AO is directed to exclude telecommunication charges and insurance charges incurred be excluded both from export turnover and total turnover. (AY. 2006-07)
FCG Software Services (India) (P) Ltd. v. ITO (2016) 176 TTJ 145 / 66 taxmann.com 296 (Bang.)(Trib.)

260 **S. 10A : Free trade zone – Enhancement of Income by transfer pricing addition – Eligibility to claim deduction under section 10A does not operate as a bar for determining ALP of international transaction undertaken – No benefit of deduction on transfer pricing adjustment. [S. 10B, 92C]**
Having heard no exception has carved out by the statute for non-determination of the ALP of an international transaction of an assessee who is eligible for the benefit of deduction section 10A/10B or any other section of Chapter VIA of the Act. S.92(1) clearly provides that any income arising from an international transaction is required to be computed having regard to its arm's length price. There is no provision exempting

the computation of total income arising from an international transaction having regard to its ALP, in the case of an assessee entitled to deduction u/s. 10A or 10B or any other relevant provision. A circumspect perusal of this proviso read along with sub-section (4) of section 92C divulges that when the total income of an assessee from an international transaction is computed having regard to its ALP, then, no deduction u/s 10A or any other section including those covered under Chapter VIA of the Act shall be allowed in respect of the amount of income by which the total income of the assessee has been enhanced after computation of income determined on the basis of the ALP of an international transaction. The legislature has unconditionally provided for not allowing the benefit of deduction under any section in respect of the addition made on account of transfer pricing adjustment. Not allowing of any benefit u/s 10A in respect of an addition on account of transfer pricing adjustment pre-supposes the existence of transfer pricing addition in the first instance to an assessee who is otherwise eligible to the benefit of deduction under this section. If one was to presume that no addition towards transfer pricing adjustment is comprehensible in the case of an assessee enjoying the benefit of deduction u/s. 10A, then there was no need to enshrine an express provision forbidding the grant of deduction under this section in respect of enhancement of income due to transfer pricing adjustment. Once the legislature has engrafted an unambiguous provision explicitly spelling out the non-granting of deduction u/s 10A on the enhanced income due to transfer pricing addition, we are afraid to accept the assessee's contention, which runs diagonally opposite to the unequivocal language of proviso to section 92C(4). Our view is fortified by the Special Bench order in the case of *Aztec Software & Technology Services Ltd. v. Asstt. CIT [2007] 107 ITD 141/162 Taxman 119 (Bang.)* in which similar issue has been decided by the Special Bench by holding that availability of exemption u/s 10A to the assessee is no bar to applicability of sections 92C and 92CA. Fact that there is already a Special Bench decision in the case of Aztec Software & Technology Services Ltd. (supra) which supports the making of transfer pricing adjustment notwithstanding the eligibility of deduction u/s 10A to the assessee, apart from clear statutory mandate contained in proviso to section 92C(4), we are more inclined to go with the view of the Special Bench. Therefore, held that the eligibility of the assessee to deduction u/s. 10A of the Act does not operate as a bar for determining the ALP of international transaction undertaken by it and further the enhancement of income due to such transfer pricing addition cannot be considered for allowing the benefit of deduction under this section. (AY. 2008-09)
Headstrong Services India (P) Ltd. v. DCIT (2016) 158 ITD 717 / 176 TTJ 665 / 135 DTR 73 (Delhi)(Trib.)

S.10AA. Special provisions in respect of newly established Units in Special Economic Zones

S. 10AA : Special Economic Zones – Newly established units – Trading activity carried by SEZ was to be considered 'service' eligible exemption is a question of law – Matter remanded to High Court to decide the question of law. [S.260A] 261

The High Court affirmed the finding of the Tribunal that the trading activity carried on by the special economic zone unit of the assessee was "service" eligible for exemption under section 10AA, without considering the submission of the Department that for

this purpose, the Tribunal could not have relied upon the definition of "services" in the Special Economic Zones Rules, 2006, when there was no such provision under section 10AA, on appeal :
Held, that the High Court did not consider this aspect and brushed it aside saying that the Tribunal had held it to be a "service" and that it was a question of fact. While the factual aspects of activity carried on by the assessee were not in dispute, whether that would constitute "service" within the meaning of section 10AA would be a question of law and not a question of fact. The High Court was, therefore, in error in not entertaining the plea. (AY. 2004-05)
CIT v. Bommidala Enterprises P. Ltd. (2016) 389 ITR 1 / 242 Taxman 248 (SC)
Editorial : Decision of the Andhra Pradesh High Court CIT v. Bommidala Enterprises P. Ltd. ITA No. 461 of 2013 dt 1-10-2013 was set aside and matter remanded to High Court.

262 **S. 10AA : Special Economic Zones – Amendment to claim deduction based on the proportion of export turnover to the total turnover the undertaking and not total undertaking of the assessee, is retrospective in nature and is applicable for AY. 2007-08.**
The assessee claimed deduction u/s. 10AA in its original return of income, which was enhanced *vide* a revised return of income, based on the amendment as per Finance (No. 2) Act, 2009. As per the amendment deduction u/s. 10AA was allowable in the proportion of the export turnover of the undertaking to the total turnover of the undertaking, instead of total turnover of an assessee. This beneficial amendment was made applicable from 1st April, 2006. The AO did not allow the increased claim of deduction since the amendment came into effect on 1st April, 2010. The CIT(A) allowed the appeal of the assessee, and held that the amendment was retrospective in nature. On appeal by the Department, it was held by the ITAT that the retrospective amendment was applicable to the assessee since it was made applicable from 1st April, 2006 and shall apply for AY 2007-08. (AY. 2007-08)
DCIT v. AVTIEC Ltd. (2016) 52 ITR 270 (Delhi)(Trib.)

263 **S. 10AA : Special Economic Zones – Words 'pendant' and 'medallion' have same meaning and usage in common parlance and, therefore, merely because product manufactured by assessee was described as medallion, it could not be said that there was any violation of approval granted by Development Commissioner, Special Economic Zone for manufacturing gold pendants.**
Assessee was engaged in business of manufacturing gold jewellery. It claimed deduction u/s. 10AA on basis of approval granted by MEPZ Special Economic Zone for manufacturing gold bangles and gold pendants. The A.O. disallowed assessee's claim on ground that it was manufacturing medallions and, thus, had violated approval granted by Special Economic Zone for manufacturing gold bangles and pendants. The ITAT held that the words 'pendant' and 'medallion' have same meaning and usage in common parlance and, therefore, merely because product manufactured by assessee was described as medallion, it could not be said that there was any violation of approval granted by Development Commissioner, Special Economic Zone. Purity of gold in pendant/ medallion would depend upon design and stones implanted on pendant or medallion and, therefore, merely because pendant/medallion was of 99.5 per cent purity, it would

not lose its character as pendant. Assessee entitled to claim deduction u/s. 10AA. (AY. 2011-12, 2012-13)
Jewels Magnum v. ACIT (2016) 158 ITD 185 / 181 TTJ 137 (Chennai)(Trib.)

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

S. 10B : Export oriented undertakings – Computation of deduction – Deduction to be given before setting off losses and unabsorbed depreciation. [S.32, 41, 72] 264
Deduction under section 10B had to be given at the stage when the profits and gains of business were computed in the first instance before setting off losses and unabsorbed depreciation of earlier years. *CIT v. Black and Veatch Consulting Pvt. Ltd. (2012) 348 ITR 72 (Bom.)* followed. (AY. 2005-06)
CIT v. BEHR India Ltd. (No.1)(2016) 389 ITR 419 (Bom.)(HC)
CIT v. BEHR India Ltd. (No.2)(2016) 389 ITR 459 / 74 taxmann.com 170 (Bom.)(HC)
Editorial: SLP is granted to the revnue; lCIT v. BEHR India Ltd. (2016) 242 Taxman 506 (SC)

S. 10B : Export oriented undertakings – Interest earned on surplus business funds deposited with banks for short periods is assessable as business income hence allowable deduction. 265
Dismissing the appeal of the Revenue, the Court held that; the entire business income of the 100 per cent EOU including the interest earned on temporarily surplus business funds will be the 'profits of the business of the undertaking'. Accordingly, it was held that the ITAT was correct in allowing deduction u/s. 10B on such interest income. (AY.2003-04)
CIT v. Hindustan Gum & Chemicals Ltd. (2016) 241 Taxman 401 / (2017) 152 DTR 84 (Cal.)(HC)

S. 10B : Export oriented undertakings – Inclusion of customer claim, freight subsidy and interest on FDRs in the profits of the undertaking. [S.10B(4)] 266
It is held by the High Court that the customer claim, freight subsidy and interest on FDRs are to be included in the profits of the undertaking for the purpose of computation of deduction under section 10B of the Act as they are directly related to the business of the undertaking. Insofar as the interest on FDRs is concerned, it is held that the deposits are under lien with Bank of India for facilitating the letter of credit and bank guarantee facilities and therefore, the interest earned on such FDR ought to qualify for deduction under S. 10B of the Act. (AY. 2008-09)
Rivera Home Furnishing v. ACIT (2016) 237 Taxman 520 / 138 DTR 149 (Delhi)(HC)

S. 10B : Export oriented undertakings – Export of Legal Services by a law firm to its overseas clients by transfer of customized electronic data constitutes export of "computer software" as per Explanation 2 to s. 10B and is eligible for deduction. 267
Dismissing the appeal of revenue the Tribunal held that; Export of Legal Services by a law firm to its overseas clients by transfer of customized electronic data constitutes export of "computer software" as per Explanation 2 to s. 10B and is eligible for

deduction. Tribunal also held that; the customs bonding which was never mentioned by the authorities as a condition for grant of registration can never be made a pre-condition for registration after 3 years. (AY. 2004-05 to 2008-09)
ACIT v. Majmudar & Co. (2016) 181 TTJ 577 / 52 ITR 54 / 73 taxman.com 77 (Mum.) (Trib.)

268 **S. 10B : Export oriented undertakings – Deduction to be computed before adjusting brought forward losses.**
The Assessing Officer held 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. The Commissioner (Appeals) confirmed this. The Tribunal held that deduction under section 10B of the Act was to be computed before adjusting brought forward unabsorbed losses or depreciation. [*CIT v. Black and Veatch Consulting P. Ltd. (2012) 348 ITR 72 (Bom.)* followed] (AY. 2005-06)
Vishay Components India P. Ltd. v. Addl. CIT (2015) 174 TTJ 354 / 128 DTR 178 / (2016) 45 ITR 471 (Pune)(Trib.)

269 **S. 10B : Export oriented undertakings – Weighted deduction – Expenditure on research and development – Failure to prove that no part of knowledge gained out of research and development activity useful to section 10B units – Matter remanded**
The assessee claimed exemption under section 10B of the Act on two Export Oriented Units and weighted deduction under section 35(2AB), section 35AC and 35(1)(ii) of the Act. Since the assessee had not allotted the research and development expenditure to the Export Oriented Units, the research and development expenditure claimed under section 35AC and section 35(1)(ii) in respect of donations paid was allotted proportionately on the basis of the turnover of the undertaking. The Commissioner (Appeals) remanded the matter to the Assessing Officer holding that the knowledge gained out of research and development was equally useful for all the units of the assessee unless the research and development activity was exclusively related to the components manufactured by the non-section 10B units alone and it was not proved substantively that no part of the knowledge gained out of research and development activity was useful to the section 10B units and hence the Assessing Officer to find out the tangible benefits which the section 10B units had derived from the research and development activities carried out by the assessee and to decide the disallowance. The Tribunal held that the Commissioner (Appeals) was justified in remanding the matter to the Assessing Officer to find out the tangible benefits which the section 10B units derived from the research and development activities carried out by the assessee and to decide the disallowance. (AY. 2005-06, 2008-09 and 2009-10)
Brakes India Ltd. v. DCIT (2016) 46 ITR 212 (Chennai)(Trib.)

270 **S. 10B : Export oriented undertakings – Apportionment of expenses on the basis of turnover proper.**
The Assessing Officer, for the assessment years 2007-08 and 2008-09, held that the assessee had apportioned the common expenses to its unit in a software technology park, which worked out to 1.56 per cent (₹ 3,30,747). However, the Assessing Officer following the directions of the Additional Commissioner to rework the apportionment

of common expenses considering one-third of the audit fees and directors' remuneration towards the unit in the software technology park, recomputed the allocation of common expenses at ₹ 39,39,208. The Commissioner (Appeals) confirmed the AO order. The ITAT held that the CIT(A) had given a finding that apportionment of expenses was to be done on the basis of turnover of the software technology parks of India unit and non-software technology parks of India unit. This was fair and appropriate. (AY. 2007-08, 2008-09)
Accel Frontline Ltd. v. DCIT (2016) 46 ITR 138 (Chennai)(Trib.)

S. 10B : Export oriented undertakings – Research documents and speciality compound produced while providing 'contract research' service in chemistry would be used only in later stages of development of industrially useful chemicals Amounts to manufacturing – Entitle to exemption. 271
Assessee-company was engaged in business of providing contract research services in field of molecular biology and synthetic chemistry - Assessee had categorised its receipts under two heads, namely, contract research fee and sale of compounds. Assessee filed its return claiming exemption under section 10B. According to Assessing Officer, since assessee's earnings were not from exports of compounds, but from entire research work including intellectual property embedded therein, claim raised by assessee could not be allowed. CIT(A) allowed the claim. On appeal Tribunal held that mere fact that end product was either research documents in nature of experimental records or speciality compound which would find use only in later stages of development of industrially useful chemicals and formulations, it could not be concluded that assessee was not manufacturing an article or thing. Therefore, assessee's claim for exemption was to be allowed. (AY. 2005-06,1006- 07)
Dy. CIT v. Syngene International Ltd. (2016) 157 ITD 542 (Bang.)(Trib.)

S. 10B : Export oriented undertakings – Deduction u/s. 10B is allowable if necessary approvals are obtained, even though earlier deduction was claimed u/s. 80IC. [S. 80IC] 272
The Assessee was earlier claiming deduction u/s. 80IC and during the impugned AY it switched over to claiming deduction u/s. 10B. The AO did not allow the same on the ground that a switch over to S.10B was not allowed from S. 80-IC. On appeal, the ITAT allowed the deduction u/s. 10B since it had received all the necessary approvals for registering its unit and it had forgone its earlier claim of deduction u/s. 80IC. (AY 2009-10)
ACIT v. Windlass Steel Craft (2016) 45 ITR 259 / 175 TTJ 1 (UO) (Delhi)(Trib.)

S. 10B : Export oriented undertakings – Gherkins pickles – Processes undertaken by the assessee had significant effect on the raw nature, converting it to a material capable of withstanding decay for a considerable period of time, amounts to manufacture – Entitle to deduction.[S.10A] 273
Allowing the appeal of assessee the Tribunal held that; once such raw gherkins are put into some process which increases its shelf life to six months or more, there indeed happen some irreversible change. Raw gherkins are changed from its original state to a state where it remains good for human consumption even after six months. Thus the steps as undertaken by the assessee which included fermentation and which extended the shelf life of raw gherkins, even if we construe as not 'manufacture', as commonly understood, it cannot be denied that it resulted in a product which cannot be equated

with raw gherkins. The processes undertaken by the assessee had significant effect on the raw nature, converting it to a material capable of withstanding decay for a considerable period of time. In our opinion, in such a situation, it is difficult to say that what was packed by the assessee after the various process was very same as the raw gherkins which it got from its contract farmers.(ITA No. 1292/Bang/2010 & ITA No. 287/Bang/2013, dt. 18.03.2016)(AY. 2006-07, 2007-08)
Intergarden India Pvt. Ltd. v. ACIT (Bag.)(Trib.); www.itatonline.org

S. 11. Income from property held for charitable or religious purposes.

274 **S. 11 : Property held for charitable purposes – Excess of expenditure over current years income – Excess expenditure incurred out of accumulated charity fund – Trust is entitled to exemption.**
The assessee, an agriculture produce market committee, filed return of income claiming the status as Charitable Trust. Expenditure incurred by the assessee towards the charitable aims and objects, was found to be in excess of the income earned in the relevant assessment year. AO held that since the excess of expenditure over the income of the relevant assessment year was incurred out of the accumulated charity fund, therefore no exemption u/s 11 can be allowed in respect of the income of the assessment year. The High Court held that, it was an undisputed fact, that the assessee had incurred expenditure out of the income of the year under consideration and only the excess of expenditure was out of the accumulated charity fund. In such a case, the Court held that the deduction u/s 11 cannot be denied to the assessee. (AY 2008-09)
CIT v. Krishi Upaj Mandi Samiti, Raisinghnagar (2016) 240 Taxman 527 / (2017) 390 ITR 59 / 293 CTR 348 (Raj.)(HC)
Editorial: SLP is granted to the revenue; CIT v. Krishi Upaj Mandi Samiti, Raisinghnagar (2017) 244 Taxman 187 (SC)

275 **S. 11 : Property held for charitable purposes – Held, depreciation allowable even if entire cost claimed as an application of income for charitable activities – Held, amendment made in section 11(6) prospective in nature. [S.32]**
The High Court, following the judgment of the same court in case of *DIT v. Al-Ameen Charitable Fund Trust [2016] 383 ITR 517/238 Taxman 148/67 taxmann.com 160 (Kar),* held that assessee can claim depreciation inspite of the fact that it has already claimed the entire cost of the asset as application of income for charitable activities. Further, it also held that the amendment made in section 11(6) w.e.f. 1.4.2015 to negate the allowability of depreciation if the entire cost is already claimed as application of income was prospective in nature and therefore, not applicable to years prior to 1.4.2015.(AY. 2010-11)
CIT v. Bangalore Baptist Hospital Society (2016) 240 Taxman 567 (Karn.)(HC)
Editorial: SLP is granted to the revenue, CIT v. Bangalore Baptist Hospital Society (2017) 244 Taxman 216 (SC)

276 **S. 11 : Property held for charitable purposes – Depreciation – Application of income – Depreciation is allowable. [S. 32]**
On appeal by revenue; dismissing the appeal, that application of income for acquiring an asset was different from claim for depreciation in relation to the use or application

of the asset for achieving the stated object or purpose of a charitable trust. Therefore, the depreciation in respect of capital expenditure is allowable and no question of double deduction arose. (AY. 2008-09)
DIT(E) v. Gem and Jewellery Export Promotion Council (2016) 384 ITR 412 (Bom.)(HC)
Editorial : The Supreme Court has granted special leave to the Department to appeal against this judgment, DIT(E) v. Gem and Jewellery Export Promotion Council [2016] 380 ITR 4. (St.)

S. 11 : Property held for charitable purposes – Depreciation – Amount spent on purchase of capital assets claimed exempt as application of income to objects – Depreciation allowable on such capital assets.[S. 32] 277
The assessee claimed depreciation in respect of fixed assets. In the year of purchase of the fixed assets, the entire amount attributable to their purchase was shown as application of income for the objects of the assessee and thus exempt in terms of section 11 of the Income-tax Act, 1961. The Assessing Officer disallowed the claim for depreciation on the ground that it would amount to double deduction. On appeal, the Commissioner (Appeals) upheld the decision of the Assessing Officer. The Tribunal held that the assessee was entitled to the depreciation. On appeal :
Held, that the deduction on account of depreciation would not amount to double deduction. It was allowable. (AY. 2006-07, 2007-08)
CIT v. Jawaharlal Nehru Port Trust (2016) 383 ITR 339 (Bom.)(HC)
Editorial: The Supreme Court has granted special leave to the Department to appeal against this judgment CIT v. Jawaharlal Nehru Port Trust [2016] 382 ITR (St.) 33]

S. 11 : Property held for charitable purposes – Amendment by Finance (No. 2) Act, 2014 denying depreciation is prospective – Effect from 1-4-2015 [S. 10(23C), S. 12AA, S. 32] 278
Dismissing the appeal of revenue, the Court held that Amendment by Finance (No. 2) Act, 2014 denying depreciation is prospective and is effect from 1-4-2015, hence for the relevant years depreciation was rightly allowed as application of income. (AY. 2005-06, 2009-10)
DIT(E) v. Al-Ameen Charitable Fund Trust (2016) 383 ITR 517 / 238 Taxman 148 / 133 DTR 72 (Karn.)(HC)
Editorial: SLP is granted to the revenue, DIT v. Al-Ameen Charitable Trust (2016) 242 Taxman 4 (SC)

S. 11 : Property held for charitable purposes – Profit from sale of land owned by assessee, an educational trust, could not be treated as business income and was eligible for exemption. [S.2(15)] 279
Dismissing the appeal of the revenue, the Court held that; Profit from sale of land owned by assessee, an educational trust, could not be treated as business income and was eligible for exemption. as activity of sale of land was incidental to objects of trust and said profit had been applied for objects of trust. (AY. 2011-12)
CIT v. Sri Magunta Raghava Reddy Charitable Trust. (2016) 242 Taxman 18 / (2017) 292 CTR 464 (Mad.)(HC)

280 **S. 11 : Property held for charitable purposes – Club – Mutuality Deposit of money in scheduled banks and receipt of interest thereon is not an activity in nature of trade, commerce or business, withdrawal of registration was held to be not justified. [S.2(15), 4, 12A]**

Allowing the appeal of the assessee the Tribunal held that the act of deposit of money in scheduled bank account complying with provision of s. 11(5) and receipt of interest thereon was not an activity in nature of trade, commerce or business hence addition cannot be made on account of interest which was exempt u/s. 11(5). (AY. 2009-10)

Bombay Presidency Golf Club Ltd. v. ITO (2016) 159 ITD 1050 / (2017) 147 DTR 304 (Mum.)(Trib.)

281 **S. 11 : Property held for charitable purposes – Depreciation – Cost of asset already allowed as application of income for charitable purposes – Depreciation on asset is allowable.**

Even if amount spent on acquiring depreciable asset was treated as application of income of trust in year of acquisition, depreciation would still be allowable in subsequent years.

ACIT v. Shreyash Pratisthan (2016) 51 ITR 134 (Pune)(Trib.)

282 **S. 11 : Property held for charitable purposes – Micro finance business in commercial manner so as to earn profit and there was no iota of charity carried on by Assessee – Not entitled to exemption. [S. 2(15)]**

Allowing the appeal of the revenue the Tribunal held that; the assessee carried on, Micro finance business in commercial manner so as to earn profit and there was no iota of charity carried on by Assessee hence not entitled to exemption.(AY. 2009-10, 2010-11, 2011-12)

ACIT v. Grama Vidiyal Trust (2016) 180 TTJ 579 / 71 taxman.com 88 (Chennai)(Trib.)

283 **S. 11 : Property held for charitable purposes – Carry forward of deficit was allowed to set off against the current years income.**

Dismissing the appeal of the revenue, the Tribunal held that; Carry forward of deficit was allowed to set off against the current years income. (AY. 2008-09)

ACIT (E) v. K. J. Somaiya Trust (2016) 158 ITD 57 (Mum.)(Trib.)

284 **S. 11 : Property held for charitable purposes – Education – Denial of exemption was not justified merely on the ground that receipt from education constituted a small proportion of total receipts of society. [S. 2(15), 12A]**

Allowing the appeal of the assessee; Assessee worked with community organizers, adult educator, health care workers, social workers etc. in training them to use participatory research methodology in their work. Assessee also produced own educational materials for use in educational programmes and for wider dissemination. Therefore denial of exemption was not justified merely on the ground that receipt from education constituted a small proportion of total receipts of society. (AY. 2007-08, 2009-10, 2010-11)

Society For Participatory Research in Asia v. ITO (2016) 159 ITD 887 / 180 TTJ 596 (Delhi) (Trib.)

S. 11 : Property held for charitable purposes – Organising seminars/conferences and Auto Expo were performed with prior object of promotion of growth of automobile industry in India which is an object of general public utility, such activities would not come within ambit of proviso to S. 2(15) even if some income was generated from such activities. [S.2(15), 12] 285

AO denied benefit of S. 11 and 12 on ground that in view of amended provisions of S. 2(15) receipts from seminars, statistical information and Auto Expo 2008 were not charitable activities. Allowing the appeal the Tribunal held that activities of assessee in organizing seminars, conferences and Auto Expo and publications in relation to automobile industry were performed with prior object of promotion of growth of automobile industry in India, which is an object of general public utility, and, therefore, proviso to S. 2(15) would not apply.

Society of Indian Automobile Manufacturers v. ITO (2016) 159 ITD 659 (Delhi)(Trib.)

S. 11 : Property held for charitable purposes – Auditorium – Whole or some part of income from running of auditorium hall was used for charitable purposes would not render business itself being considered as incidental to attainment of objects of assessee-trust. [S. 2(15), 12] 286

Dismissing the appeal of the assessee the Tribunal held that Whole or some part of income from running of auditorium hall was used for charitable purposes would not render business itself being considered as incidental to attainment of objects of assessee-trust. Assessee was not entitled to any exemption u/s. 11. (AY. 2010-11)

Suguna Charitable Trust v. ITO (2016) 159 ITD 838 (Chennai)(Trib.)

S. 11 : Property held for charitable purposes – Pharmacy shop was an integral part of hospital, same would not be hit adversely by conditions specified in provisions of S. 11(4A) and, thus, would be eligible for exemption. [S. 10(23C), 11(4A)] 287

Assessee is a registered charitable Trust which is engaged in running schools and hospitals .Assessing Officer invoking the provisions of section 11(4A) held that as no separate books are maintained for pharmacy there is violation of provision hence not eligible exemption. On appeal the Tribunal held that; Since pharmacy shop was an integral part of hospital, same would not be hit adversely by conditions specified in provisions of S. 11(4A) and, thus, would be eligible for exemption. (AY. 2006-07 to 2009-10)

Hiranandani Foundation v. ADIT (E) (2016) 159 ITD 278 / 181 TTJ 471 (Mum.)(Trib.)

S. 11 : Property held for charitable purposes – Development authority – Since its activity as town planner was part of its object, denial of exemption was not justified. [S. 12AA] 288

Dismissing the appeal of the Revenue, the Tribunal held that activity of the assessee was part of development only, which was object of assessee since beginning and there was no change in charitable purpose while doing activity of development, its income would be eligible for exemption. (AY.2009-10)

ITO v. Moradabad Development Authority (2016) 159 ITD 971 / 49 ITR 270 / (2017) 183 TTJ 278 (Delhi)(Trib.)

289 **S. 11 : Property held for charitable purposes – Conducting fairs outside India was part of objects of the assessee and hence eligible for exemption, revision was held to be not valid. [S. 2(15), 12AA, 263]**

The assessee, engaged in promoting commerce and industry relating to building construction, among other conducted fairs and seminars. The CIT, under proceedings u/s. 263, alleged that the assessee was not eligible to exemption u/s. 11 since its main activity was holding fairs in and outside India, which was commercial in nature. Further, the CIT alleged that the fairs conducted outside India violated the provisions of s. 11(1)(a), which prohibited the application of money in the form of expenses outside India. The ITAT held that since the inception the main as well as incidental objects remained the same, which was accepted by the Department, hence the exemption was available to the assessee. Further, the ITAT held that there was no evidence to prove that income was applied outside India. The fair abroad was conducted for the advancement of business of realty business in India and all expenses were incurred in India. (AY. 2011-12)

CREDAI Bengal v. CIT(E) (2016) 52 ITR 161 (Kol.)(Trib.)

290 **S. 11 : Property held for charitable purposes – One of objects of charitable society was sale and purchase as required by Government, while ultimate object was not profit is eligible for exemption. [S. 2(15), 12]**

Assessee was a registered society working under Government of India for advancement of object of general public utility. Even though object of society contained sale and purchase as one of its objects, still ultimate object was not profit-making. Assessee was not driven by profit motive, not hit by proviso to S. 2(15). Eligible for exemption u/s. 11. (AY. 2010-11, 2011-12)

DCIT v. Semi-Conductor Laboratory, Deptt. of Space, Govt. of India (2016) 161 ITD 584 (Chd.)(Trib.)

291 **S. 11 : Property held for charitable purposes – Since Assessing Officer neither doubted genuineness of activities of assessee nor pointed out any violation, hence order passed by AO was not sustainable [S. 11, 12A, 13(1)(c), 13(1)(d)]**

Assessing Officer denied exemption on basis that though objects were charitable in nature and activities were genuine, still activities carried out by assessee were akin to any commercial activity because assessee's gross receipts had increased over a period of time. Tribunal held that since Assessing Officer neither doubted genuineness of activities of assessee nor pointed out any violation referred to in section 13(1)(c) or 13(1)(d), order passed by AO was not sustainable. (AY. 2009-10)

ITO v. Mother Theresa Educational Society (2016) 158 ITD 473 (Visakha)(Trib.)

292 **S. 11 : Property held for charitable purposes – Merely because surplus was generated from hospital activities could not be ground to deny exemption – Payment made to trustees for services rendered being reasonable, there is no violation. [S. 2(15), 12, 13(1)(c)]**

Dismissing the appeal of the revenue, the Tribunal held that; merely because surplus was generated from hospital activities could not be ground to deny exemption. Payment made to trustees for services rendered being reasonable, there is no violation. (AY. 2008-09)

ITO v. Noble Medical Foundation & Research Centre (2015) 68 SOT 343 (URO)(Pune) (Trib.)

S. 11 : Property held for charitable purposes – Receipts from letting out of community hall and marriage hall – Business carried on subsequent to formation of trust does not constitute property held under trust and, thus, income from such business is not exempt from tax. [S. 2(15), 12AA] 293

The assessee was a society registered under Section 12AA of the Act. It ran a community and marriage hall and claimed the income from those properties as income from house property. The AO denied the claim of the assessee holding that the business of running community hall, marriage hall and funeral ceremonies could not be treated as incidental business eligible for exemption under Section 11(4A) of the Act and was hit by proviso to Section 2(15). On appeal to Tribunal, it was held that the running of community hall, marriage hall and funeral ceremonies constituted business of the assessee and could not be held to constitute property held under the trust. Only business held under the trust would enjoy exemption under Section 11(4) and there was distinction between the objects of the trust and the powers given to the trustees to effectuate the purpose of the trust. There was no nexus between the activities carried on and the objects of the assessee that could constitute an activity incidental to the attainment of objects. The assessee was not entitled to exemption under Section 11 of the Act. If a property is held under trust, and such property is a business, the case would fall under section 11(4) of the Income-tax Act, 1961, and not under section 11(4A). Section 11(4A) would apply only to a case where the business is not held under trust. Thus, there is a difference between property or business held under trust and business carried on by or on behalf of the trust. (AY. 2010-11, 2011-12)

Sri Ram Samaj v. JDIT (E) (2016) 158 ITD 676 / 47 ITR 629 / 181 TTJ 837 (Chennai)(Trib.)

S. 11 : Property held for charitable purposes – Application of income depreciation cannot be allowed on fixed asset which was earlier claimed as application of income. [S. 32] 294

The ITAT held that if the cost of fixed assets had been claimed as application of income while claiming exemption under section 11 of the Act in earlier assessment years, the assessee could not claim depreciation on the same asset under section 32 of the Act as its cost had already became nil. (AY. 2009-10)

Information Systems Audit and Control Association v. DDIT (E) (2016) 157 ITD 815 / 46 ITR 665 / 179 TTJ 99 (Chennai)(Trib.)

S. 11 : Property held for charitable purposes – Donation given by one public charitable trust to another public charitable trust is permissible as application of income and said payment is not in violation of section 13(1)(c) because payment is not made for benefit of any person either directly or indirectly referred to in section 13(3). [S.13(3)] 295

Donation given by one public charitable trust to another public charitable trust is permissible in S. 11 as application of income and said payment is not in violation of section 13(1)(c) because payment is not made for benefit of any person either directly or indirectly referred to in section 13(3). (AY. 2009-10)

St. Joseph's Convent Chandannagar Educational Society v. Jt. CIT (2016) 158 ITD 1022 (Kol.)(Trib.)

296 **S. 11 : Property held for charitable purposes – Application of income – Mere deposit of surplus funds in FDRs cannot be treated as application of fund there has to be nexus between investment in FDRs and achievement of charitable objects of assessee – Matter remanded. [S. 12A]**

Mere deposit of surplus funds in FDRs cannot be treated as application of fund there has to be nexus between investment in FDRs and achievement of charitable objects of assessee. Matter remanded. (AY. 2011-12)

ITO v. S. D. Public School (2016) 157 ITD 521 (Chd.)(Trib.)

297 **S. 11 : Property held for charitable purposes – Advance to sister concern was out of surplus accumulated – No violation exemption was to be allowed.**

Where assessee-trust spent 85 per cent of its income for construction of building to be used for educational purpose, mere fact that it advanced certain amount to its sister concern out of surplus accumulated which remained at its disposal, there was no violation of provisions of section 11(2) and, thus, assessee's claim for exemption of income was to be allowed. (AY. 2004-05)

Chawara Educational Trust v. ITO (2016) 157 ITD 281 (Pune)(Trib.)

298 **S. 11 : Property held for charitable purposes – Publishing newspaper – Not entitled to exemption. [S. 2(15)]**

Dismissing the appeal of assessee the Tribunal held that; Where assessee-trust having object to improve and spread language, was publishing newspaper following commercial activity, it could not be considered as charitable activity. Denial of exemption was held to be justified. (AY. 2009-10, 2010-11)

Murasoli Trust v. ADIT (E) (2016) 156 ITD 761 / 48 ITR 472 / 139 DTR 320 / 179 TTJ 378 (Chennai)(Trib.)

299 **S. 11 : Property held for charitable purposes – Advance of money to managing trustee for purchase of land – No violation – Entitled to exemption. [S. 13(1)(c)]**

Assessee trust advanced money to its managing trustee for purchase of land belonging to the latter and the said trustee returned the entire money along with interest after cancellation of agreement. It cannot be said that the transaction between the assessee trust and the managing trustee was one without adequate security or adequate interest or that the money was diverted for the benefit of the managing trustee and, therefore, there is no violation of S. 13. There was no violation of any other provision of the IT Act on transfer of three institutions and its infrastructure by another trust to the assessee trust by way of donation. Assessee was entitled for exemption u/s. 11.(AY. 2010-11)

Dy. DIT (E) v. Vels Institute of Science, Technology & Advanced Studies (2016) 157 ITD 237 / 130 DTR 331 / 175 TTJ 593 (Chennai)(Trib.)

300 **S. 11 : Property held for charitable purposes – Education of fathers serving in schools – Exemption could not be denied. [S. 2(15), 12A]**

Dismissing the appeal of revenue the Tribunal held that; where assessee, a charitable trust, spent certain amount towards education of Fathers serving in schools run by it as teachers, supervisers etc., it was to be regarded as charitable purpose and, thus,

assessee's claim for exemption of income under section 11 could not be rejected. (AY. 2003-04)
ACIT v. Carmelite Charitable Society (2016) 157 ITD 78 (SMC) (Amritsar)(Trib.)

S. 11 : Property held for charitable purposes – Receipts from non-members by allowing them to have their stalls in trade fair being negligible – Denial of exemption was held to be not justified. [S. 2(15)] 301
Dismissing the appeal of revenue the Tribunal held that; where assessee-association was formed with an object to promote leather trade, in view of fact that assessee's receipt of rent from non-members by allowing them to keep their stalls in trade fairs organised by assessee was negligible in comparison to total trade receipts, assessee's case could not be said to be covered under proviso to section 2(15) (AY. 2009-10)
ITO v. Indian Leather Products Association (2016) 156 ITD 393 (Kol.)(Trib.)

S. 11 : Property held for charitable purposes – Micro finance business in commercial manner – Not eligible exemption. [S. 2(15)] 302
Where assessee was carrying on micro finance business in a commercial manner, its activities fell under category of 'advancement of any other object of general public utility' and thereby hit by proviso to section 2(15) disentitling it from exemption. (AY. 2009-10)
ITO v. Kalanjiam Development Financial Services (2016) 156 ITD 213 (Chennai)(Trib.)

S. 11 : Property held for charitable purposes – Exemption allowed if the accumulated funds were utilized in the subsequent year for the valid objects of the trust, though there was a technical error in the Form 10 that was filed. 303
The assessee Trust filed in its Form 10 that the accumulated sum would be used for social-economic programmes. The AO treated it as income since the Assessee was not specific in how the funds were going to be utilized. The ITAT allowed the exemption for the trust since the funds were utilized in the subsequent year for its objects and the technical lapse in filling up of Form 10 could be condoned. (AY. 2011-12)
Presentation Social Service Centre v. DDIT (2016) 45 ITR 23 (Hyd.)(Trib.)

S. 11 : Property held for charitable purposes – Excess application of funds not permissible to be carried forward to subsequent years. [S. 32] 304
Tribunal held that the; claim of the assessee for carry forward of excess application of fund to subsequent years was not permissible under the Act. Purchase cost of the assets would have been already allowed as application of funds in the year of purchase. Therefore, loss on sale of these assets could not be treated as application of funds once again. Claim of depreciation made by the assessee could not be entertained as per the provisions of the Act. If the receivables on which claim of bad debts was made were earlier treated as income of the assessee-trust, they should be allowed as application of funds when such receivables had become bad and written off in the books of account, following the mercantile system of accounting. (AY 2010-11)
Sundaram Medical Foundation v. Dy. CIT (E) (2016) 45 ITR 500 (Chennai)(Trib.)

S. 12. Income of trust or institutions from contributions

305 **S. 12 : Voluntary contributions – Corpus donations received by the trust cannot be brought to tax despite the fact that the assessee – Trust was not registered u/s.12A/12AA of the Act. [S. 2(24)(iia), 12A, 12AA]**
Allowing the appeal of the assesse the Tribunal held that corpus donations received by the assessee trust cannot be brought to tax despite the fact that the assessee-trust was not registered u/s 12A/12AA of the Act. (AY. 2011-12)
Chandraprabhu Jain Swetamber Mandir v. ACIT (2016) 50 ITR 355 (Mum.)(Trib.)

S. 12A. Conditions for applicability of sections 11 and 12.

306 **S. 12A : Registration – Trust or institution – Maintaining separate books of account for research activity and for running hospital – Fulfilment of requirement of section 11(4A) of Act – Appellate Tribunal holding that activities incidental to main activity of hospital itself and not undertaken with profit motive. [S.11(4A)]**
The assessee-company was running a hospital which had been approved as a charitable institution under section 12A. It maintained separate books of account for the research activity and for running the hospital and filed its return of income showing nil income. Held that the activities were incidental to the main activity of the hospital itself and were not undertaken with a profit earning motive and noticed that for the AYs earlier and later to the present AYs the AO had allowed its claim for exemption. Maintenance of separate ledgers for each of the sources of income fulfilled the requirement of section 11(4A) of the Act. (AY. 2008-09)
CIT v. Pushpawati Singhania Research Institute for Liver, Renal and Digestive Diseases (2016) 386 ITR 43 (Delhi)(HC)

307 **S. 12A : Registration – Trust or institution – Some of the activities undertaken by it, which are ancillary or incidental to the main object of general public utility, it does not cease to be charitable in character so as to render it ineligible to claim registration. [S. 2(15), 12AA]**
Dismissing the appeal of the Revenue, Court held that predominant object of TDA/VIT was to secure integrated development and /or improvement of city/region, which falls within the express advancement of any other object of general public utility and on account of profit being earned by it through some of the activities undertaken by it, which are ancillary or incidental to the main object of JDA/VIT was to secure integrated development and /or improvement of city/ region which falls within the express advancement of any other object of general public utility and on account of profit being earned by it through some of the activities undertaken by it, which are ancillary or incidental to the main object of general public utility, it does not cease to be charitable in character so is to render it ineligible to claim registration u/s. 12A r.w.s 12AA. (AY. 2004-05 to 2006-07, 2010-11)
CIT v. Jodhpur Development Authority (2016) 139 DTR 1 / 287 CTR 473 (Raj.)(HC)

S. 12A : Registration – Trust or institution – Grant of registration was held to be justified. [S. 12AA] 308

CIT held that the objects and the activities of the trust were not genuine and rejected the registration. Tribunal held that, CIT cannot find out whether trust applied its income for its object while granting registration and CIT should consider the report of the JCIT before giving registration. On appeal dismissing the appeal of the revenue the Court held that; the ITAT being satisfied after considering the material on record granted registration ,order of ITAT upheld.

CIT v. Gopi Ram Goyal Charitable Trust (2016) 240 Taxman 749 (Raj.)(HC)

S. 12A : Registration – Trust or institution – While granting registration to a trust, Commissioner is empowered to examine only genuineness of trust. [S. 2(15)] 309

While granting registration to a trust, Commissioner is empowered to examine only genuineness of trust. He cannot examine the application of funds or ethical background of settlors called for at that stage. That unethical methods used for collection of funds and no charitable activities carried out cannot be the grounds on which registration can be refused.

Sree Anjaneya Medical Trust v. CIT (2016) 382 ITR 399 / 239 Taxman 229 / 135 DTR 199 (Ker.)(HC)

Editorial: Special Leave Petition against impugned order was granted, CIT v. Sree Anjaneya Medical (2016) 243 Taxman 142 (SC)

S. 12A : Registration – Trust or institution – Charitable purposes – Objectives of trust to be considered as a whole, and not in isolation – Matter remanded. [S. 80G(5)(vi)]. 310

Allowing the appeal the Court held that objectives of trust to be considered as a whole, and not in isolation. Intention of settler or executor cannot decide nature of trust. Tribunal to consider purpose and objectives of trust in light of trust deed and other documents.

Bangalore Urban & Rural District Co-op Milk Producers Societies Members and Employees Welfare Trust Bangalore Milk Union Ltd. v. DIT (E) (2016) 382 ITR 528 (Karn.)(HC)

S. 12A : Registration – Trust or institution – No obligation to maintain separate books of account – First proviso applies to the advancement of any other object of general nature – Withdrawal of registration was held to be not justifies. [S.2(15), 11(4A)] 311

Dismissing the appeal of revenue the Court held that if the predominant purpose is charitable, the earning of profit from an incidental activity like letting of property does not affect the charitable status. As the letting is a part of the educational activities, there is no obligation to maintain separate books u/s. 11(4A). As per CBDT Circular No. 11 of 2008, the first proviso to s. 2(15) applies to the 'advancement of any other object of general public utility'." (AY.2009-10)

DIT (E) v. Lala Lajpatrai Memorial Trust (2016) 383 ITR 345 / 136 DTR 233 / 240 Taxman 557 (Bom.)(HC)

S. 12A : Registration – Trust or institution – For granting registration enquiry into objects of trust is relevant and not the application of income.[S.12AA] 312

Dismissing the appeal of the revenue, the Court held that, having been satisfied about the genuineness of the objects and activities of the assessee-trust, the Appellate Tribunal

had committed no error in granting the application for registration preferred by the assessee under section 12A of the Act. For granting registration enquiry into objects of trust is relevant and not the application of income.
CIT v. Gopi Ram Goyal Charitable Trust (2016) 240 Taxman 749 / (2017) 392 ITR 285 (Raj.)(HC)

313 **S. 12A : Registration – Trust or institution – Religious objects – Tribunal was correct in allowing registration to assessee as the Trust had large number of other objects, which were for benefit of general public. [S.(2(15), 13]**
Dismissing the appeal of revenue the Court held that since apart from objects which were for benefit of a religious community, assessee-trust had large number of other objects, which were for benefit of general public, Tribunal was correct in allowing registration to assessee.
CIT v. Bayath Kutchhi Dasha Oswal Jain Mahajan Trust (2016) 243 Taxman 60 (Guj.)(HC)

314 **S. 12A : Registration – Trust or institution – Restriction imposed under first proviso to section 2(15) would be relevant only for purpose of grant of exemption under section 11 and not for cancellation of registration. [S. 2(15), 12AA]**
Allowing the appeal of the assessee, the Tribunal held that merely because income of assessee during relevant previous year exceeded prescribed limit, that, by itself, could not be a ground for considering assessee as non-charitable and for cancellation of its registration more so when DIT(E) failed to establish that either there was change in objects of institution on basis of which registration was granted earlier or activities of institution were not in accordance with its stated objects. (AY. 2009-10)
Bombay Chamber of Commerce & Industry v. ITO (2016) 157 ITD 861 (Mum.)(Trib.)

315 **S. 12A : Registration – Trust or institution – Pre-schooling is very much integral part of term 'education', rejection of application was held to be not justified. [S. 2(15), 11]**
The Commissioner rejected application for grant of registration on two reasons i.e. assessee was running pre-school which was stage prior to normal schooling, and therefore, its activities could not be treated as falling within gamut of 'education' as per S. 2(15) and second one, assessee trust was charging fees for issue of prospects, supply of school kit, admission fees etc., thus, it was engaged in business of commercial activity while running pre-school. Allowing the appeal the Tribunal held that pre-schooling is very much integral part of term 'education' as has been envisaged u/s. 2(15). As regards second objection, at stage of granting registration u/s. 12A, Commissioner was required to examine only genuineness of activities of trust and not commercial nature of those activities. Therefore, rejection of registration was not sustainable.(AY. 2013-14)
Green Acres Educational Trust v. Dy. CIT (2016) 159 ITD 671 / 182 TTJ 537 / 49 ITR 533 (Mum.)(Trib.)

316 **S. 12A : Registration – Trust or institution – Relief u/s 11 cannot be denied if registration was granted when an appeal was pending before CIT(A). [S.11, 12AA]**
During the pendency of appeal the assessee applied for registration and was accordingly granted registration under section 12AA. Those appeals were the continuation of the original proceedings. In view of the principle of purposive interpretation of statutes, an

assessment proceeding which is pending in appeal before the appellate authority should be deemed to be 'assessment proceedings pending before the Assessing Officer' within the meaning of that term as envisaged under the proviso. It follows therefrom that the assessee, which obtained registration under section 12AA during the pendency of appeal, was entitled for exemption claimed under section 11 even for the earlier assessment years pending.(AY. 2009-10, 2011-12)
SNDP Yogam v. ADIT (2016) 161 ITD 1 / (2017) 152 DTR 137 (Cochin)(Trib.)

S. 12A : Registration – Trust or institution – Corporation was for purpose of development of infrastructure of a specified industrial area with a predominant purpose of creating and developing facility for development of industries in state, hence entitle for registration.[S. 2(15), 12, U.P. Industrial Area Development Act, 1976] 317
Assessee, corporation was for purpose of development of infrastructure of a specified industrial area with a predominant purpose of creating and developing facility for development of industries in State, Allowing the appeal of the assessee the Tribunal held that There is no prime object or element of earning profit as private developer or builder and activities of acquiring of land and selling developed property is an incidental activity and profit earned therefrom has to be used towards objects of the appellant which are of charitable purposes and thus newly inserted proviso to section 2(15), cannot be pressed into service for denial of registration under section 12A.
New Okhla Industrial Development Authority v. CIT (2016) 161 ITD 105 / 181 TTJ 289 (Delhi)(Trib.)

S. 12A : Registration – Trust or institution – Charitable purpose – ICAI is an educational institute and hence its income would be exempt, as education falls within meaning of charitable purpose. [S. 2(15), 10(23C) 11] 318
Dismissing the appeal of the revenue the Tribunal held that; ICAI is an educational institute and hence its income would be exempt, as education falls within meaning of charitable purpose. (AY. 2010-11)
Dy. DIT v. Institute of Chartered Accountants of India (2016) 159 ITD 573 (Delhi)(Trib.)

S. 12A : Registration – Trust or institution – Imparting training in field of travel and tourism in aviation – Obtained approval/recognition of DGCA, IATA at global level – Activity would fall under purview of charitable purpose u/s. 2(15), hence the assessee is eligible for exemption. [S. (2(15), 11, 12] 319
Assessee was a society registered u/s. 12A, imparting training in field of travel and tourism in aviation as well as in other professional courses. Approval/recognition of sector specific competent authority like DGCA at national level and IATA at global level were obtained who gave approvals as per industry standard requirements by way of their agreements/approvals etc. on a year to year basis after due care and diligence and considering adherence of standards and requirements to be met in industry specific skill/qualification requirements. Assessee was entitled to avail exemption u/s. 11 and 12.(AY. 2008-09)
ADIT v. Bird Education Society for Travel & Tourism (2016) 160 ITD 18 / 181 TTJ 782 / (2017) 147 DTR 169 (Delhi.)(Trib.)

320 **S. 12A : Registration – Trust or institution – It was not necessary that institution should be established under an instrument and in instant case institution was established by an order of a Bishop, Commissioner was not correct to deny registration. [ITR, 1962, 17A]**

Registration u/s.2A it is not necessary that institution/trust should be established under an instrument; what is required is only a document evidencing creation of trust or establishment of institution together with a copy thereof. Assessee, a religious trust (Parish) created under conventional way by issuing a 'decree' under Cannon law by concerned Bishop, filed an application in prescribed Form No. 10A requesting for registration u/s.12A. Commissioner rejected application and denied registration on ground that assessee had not filed copy of instrument in support of creation of trust. Since creation of institution in question was evidenced by decree issued by Bishop, Commissioner was not correct to deny registration.

Merciful Jesus Church v. CIT (2016) 160 ITD 42 (Cochin)(Trib.)

321 **S. 12A : Registration – Trust or institution – Assessee building up its assets and receipts to use for educational purpose – Not profit motive – Registration to be granted. [S. 2(15)]**

The assessee was incorporated with the main object of providing education. The Commissioner refused to grant registration under Section 12 A of the Act on the ground that education was to be given free of cost to needy students and the assessee was expanding and increasing its receipts. On appeal to Tribunal it was held that the reasons recorded by the Commissioner that education was to be given free of cost to needy students and the assessee was expanding and increasing its receipts was not a criteria or relevant fact for gathering satisfaction as required under the Act. Merely because the assessee was increasing its assets and receipts that would not *ipso facto* establish that the assessee exists for the purpose of profit and carried out educational activities with a profit motive in the nature of trade, commerce or business as provided in the amended provision of Section 2(15). The Commissioner had not brought out any allegation to show that the receipts of the assessee's trust were not used for educational purposes and the receipt was used for other purposes beyond the objectives of the assessee. The assessee was eligible for registration under Section 12A of the Act.

Shree Balaji Educational Trust v. CIT (2016) 47 ITR 595 (Delhi)(Trib.)

322 **S. 12A : Registration – Trust or institution – Objects of the Trust cannot be regarded as non-charitable merely because one of the objects is related to conduct of coaching classes – Refusal of registration was held to be not justified [S. 2(15)]**

The Tribunal held that the objects of the Trust cannot be regarded as non-charitable merely because one of the objects is related to conduct of coaching classes which in fact, has not been pursued so far, fact that the assessee has been earning huge profits year after year does not justify refusal of registration, assessee is entitled to registration. CIT is directed to grant registration. (AY. 2013-14)

Bhai Gurudas Educational Trust v. CIT (2016) 177 TTJ 25 (UO) (Chd.)(Trib.)

S. 12A : Registration – Trust or institution – Running of school – Refusal of registration was held to be not justified. [S.11, 12AA] 323

Tribunal held that where assessee-educational trust undertook only one activity of running of school out of 21 objects for charitable purposes and it was charging reasonable fees from students and it also gave concession to poor and deserving students, registration of trust under section 12AA was to be granted.

Swami Dayanand Educational Trust v. CIT (2016) 157 ITD 564 (Delhi)(Trib.)

S. 12A : Registration – Trust or institution – Proviso to section 2(15) cannot be basis for cancellation of registration under section 12A [S. (2(15), 11] 324

Assessee was a golf club registered under section 12A. Commissioner cancelled its registration on ground that it was indulged in certain commercial activities, e.g., running bar and restaurant. On appeal Tribunal held that; since activities carried out by assessee were incidental to main object of club and Commissioner failed to prove that activities were not genuine, his order cancelling registration of assessee was bad in law. Whether issue as to whether activities of assessee are commercial in nature has to be considered by Assessing Officer while giving exemption under section 11 and not by Commissioner for cancellation of registration.

Chandigarh Golf Club v. CIT (2016) 156 ITD 264 / 177 TTJ 47 (UO) (Chd.)(Trib.)

S. 12A : Registration – Trust or institution – Commissioner is empowered to cancel registration granted to a society under section 12A from assessment year 2011-12 onwards, he cannot assume such power for earlier assessment years – Consideration of first proviso to section 2(15) has no role to play in matters relating to registration of a trust or institution under section 12A in respect of granting or declining or cancelling registration.[S. 2(15), 12AA] 325

Amendment to section 12AA(3) giving power to Commissioner to cancel registration granted under section 12A has been conferred by Finance Act, 2010, which explicitly provides that said powers are available to Commissioner with effect from 1-6-2010 and same accordingly can be applied for assessment year 2011-12 and subsequent assessment years and, in view of this, Commissioner, could not assume jurisdiction to cancel registration of assessee society from assessment year 2009-10 onwards. Tribunal also held that consideration of first proviso to section 2(15) has no role to play in matters relating to registration of a trust or institution under section 12A in respect of granting or declining of registration or in respect of cancellation. Amendment to proviso to section 2(15) brought by Finance Act, 2008 cannot be basis for cancellation of registration already granted in earlier year under section 12A. Commissioner had not given findings that activities of assessee were not genuine or not being carried out in consonance with objects of assessee, action of Commissioner in cancelling registration was not as per law.

Punjab Cricket Association v. CIT (2016) 157 ITD 227 (Chd.)(Trib.)

S. 12AA. Procedure for registration

326 **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) results in deemed grant of registration. [S. 2(15)]**

In Society for the *Promotion of Education, Adventure Sport & Conservation of Environment v. Commissioner of Income Tax (2008) 216 CTR (All) 167*, the Allahabad High Court held that non disposal of an application for registration before the expiry of six months as provided u/s 12AA (2) would result in deemed grant of registration. However, this was reversed by the Full Bench of the Allahabad High Court in *CIT v. Muzafar Nagar Development Authority (2015) 372 ITR 209*. The appeal filed by the department in the case of Society for the Promotion of Education came up before the Supreme Court. HELD by the Supreme Court disposing of the appeal:

(i) The short issue is with regard to the deemed registration of an application under Section 12AA of the Income Tax Act. The High Court has taken the view that once an application is made under the said provision and in case the same is not responded to within six months, it would be taken that the application is registered under the provision.

(ii) The learned Additional Solicitor General appearing for the appellants, has raised an apprehension that in the case of the respondent, since the date of application was of 24.02.2003, at the worst, the same would operate only after six months from the date of the application.

(iii) We see no basis for such an apprehension since that is the only logical sense in which the Judgment could be understood. Therefore, in order to disabuse any apprehension, we make it clear that the registration of the application under Section 12AA of the Income Tax Act in the case of the respondent shall take effect from 24.08.2003.

(iv) Subject to the above clarification and leaving all other questions of law open, the appeal is disposed of with no order as to costs. (AY. 1998-99)

CIT v. Society for the Promotion of Education, adventure sport & Conservation of Environment (2016) 382 ITR 6 / 133 DTR 1 / 284 CTR 207 / 238 Taxman 330 (SC)

Editorial : From the judgment of Allahabad High Court in, Society for the Promotion of Education, adventure sport & Conservation of Environment v. CIT (2008) 216 CTR 167 / 5 DTR 329 (All)(HC). Though the Supreme Court left "all other questions of law open", the impact of the verdict is that the law laid down in Society for the Promotion of Education, Adventure Sport & Conservation of Environment vs. Commissioner of Income Tax (2008) 216 CTR (All) 167 that there is a deemed registration is approved and the law laid down by the Full Bench in CIT v. Muzafar Nagar Development Authority (2015) 372 ITR 209 is no longer good law.

327 **S. 12AA : Procedure for registration – Trust or institution – If proviso to section 2(15) becomes applicable, it cannot be a valid ground for cancellation of registration. [S. 2(15)]**

The High Court after following the judgment in case of *DIT (E) v. Karnataka Badminton Association (2015) 378 ITR 700 (Karn.)(HC)* held that merely because the provision

to section 2(15) becomes applicable, cannot be a ground to cancel registration u/s. 12AA(3), as it is not the condition stipulated under the said section for cancellation of registration.
DIT v. Sri Kuthethur Gururajachar Charities (2016) 242 Taxman 292 (Karn.)(HC)
Editorial: SLP is granted to the revenue; DIT v. Sri Kuthethur Gururajachar Charities (2016) 242 Taxman 254 (SC).

S. 12AA : Procedure for registration – Trust or institution – Fresh deed was not required to be made and assessee was free to alter or correct mistakes in Trust Deed and, thereafter, comply with procedure prescribed in relevant clause. 328
The assessee filed an application for availing benefits under Income-tax Act. The Commissioner the scrutinized documents and intimated the assessee that there were certain defects in the Trust Deed. He called upon the assessee to correct the mistakes in the trust deed by preparing a fresh deed. On writ allowing the petition, the Court held that fresh deed was not required to be made and assessee was free to alter or correct mistakes in Trust Deed and, thereafter, comply with procedure prescribed in relevant clause.
Yogakshemam Loans Ltd. v. ITO (2016) 243 Taxman 102 (Ker.)(HC)

S. 12AA : Procedure for registration – Trust or institution – Company – Charitable activity – Commissioner was directed to grant the registration [S. 11, 12A, 80G, Companies Act, S. 25] 329
Dismissing the appeal of revenue, the Court held that; a perusal of order of Commissioner showed that he declined to grant registration to assessee company by reading its ancillary objects as its main objects as also on basis that in future company may, under its ancillary/incidental objects, indulge in activities, which would be of non-charitable character. There was nothing on record to show that company was indulging in any activity which was not in nature of charity. Further there was also nothing on record to show that company did not meet any conditions prescribed under Act for grant of registration to make it eligible for grant of exemption under section 11 and, consequently, under section 80G. Company had been granted registration under section 25 of Companies Act which as per Tribunal was a recognition of fact that company was essentially established for purpose of education which was its main object. Tribunal was right in directing the Commissioner to grant the registration; however, while granting registration, it would be open to the Registering Authority to grant the same by imposing any condition, which would bind the Company to indulge in only charitable activities. It will also be subject to an affidavit or undertaking to be filed by the Company that it would not breach any of the imposed conditions and further that surplus funds would be utilized only for educational purposes and would not be diverted to any other non-educational objectives.
CIT v. IILM Foundation Academy (2016) 389 ITR 148 / 243 Taxman 285 (P&H)(HC)

330 **S. 12AA : Procedure for registration – Trust or institution – Submission of audited accounts along with application – Directory and not mandatory – Application for registration submitted without audited accounts – Application not to be treated as defective – Registration to be allowed from date of filing application not date on which defects in application cured.**

Held, application under section 12AA was filed without any defect and the audited accounts were submitted later on because submission of audited accounts along with the application was not mandatory. There was no error in the order of the Tribunal which allowed the registration from the date of submission of the application by the assessee. The Tribunal and the Department had not pointed out any defect in the application other than the non-filing of the audited accounts with the application, which was not mandatory.

CIT v. Garment Exporters Association of Rajasthan (2016) 386 ITR 20 / 138 DTR 214 / 289 CTR 652 (Raj.)(HC)

331 **S. 12AA : Procedure for registration – Trust or institution – The DIT has no jurisdiction to cancel registration of a charitable institution on the ground that it is carrying on commercial activities which are in breach of the amended definition of "charitable purpose". [S.(2(15), 11]**

Dismissing the appeal of revenue, the Court held that it is evident from Circular No.21 of 2016 dated 27th May, 2016 that the amendment to the definition of charitable purpose by adding of the proviso, would not *ipso facto* give jurisdiction to the Commissioner of Income Tax to cancel the Registration under Section 12AA(3) of the Act. The jurisdiction to cancel the Registration would only arise if there is any change in the nature of activities of the institution. The above Circular clearly directs the authorities not to cancel the Registration of the charitable institution just because the proviso to section 2(15) of the Act comes into play as receipts are in excess of ₹ 25 lakhs in a year. It also refers to Section 13(8) of the Act which provides that where the receipts on account of commercial activities is in excess of the limit of ₹ 25 lacs provided in second proviso to section 2(15) of the Act, then the Assessing Officer would deny the benefit of registration as a Trust for the subject Assessment Year while framing the Assessment. The Court also held that the submission made on behalf of the Revenue that the Circular No.21 of 2016 would have only prospective effect in respect of Assessment made subsequent to the amendment under Section 2(15) of the Act w.e.f. 1st April, 2016 is also not sustainable. The amendment in Section 2(15) of the Act brought about by Finance Act, 2016 w.e.f. 1st April, 2016, is essentially that where earlier the receipts in excess of ₹ 25 lakhs on commercial activities would exclude it from the definition of 'charitable purpose' is now substituted by receipts from commercial activities in excess 20% of the total receipts of the institution. In the above view, Circular No.21 of 2016 directs the Officer of the Revenue not to cancel Registration only because the receipts on account of business are in excess of the limits in the proviso to Section 2(15) of the Act would also apply in the present case. The impugned order has held that cancellation of a Registration under Section 12AA(3) of the Act, can only take place in case where the activities of trust or institution are not genuine and/or not carried on in accordance with its objects. The aforesaid Circular No.21 of 2016 is in

line of the finding of the Tribunal in the impugned order. The submission on behalf of the Revenue that the Trust is not genuine because it is hit by proviso to Section 2(15) of the Act, is in fact, negatived by Circular No.21 of 2016. In fact, the above Circular No.21 of 2016 clearly provides that mere receipts on account of business being in excess of the limits in the proviso would not result in cancellation of Registration granted under Section 12AA of the Act unless there is a change in nature of activities of the institution. Admittedly, there is no change in nature of activities of the institution during the subject Assessment Year. The further submission on behalf of the Revenue is that, looking at the quantum of receipts on account of commercial activities, it is unlikely/ improbable that in the subsequent Assessment Years, the receipts would fall below ₹ 25 lakhs and therefore, the Commissioner is entitled to cancel the Registration. The aforesaid submission made on behalf of the Revenue is based not on facts as existing but on probability of future events. We are unable to accept the submission based on clairvoyance. Further, we are unable to understand what prejudice is caused to the Revenue since whenever the receipts on account of commercial activities is in excess of the limits provided in proviso to Section 2(15) of the Act, the Assessing Officer is mandated/ required to deny exemption under Section 11 of the Act as provided in Circular No.21 of 2016 dated 27th May, 2016. Accordingly, the issue stands covered in favour of the assessee by virtue of Circular No.21 of 2016. (AY. 2009-10)
DIT (E) v. Khar Gyamkhana (2016) 385 ITR 162 / 137 DTR 249 / 240 Taxman 407 / 287 CTR 303 (Bom.)(HC)

S. 12AA : Procedure for registration – Trust or institution – Institution carrying out charitable or religious activities outside India, would also be entitle to registration. [S. 2(15), 11, 12] 332
Allowing the appeal of the assessee the Tribunal held that merely because assessee trust intended to carry out its activities outside India, it could not be denied registration, if the Trust is genuine. (AY. 2013-14, 2014-15)
Foundation for Indo-German Studies v. DIT (2016) 161 ITD 226 (Hyd.)(Trib.)

S. 12AA : Procedure for registration – Trust or institution – Commissioner was not justified in cancelling registration granted to assessee – Revenue has not placed any material on record to demonstrate that the Trust was either not genuine or its activities were not as professed in the Trust Deed. [S. 2(15), 11, 12A] 333
On perusing the objectives of the Trust as detailed above, it is seen that the objects of the assessee are *inter alia* to promote and advance Medical and Allied Sciences in different branches and to promote improvement in Public Health and Medical Education. Thus the objects of the Trust, *prima facie*, appears to be of charitable in nature. Further, we are of the view that in order to ascertain the true nature and purpose of the Trust, the objectives are to be considered as a whole and not in isolation. Another aspect of issue is the introduction of first proviso of section (15) holding that activities of the trust was commercial in nature. In this connection, we find that the Amritsar Bench of Tribunal in the case *Kapurthala Improvement Trust v. CIT [2015] 154 ITD 637* has held that first proviso to section 2(15) have no role in matters relating to registration of a trust or institution under section 12A or 12AA for granting or declining registration or in

respect of cancellation of registration. Further, the Revenue has not placed any material on record to demonstrate that the Trust was either not genuine or its activities were not as professed in the Trust Deed.
Indian Medical Association v. Addl. DIT(E) (2016) 49 ITR 7 (Delhi)(Trib.)

334 **S. 12AA : Procedure for registration – Trust or institution – Commissioner was not justified in cancelling registration granted to assessee on the ground that some of the activities of the trust were not charitable in nature. [S. 2(15), 11, 12A]**
The status of registration under section 12A or 12AA has no bearing, as recognized in Section 13(8), on the availability of exemption under section 11. To the extent income of the assessee arises from the activities hit by the first proviso to Section 2(15) in any assessment year, the assessee will be disentitled for exemption under section 11 to that extent. The disentitlement for exemption under section 11, as a result of the activities of an assessee being held to be not for charitable purposes under section 2(15) read with proviso thereto, is in respect of entire income of the assessee trust or institution but only for the assessment year in respect of which the first proviso to Section 2(15) is triggered. If the status of registration is to be declined to an assessee only on the ground that some of the objects may be hit by the first proviso to Section 2(15) but the assessee's receipts from such activities do not exceed specified threshold in a particular assessment year, the assessee will be subjected to undue hardship in the sense that while the assessee will be disentitled to exemption under section 11 due to denial of registration under section 12A or 12AA which is *sine qua non* for admissibility of exemption under section 11. On the other hand, if the status of registration is granted to the assessee even when some of the objects may be hit by the first proviso to Section 2(15) and the assessee's receipts from such activities do exceed specified threshold, no prejudice will be caused to the legitimate interests of the revenue because, notwithstanding the status of registration and by the virtue of section 13(8), the assessee will not be eligible for exemption under section 11 in respect of such income. It is only elementary that a statutory provision is to be interpreted *ut res magis valeat quam pereat*, i.e. to make it workable rather than redundant.
Improvement Trust Bathinda v. CIT (2015) 70 SOT 345 (Amritsar)(Trib.)

335 **S. 12AA : Procedure for registration – Trust or institution – Refusal of registration was held to be justified as the Commissioner of Income Tax has not found the object of the society and genuineness of its activities as satisfactory. [S. 2(15), 12]**
Assessee, a registered society was running an educational institution. Assessee applied for to CIT, Haldwani for granting registration under section 12AA of the ACT. CIT rejected the application on the ground that the members of the Management Committee has siphoned off or misappropriated the income of the Society and thus the activity of the Society, cannot be termed as genuine. On appeal dismissing the appeal the Tribunal held that it is evident that the Commissioner of Income Tax has not found the object of the society and genuineness of its activities as satisfactory, and refusal of registration was held to be valid.
Corbett Educational Society v. CIT (2016) 48 ITR 743 / 181 TTJ 315 / 142 DTR 335 (Delhi) (Trib.)

S. 12AA : Procedure for registration – Trust or institution – Bar Council and Advocates' welfare fund are two separate legal entities; they require separate registration for claiming income-tax exemption. 336

Bar Council is constituted under Advocate Act, 1961 while Advocates' Welfare Fund is constituted under Advocates' Welfare Fund Act, 2002. Hence, these are separate legal entities and, thus, registration is to be obtained separately by them, for claiming income tax exemption under section 11. (AY. 2003-04 to 2010-11)

Advocates Welfares Fund of The Bar Council of Tamil Nadu v. DDIT (E) (2016) 50 ITR 209 (Chennai)(Trib.)

S. 12AA : Procedure for registration – Trust or institution – Ancient temple – Certificate of registration with Endowments Department would be a document evidencing creation of trust for purpose of registration. [S. 12] 337

Assessee is an ancient temple registered with Endowments Department, Andhra Pradesh. CIT(E) rejected application on ground that trust deed was not produced along with application. On appeal allowing the appeal, the Tribunal held that; Registration certificate issued by Endowments Department established that temple was a religious and charitable institution and thus, evidenced creation of trust. Therefore, eligible for registration. (AY. 2015-16)

Sri Seetharamachandra Swamy Temple v. CIT (E) (2016) 159 ITD 655 (Hyd.)(Trib.)

S. 12AA : Procedure for registration – Trust or institution – Execution of a formal deed of trust is not necessary for grant of registration, Trust can be created orally. [S.12A, 13] 338

Allowing the appeal of the assessee the Tribunal held that (a) Execution of a formal deed of trust is not necessary for grant of registration, Trust can be created orally (b). Environmental protection is held to be charitable in nature (c) Expenditure is not relevant for registration (d) Activities of Trust to benefit of particular community would not debar the institution for claiming exemption (e) Supreme head of the Trust taking food and clothes etc. from trust funds is not violate the provision of section 13 (AY. 2011-12)

Tsurphu Labrang v. DIT (E) (2016) 159 ITD 848 / 182 TTJ 176 / (2017) 148 DTR 246 (Delhi)(Trib.)

S. 12AA : Procedure for registration – Trust or institution – Registration has to be granted from first day of relevant financial year. Delay of 1875 days in filing the appeal was condoned. [S. 254(1)] 339

Assessee was an authority constituted under the U. P. Urban Planning and Development Act, 1973. It was initially denied registration u/s. 12AA by the Commissioner. Tribunal directed the Commissioner to grant registration, however while granting the registration the Commissioner granted the registration with effect from 31-3-2003 and not from 1-4-2002. Assessee filed rectification application which was rejected. On appeal the Tribunal held the registration has to be granted from first day of relevant year. Delay of 1875 days in filing the appeal was condoned. ITAT held that in terms of scheme of Act, registration had to be granted from first day of relevant financial year.

Ghaziabad Development Authority v. CIT (2016) 161 ITD 637 (Delhi)(Trib.)

340 **S. 12AA : Procedure for registration – Trust or institution – Advocate's Welfare Fund – Bar Council and Advocates' Welfare Fund are two separate legal entities; they require separate registration for claiming income-tax exemption [S. 2(15), 11]**

Bar Council is constituted under Advocate Act, 1961 while Advocate Welfare Fund is constituted under Advocates' Welfare Fund Act, 2002; these are separate legal entities and, thus, for claiming income tax exemption u/s. 11, registration is to be obtained separately.(AY. 2003-04 to 2010-11)

Advocates Welfare Fund of Bar Council of Tamil Nadu v. DIT (2016) 160 ITD 66 / 50 ITR 209/ 182 TTJ 922 (Chennai)(Trib.)

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

Allowing the appeal the Tribunal held that; registration cannot be rejected only on the ground that the Trust is religious Trust.

Sri Guru Har Rai ji Religious & Charitable Trust v. CIT (2016) 179 TTJ 46 (UO) (Chd.) (Trib.)

342 **S. 12AA : Procedure for registration – Trust or institution – Cancellation of registration – No satisfaction that the activities are not as per the objects of the trust – Cancellation order quashed**

The assessee was an association of builders registered under section 12A of the Income-tax Act, 1961. The registration was cancelled by the Director of Income-tax (Exemption) under section 12AA(3) on the ground that the activities of the assessee were in the nature of trade, commerce or business in violation of the proviso to section 2(15). The Tribunal held that under the provisions of section 12AA(3), registration granted under section 12A or section 12AA could be cancelled only if the Commissioner or Director was satisfied that, firstly, the activities of such trust or institution were not genuine or, secondly, were not being carried out in accordance with the objects of the trust or institution. The Director of Income-tax had not recorded any satisfaction that the activities of the assessee was either not genuine or not being carried out in accordance with the objects for which it was granted registration under section 12A. From the nature of receipts such as membership subscription, contribution by members for holding exhibition and conference contribution for programmes it was seen that the assessee had carried out activities in terms of its objects only. It was not the case of the Director of Income tax that the activities were carried out for outsiders or for commercial purposes solely to earn business receipts. To be hit by the proviso to section 2(15), the dominant object of general public utility was to be in the nature of trade, commerce or business. But none of the activities like holding conferences, seminars, publishing journals for its members could be held to be in the nature of business, trade or commerce. Since there was no material on record to show that the assessee was carrying out activities on business or commercial principles or outside of its objects, it could not be held that the assessee's case was hit by the proviso to section 2(15) and the registration granted earlier could not be cancelled under section 12AA(3) of the Act.

Builders Association of India v. DCIT (2016) 46 ITR 295 (Mum.)(Trib.)

S. 12AA : Procedure for registration – Trust or institution – Contribution of corpus fund was not by settlor – Registration cannot be refused. 343

Assessee-trust was running an educational institution. It filed an application seeking registration u/s. 12AA. Commissioner did not dispute objects of trust as charitable in nature. He, however, refused to grant registration on ground that entire amount of initial corpus fund had not been brought in by settlors and, thus, trust could not be said to have come into existence. At time of granting registration by Commissioner what is relevant is, whether objects of trust are charitable and activities carried out are genuine in nature, therefore, merely because a part of initial corpus fund had not been brought in by settlors at time of execution of trust deed, could not be a ground to decline registration to assessee-trust. Even otherwise, since Commissioner had passed an order refusing registration to assessee-trust beyond stipulated period of six months u/s. 12AA(2), impugned order passed by him was not sustainable.

Broadway Charitable Trust v. CIT (2016) 158 ITD 886 (Kol.)(Trib.)

S. 12AA : Procedure for registration – Trust or institution – Registration of a society can be cancelled only in those cases where registration has been granted u/s. 12AA(1)(b). 344

Under section 12AA(3) registration of society can be cancelled only in those cases where registration has been granted u/s. 12AA(1)(b) but this section nowhere empowers DIT to cancel or withdraw registration granted u/s. 12AA.

Technological Institute of Textile & Science v. DIT (2016) 158 ITD 808 (Kol.)(Trib.)

S. 12AA : Procedure for registration – Trust or institution – Provisions of section 13(1)(b) cannot be invoked at time of granting registration. [S. 13(1)(b)] 345

Assessee-society was formed to provide medical aid, educational institutions, scholarships, sports, blood donation camps, other facilities and activities on teachings of Bhai Mansa Singh Ji. It filed an application for registration under section 12AA. Commissioner rejected the application on the ground of genuineness of the Trust. On appeal the Tribunal held that the Commissioner has not questioned the charitable object of the Trust and also nor he had been able to bring on record any material to prove that activities of assessee were not genuine, impugned order passed by him was to be set aside.

Bhai Mansa Singh Ji Welfare Society (Regd.) v. CIT (2016) 156 ITD 117 (Chd)(Trib.)

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

S. 13 : Denial of exemption – Trust or institution – Payment of lease rent or interest on borrowed funds to trustees – Exemption cannot be denied if the payment being excessive or unreasonable. [S.11, 12A] 346

Allowing the appeal of assessee the Court held that, mere payment of lease rent or interest on borrowed funds to trustees without there being any element of such payments being excessive or unreasonable, would not fall within mischief of section 13(1)(c). Since there was no excessive or unreasonable payments to trustees, exemption could not be denied to assessee-trust.(AY. 2003-04)

Shree Kamdar Education Trust v. ITO (2016) 243 Taxman 76 (Guj.)(HC)

347 **S. 13 : Denial of exemption – Trust or institution – Investment restrictions – Exemption allowed if documentary evidence were submitted to prove that the donation was used for education and health purposes – Extract from foreign agency website is not evidence that donation was not used for charitable purposes.**

Pursuant to an agreement, the assessee trust had received donations from a Canadian donor, wherein one part of the agreement related to construction of a temple and the other part related to utilisation of funds for the charitable activities. Based on the information of Form FC-3 under Foreign Contribution (Regulation) Act available on the Canadian resource agency website, the AO alleged that the donations received by the Assessee were not utilised as per the directions of the donor and consequently, he assessed the difference as income. The ITAT held apart from the extract of the website which was not an admissible evidence either as a primary evidence or secondary evidence, no other evidence was available on the file of the Assessing Officer. The donations were used completely for charitable activities since the Assessee had submitted the necessary agreement along with documentary evidences and photographs to prove that the same was utilised as per the mandate of the Canadian donor. (AY. 2006-07)

DCIT v. Om Sakthi Narayani Siddar Peedam Charitable Trust (2016) 47 ITR 787 (Chennai)(Trib.)

348 **S. 13 : Denial of exemption – Trust or institution – Investment restrictions – Loans were given out of funds borrowed from founder members of society, order denying exemption was to be set aside. [S. 11, 12]**

Allowing the appeal of the assessee, the Tribunal held that loans were given out of funds borrowed from founder members of society, Assessing Officer was not correct in holding that assessee had diverted funds in violation of provisions of section 13(1)(d). Even otherwise, Assessing Officer could not borrow findings of Chief Commissioner in order to deny benefit of exemption under section 11, unless he had specifically pointed out any violations referred to in any of provisions of section 13. Accordingly order denying exemption under section 11, was to be set aside. (AY. 2008-09)

Sri Koundinya Educational Society v. ACIT (2016) 159 ITD 416 / 181 TTJ 677 (Visakha) (Trib.)

349 **S. 13 : Denial of exemption – Trust or institution – Investment restrictions – Advanced money to an entity where president and his wife were directors – Not approved investment – Maximum marginal rate applicable [S. 11, 12AA, 164(2)]**

The assessee sold a piece of land for an amount and advanced the amount to Anna Investments and claimed exemption of the capital gains. The Assessing Officer treated the income from the sale of land as income of the assessee and denied the exemption under section 11 of the Income-tax Act, 1961, as the amount advanced to Anna Investments was not an approved investment under section 11(5). The Commissioner (Appeals) held that the assessee advanced the money out of sale of land to Anna Investments where the president and his wife of the assessee trust were directors, that the view of the Assessing Officer that there was violation of section 13 was incorrect, that the Assessing Officer had given a finding that there was a valid registration under

section 12AA and this was not cancelled or withdrawn by the Commissioner and that exemption under section 11 could not be denied. He directed the Assessing Officer to allow the exemption under section 11. Regarding investment of sale proceeds of land in Anna Investments he observed that making mere advance to third parties could not be treated as utilisation for investment in capital asset within the meaning of section 11(5). Accordingly, he rejected the argument of the assessee that making advance out of sale proceeds of capital asset for purchase of another asset was investment in new capital asset. Further, he observed that the capital gain arising out of transfer of capital asset to be assessed under section 48 and the rate was to be applied under section 112 and not at the maximum marginal rate suggested by the Assessing Officer. The Tribunal held that (i) that the assessee advanced the amount on June 30, 2006, to Anna Investments and the capital gain arose on sale of land during the financial year on March 31, 2007. Anna Investments returned the money on March 31, 2009, and the amount was not invested in a new asset within the previous year. Therefore, the exemption under section 11(1)(a) was not available to the assessee. (ii) That the requirements of section 13(1)(c) (ii) were that the trust should apply the funds in a concern in which they themselves are interested, if there was a mandatory provision in the trust deed for such a purpose. Such a mandate in the trust deed should have existed and could not have been brought in by amending the trust deed at a later stage after that crucial date, even if the trust deed authorised the trustees to amend the trust deed to bring in the mandatory condition or requirement for them to invest funds of the trust in a concern in which they might be interested. As the assessee invested funds in a limited company where the trustee was the managing director and his wife was a director, the Assessing Officer was correct in invoking the provisions of section 13(1)(c) and denying exemption to the assessee under section 11. (iii) That the proviso to section 164(2) inserted with effect from April 1, 1985, enjoins that where the non-exempt portion of the relevant income arises as a consequence of the contravention of the provisions of section 13(1)(c) or (d), the income would be subject to tax at the maximum marginal rate. Therefore, the benefit of section 112 so as to assess the gain from the transfer of the capital asset could not be given to the deemed association of persons. (AY. 2007-08)

DDIT (E) v. India Cements Educational Society (2016) 157 ITD 1008 / 46 ITR 80 (Chennai) (Trib.)

S. 13 : Denial of exemption – Trust or institution – Investment restrictions – Funds utilised for purchase of car in the name of Trustee – Denial of exemption should be limited to amount which was diverted. [S. 11] 350

Tribunal held that where funds of assessee-trust were utilized for purchase of car in name of its trustee, there was violation of section 13(2)(b), read with section 13(3); denial of exemption under section 11 should be limited to amount which was diverted in violation of section 13(2)(b). (AY. 2004-05)

Audyogik Shikshan Mandal v. ITO (2016) 156 ITD 1 / 176 TTJ 202 (TM)(Pune)(Trib.)

351 **S. 13 : Denial of exemption – Trust or institution – Investment restrictions – Salary to executive director – Salary being reasonable there is no violation, exemption cannot be denied. [S. 11, 12AA]**

Dismissing the appeal of revenue the Tribunal held that where there was failure by Assessing Officer to indicate in assessment order that salary paid by assessee-society to executive director was unreasonable, no violation of provision of section 13(1)(c) could be alleged and exemption could not be denied. (AY. 2011-12)

Dy. CIT v. Gideons International in India (2016) 156 ITD 666 (Hyd.)(Trib.)

S. 13A : Special provision relating to incomes of political parties

352 **S. 13A : Political parties – Requirement of maintaining audited accounts and furnishing those accounts in terms of the proviso to S. 13A was mandatory – Interest was liable to be charged on the tax amount due.[S. 2(24)(iia), 4, 56, 57(iii), 139(4B), 234A, 234B, Rule 46A]**

Allowing the Revenue's appeal, Hon'ble HC held that 13A is not a computational section. While income by way of voluntary contributions u/s. 13A, mere fact that income by way of voluntary contribution of a Political Party was not deemed to be income u/s. 2(24)(iia) does not place it outside the purview of 'Income from other sources". Requirement of maintaining audited accounts and furnishing those accounts in terms of the proviso to S. 13A was mandatory. Further the court also held that notwithstanding that the AO may not have separately dealt with the issue of interest in the Assessment order, interest was liable to be charged on the tax amount due u/s. 234A & 234B of the IT Act. (AY. 1994-95)

CIT v. Indian National Congress (I) (2016) 383 ITR 99 / 239 Taxman 72 / 285 CTR 97 / 134 DTR 1 (Delhi)(HC)

353 **S. 13A : Political parties – Exemption cannot possibly be granted from payment of income tax for that financial year. Therefore assessee was not entitled to any benefit. [S. 139(4B)]**

The issue before the Hon'ble HC was whether assessee was entitled for benefit u/s. 13A of the IT Act as the return was filed only pursuant to notice u/s. 142(1) that too containing incomplete details. Only after the Chennai Bank Account of the assessee was detected that the assessee came forward to make a disclosure of the Bank Accounts of its Mumbai & Bangalore units. Either the President of party did not disclose the full facts to the auditor or the auditor gave an incorrect report without qualifying the report. The Hon'ble HC allowed appeal of the Revenue and held that Tribunal's findings of granting exemption u/s. 13A was nothing short of perverse as it was wholly contrary to and unsupported by the documents on record. When in any particular financial year, a political party was unable to maintain its accounts for any reason whatsoever or satisfy the pre conditions set out in the proviso to S. 13A, an exemption cannot possibly be granted from payment of income tax for that financial year. Therefore assessee was not entitled to any benefit u/s. 13A of IT Act. (AY. 1995-96)

CIT v. Janata Party (2016) 383 ITR 146 / 239 Taxman 194 / 285 CTR 194 / 134 DTR 49 (Delhi)(HC)

CHAPTER IV
COMPUTATION OF TOTAL INCOME

S. 14A. Expenditure incurred in relation to income not includible in total income

S. 14A : Disallowance of expenditure – Exempt income – Interest – Sufficient interest free funds to invest in tax free investments – Disallowance cannot be made. [R.8D] 354
Dismissing the appeal of the revenue the Court held that, the assessee had sufficient interest free funds to invest in tax free investments hence disallowance cannot be made
PCIT v. Adani Enterprises Ltd. (2016) 241 Taxman 542 / (2017) 152 DTR 102 (Guj.)(HC)

S. 14A : Disallowance of expenditure – Exempt income – Finding that no expenditure had been incurred in earning exempt income – Disallowance is not justified [R.8D] 355
Dismissing the appeal of revenue the Court held that the assessee had sufficient funds available to it on which no interest was payable. The Appellate Tribunal was justified in holding that no expense was attributable to the exempted income.(AY. 2002-03)
CIT v. Max India Ltd. (No. 2) (2016) 388 ITR 81 / 75 taxmann.com 268 (P&H)(HC)

S. 14A : Disallowance of expenditure – Exempt income – Non-maintenance of separate accounts for investments from borrowed funds and from circulating capital of business – Disallowance on basis of percentage of dividend to income and reducing disallowance was held to be proper. 356
Tribunal held that due to non-maintenance of separate accounts for investments from borrowed funds and from circulating capital of business, disallowance on basis of percentage of dividend to income and reducing disallowance was held to be proper. Dismissing the appeal the Court held that the Department was unable to point out any mistake or infirmity in the reasonings advanced by the Commissioner (Appeals) and affirmed by the Tribunal. (AY. 2004-05)
CIT v. Shreekant Phumbhra (2016) 387 ITR 523 (Cal.)(HC)

S. 14A : Disallowance of expenditure – Exempt income – Disallowance was held to be justified, assessee failed to prove interest free fund exceeded the value of investment. [R. 8D] 357
Dismissing the appeal of the assessee the Court held that the assessee failed to prove that interest free fund exceeded value of investment made and thereafter failed to justify the quantification of disallowance made on its own for exempted income, the AO was justified in making disallowance by applying Rule 8D. (AY. 2010-11)
Bharath Beedi Works (P.) Ltd. v. ACIT (2016) 242 Taxman 492 (Karn.)(HC)

S. 14A : Disallowance of expenditure – Exempt income – The fact that the AO did not expressly record his dissatisfaction with the assessee's working does not mean that he cannot make the disallowance. The AO need not pay lip service and formally record dissatisfaction. It is sufficient if the order shows due application of mind to all aspects. [R. 8D] 358
Dismissing the appeal of assessee the Court held that (i) This Court in *CIT v. Consolidated Photo & Finvest Ltd. (2012) 25 Taxman.com 371 (Delhi)*. following the judgment of the Bombay High Court in *Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT (2010)*

194 Taxman 203, held that the AO has to take an overall view and not a "piecemeal decision" regarding merits of the disallowance. A close analysis of that judgment would show the AO's view was reversed by the CIT(A) in that case which was ultimately affirmed by the ITAT. This factor significantly dissuaded the Court from exercising its jurisdiction under Section 260A of the Act.

(ii) Undoubtedly, the language of Section 14A presupposes that the AO has to adduce some reasons if he is not satisfied with the amount offered by way of disallowance by the assessee. At the same time Section 14A(2) as indeed Rule 8D(i) leaves the AO equally with no choice in the matter inasmuch as the statute in both these provisions mandates that the particular methodology enacted should be followed. In other words, the AO is under a mandate to apply the formulae as it were under Rule 8D because of Section 14A(2). If in a given case, therefore, the AO is confronted with a figure which, prima facie, is not in accord with what should approximately be the figure on a fair working out of the provisions, he is but bound to reject it. In such circumstances the AO ordinarily would express his opinion by rejecting the disallowance offered and then proceed to work out the methodology enacted.

(iii) In this instance the elaborate analysis carried out by the AO – as indeed the three important steps indicated by him in the order, shows that all these elements were present in his mind, that he did not expressly record his dissatisfaction in these circumstances, would not per se justify this Court in concluding that he was not satisfied or did not record cogent reasons for his dissatisfaction to reject the AO's conclusion. To insist that the AO should pay such lip service regardless of the substantial compliance with the provisions would, in fact, destroy the mandate of Section 14A.

(iv) Having regard to these facts, this Court is satisfied that the disallowance which is otherwise in accord with Rule 8D(c) was justified. No substantial question of law arises. The appeal is dismissed. (ITA No. 470/2016, dt. 21.11.2016)(AY. 2009-10)

IndiaBulls Financial Service Ltd. v. DCIT (Delhi) (HC); www.itatonline.org

359 **S. 14A : Disallowance of expenditure – Exempt income – If the investments in tax free bonds were made out of assessee's own funds, no disallowance could be made. [R.8D]**

Assessee made investment in shares, mutual funds and tax free bonds out of its own funds. However, the AO disallowed proportionate interest expenditure incurred on its borrowed funds. On assessee's appeal, the CIT(A) deleted the disallowance, as the investments were made out of assessee's own funds and not made out of borrowed funds. On Revenue's appeal, the Tribunal upheld the order of the CIT(A). On Revenue's further appeal, the High Court held that the Revenue has not been able to show that the CIT(A)'s and Tribunal's findings were perverse and therefore, no question of law arose. (AY. 1998-99)

CIT v. Nicholas Piramal (India) Ltd. (2016) 239 Taxman 470 (Bom.)(HC)

360 **S. 14A : Disallowance of expenditure – Exempt income – Held, Rule 8D is prospective in nature and applicable from AY 2008-09 – Held, disallowance of 5% of exempt income proper. [R. 8D]**

High Court followed the judgment in case of *Godrej & Boyce Mfg. Co. Ltd. v. Dy. CIT [2010] 328 ITR 81 / 194 Taxman 203 (Bom)(HC)* and distinguished the judgment of the Kerala High Court in case of *CIT v. Dhanalakshmy Bank Ltd. (2012) 344 ITR 259 / 200 Taxman 29 (Mag.) / 10 taxmann.com 213 (Ker.)* to rule that Rule 8D would apply from

AY 2008-09 and not from AY. 2007-08. It held that, action of the Revenue to disallow 5% of the exempt income was proper. (AY. 2007-08)
CIT v. HimatsingkaSeide Ltd. (2016) 388 ITR 463 / 240 Taxman 753 (Karn.)(HC)

S. 14A : Disallowance of expenditure – Exempt income – If the tax exempted income was earned without the interference of any employee the question of attributing any expenditure cannot arise at all. [R. 8D] 361
Allowing the appeal the Court held that; In the present case, the AO has not analysed objectively in terms of the decision in Shah. It was firstly incumbent upon him to in fact examine the accounts closely and determine if at all any expenditure could be ascribed to the tax exempt dividend/interest earned by the assessee. If indeed the tax exempted income was earned without the interference of any employee but rather through the solicitation and advertisement of the bank, the question of attributing any expenditure cannot arise at all Referred, *CIT v. Taikisha Engineering Private Limited 370 ITR 338 (Delhi)(HC)*).(ITA No. 953 of 2015, dt. 11.08.2016)
Pradeep Khanna v. ACIT (Delhi)(HC), www.itatonline.org

S. 14A : Disallowance of expenditure – Exempt income – Provision is applicable even where the motive of the assessee in acquiring the shares is to obtain controlling interest in a company and not to earn dividends – Matter was set aside by Tribunal, hence the Court held that no question of law arise from the order of Tribunal. [R. 8D] 362
Dismissing the appeal the Court held that; The Tribunal after holding in principle the applicability of Sec. 14A, has further directed the Assessing Officer to ascertain from the facts of the case as to how much interest bearing borrowings were utilized to acquire shares in the companies and the matter is relegated to the Assessing Officer. As per the language in Sec.14A, the enquiry has to be undertaken by the Assessing Officer which has been so ordered by the Tribunal. Hence, it can be said that the Tribunal has exercised the discretion where rights of both sides are kept open for admissible deduction under Sec.14A. When such a discretion is exercised and the rights of the assessee are also kept open to satisfy the Assessing Officer, it cannot be said that any substantial questions of law would arise for consideration, as sought to be canvassed. At the stage of enquiry under S.14A, it is open to the Assessing Officer to independently consider the matter for admissibility of the interest on borrowings and if yes to what extent. Hence, when the question at large is further to be considered by the Assessing Officer, we do not find that any further observations are required to be made in this regard. In any case, the question of law as sought to be canvassed would not arise for consideration at this stage on the said aspects as sought to be canvassed.(ITA No. 419/2009) (AY. 2004-05)
United Breweries Limited v. DCIT (Karn.)(HC), www.itatonline.org

S. 14A : Disallowance of expenditure – Exempt income – Interest – Non-interest bearing funds more than investment in tax-free securities – No disallowance can be made.[R.8D] 363
When investments are made out of a common pool of funds and non-interest bearing funds were more than the investments in tax free securities, no disallowance of interest expenditure can be made. (AY. 2009-10)
CIT v. Microlabs Ltd. (2016) 383 ITR 490 (Karn.)(HC)
Editorial: Order of Tribunal in Dy.CIT v. Microlabs Ltd. (2015) 39 ITR 585 (Bang.)(Trib), is confirmed

364 **S. 14A : Disallowance of expenditure – Exempt income – Provision is applicable to income claimed as deduction u/s. 80P(2)(d). [S. 80P]**

The assessee, a co-operative society was engaged in marketing of milk products of the member societies. One of the activity of the assessee was to provide funds for working capital to the member societies and it earned interest income. AO while computing the deduction under section 80P(2)(d) in respect of the interest income received from the member co-operative societies, applied provisions of section 14A and disallowed expenses claimed by the assessee. High Court relying upon the judgment in case of *Punjab State Co-operative Milk Producers Federation Ltd. v. CIT [2011] 336 ITR 495 (Punj. & Har.)(HC)* held that provision of section 14A shall apply to income claimed as deduction u/s. 80P(2)(d). (AY. 2011-12)

Punjab State Co-operative Milk Producers Federation Ltd. v. CIT (2016) 238 Taxman 207 (P&H)(HC)

365 **S. 14A : Disallowance of expenditure – Exempt income – Common interest expense which is attributable to exempt income is to be excluded for the purpose of allocation of interest expenditure under Rule 8D(2)(ii) [R. 8D(2)(iii)]**

The High Court has held that the variable A in Rule 8D(2)(ii) would include only those common interest expenditure which are not directly attributable to any income or receipt and therefore, this would mean that any interest expenditure, which is directly attributable to taxable income has to be excluded and the balance common interest expenditure is what should be a subject matter of allocation under the said rule. (AY 2008-09)

PCIT v. Bharti Overseas Pvt. Ltd. (2016) 237 Taxman 417 (Delhi)(HC)

366 **S. 14A : Disallowance of expenditure – Exempt income – The disallowance of expenditure cannot exceed the amount of tax-free dividend. [R.8D]**

Dismissing the appeal of revenue the Court held that; in the present case, when the assessee claimed that it had not made any expenditure on earning exempt income, the Assessing Officer in terms of sub-section (2) of Section 14A of the Act was required to collect such material evidence to determine expenditure if any incurred by the assessee in relation to earning of exempt income. The income from dividend had been shown at ₹ 1,11,564/- whereas disallowance under Section 14A read with Rule 8D of the Rules worked out by the Assessing Officer came to ₹ 4,09,675/-. Thus, the Assessing Officer disallowed the entire tax exempt income which is not permissible as per settled position of law. 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". The disallowance under section 14A read with Rule 8D as worked out by the Assessing officer is not in accordance with law and as such working is not sustainable. The view adopted by the Tribunal being a plausible view based on factual position and the relevant case law on the point, does not warrant any interference by this Court. (AY. 2009-10)

PCIT v. Empire Package Pvt. Ltd. (2016) 136 DTR 342 / 286 CTR 457 (P&H)(HC)

S. 14A : Disallowance of expenditure – Exempt income – More interest free funds than interest bering funds – Presumption is that investment in tax free securities has been made from interest free funds – No disallowance is permissible – ITAT's order reversed on the ground that it is "Judicial Indiscipline" leading to complete chaos and anarchy in the administration of law. [S. 254(1), Constitution of India, Art, 226, 227] 367

The ITAT passed an order in *HDFC Bank Limited v. DCIT (2015) 155 ITD 765 (Mum.) (Trib.)* in which it held that the presumption laid down in *CIT v. HDFC Bank Ltd. (2014) 366 ITR 505 (Bom.)* and *CIT v. Reliance Utilities and Power Ltd. (2009) 313 ITR 340 (Bom.)* that investments in tax-free securities must be deemed to have come out of own funds and (ii) Law laid down in *CIT v. India Advantage Securities Ltd. (2016) 380 ITR 471 (Bom.)* that s. 14A and Rule 8D does not apply to securities held as stock-in-trade cannot be applied as both (2015) propositions are contrary to *Godrej & Boyce Mfg .Co Ltd. v. Dy. CIT (2010) 328 ITR 81 (Bom.)*. On a Writ Petition filed by the assesse the court held reversed the ITAT's order on the ground that it is "Judicial Indiscipline" leading to complete chaos and anarchy in the administration of law. The Court also held that, Tribunal to decide it afresh on its own merits and in accordance with law. However the Tribunal would scrupulously follow the decisions rendered by this Court wherein a view a has been taken on identical issues arising before it. It is not open to the Tribunal to disregard the binding decisions of this Court, the grounds indicated in the impugned order which are not at all sustainable. Unless the Tribunal follows this discipline, it would result in uncertainty of the law and confusion among the tax paying public as to what are their obligations under the Act. Besides opening the gates for arbitrary action in the administration of law, as each authority would then decide disregarding the binding precedents leading to complete chaos and anarchy in the administration of law. When the assessee have more interest free funds than interest bearing funds, presumption is that investment in tax free securities has been made from interest free funds hence no disallowance is permissible. (AY. 2008-09)

HDFC Bank Ltd. v. DCIT (2016) 383 ITR 529 / 132 DTR 89 / 284 CTR 414 (Bom.)(HC)

Editorial: Order of Tribunal in HDFC Bank v. Dy CIT (2015) 155 ITD 765 / 173 TTJ 810 / 130 DTR 21 (Mum.)(Trib.) is set aside.

S. 14A : Disallowance of expenditure – Exempt income – Disallowance of interest expenditure would not be tenable where AO failed to establish a nexus between interest bearing funds and investment made. [R.8D] 368

Assessee was a State Government undertaking engaged in financing industrial units. It had made investment in securities on which it earned tax-free dividend income. The AO observed that though 75 per cent of investments were made through funds given by State Government, 25 per cent of investments were made out of mixed pool of funds and, therefore, 25 per cent of interest expenditure was taken as indirect expenditure liable for disallowance under section 14A, r.w. Rule 8D. As amount of disallowance exceeded amount of exempt income itself, AO adopted a sum of 5 per cent of indirect expenditure together with 0.5 per cent of average investments under Rule 8D(2)(iii) as disallowance under section 14A, read with Rule 8D.

On appeal, the CIT(A) deleted the additions made by the AO on the ground that the AO failed to establish direct nexus between borrowed funds and tax-free investments. The Tribunal affirmed the order of the CIT(A).

The High Court held that as the disallowance was made on an *ad hoc* percentage without any basis or assigning any reason whatsoever, the disallowance was rightly set aside by the appellate authorities. The Court observed that the AO had been unable to establish a nexus between the interest bearing funds and the investments made. Accordingly, the High Court dismissed the Revenue's appeal. (AY. 2009-10)
CIT v. Karnataka State Industrial & Infrastructure Development Corpn. Ltd. (2016) 237 Taxman 240 / 143 DTR 67 (Karn.)(HC)

369 **S. 14A : Disallowance of expenditure – Exempt income – Investments in mutual funds and equity funds – Not recording any finding – Disallowance was held to be not justified. [R.8D]**
Assessee claiming investments to be old made out of capital and outstanding reserves of company and no separate amount borrowed for making such investments. Disallowance only after recording satisfaction that claim not correct. Assessing Officer not recording any reasons for rejecting claim of assessee. Finding of fact recorded by Commissioner (Appeals) and Appellate Tribunal not perverse. No substantial question of law arose for consideration.(AY. 2008-09)
CIT v. Kapsons Associates (2016) 381 ITR 204 (P&H)(HC)

370 **S. 14A : Disallowance of expenditure – Exempt income – Appellate authorities finding ten per cent of income earned could be apportioned towards expenses for earning dividend – Finding not perverse. [S. 260A]**
The Commissioner (Appeals) took into account the words of Rule 8D and found that the figures as derived by the Assessing Officer could not be taken into consideration. Disallowance of expenses can be made which are incurred for earning dividend. For that purpose, the figures under the head "Investment" could be taken and some charges apportioned for the purpose of computing the expenses. The Commissioner (Appeals) found from such figures, that only 10% of the income earned could be apportioned towards expenses for earning the dividend. Held, Rule had been applied correctly. (AY.2008-09)
CIT v. India Advantage Securities Ltd. (2016) 380 ITR 471 (Bom.)(HC)

371 **S. 14A : Disallowance of expenditure – Exempt income – Disallowance applies also to dividends received from strategic investments in subsidiaries.**
Tribunal held that strategic investment made by the assessee in its subsidiary Saraswat Infotech Limited as well in the other securities which are capable of yielding exempt income i.e.. by way of dividend etc. which are exempt from tax shall be included while computing disallowance u/s. 14A of the Act as per the scheme of the Act as contained in provisions of Section 14A of the Act as the statute does not grant any exemption to the strategic investments which are capable of yielding exempt income to be excluded while computing disallowance u/s. 14A of the Act and hence the investment made by the assessee in subsidiary company M/s. Saraswat Infotech Limited and all other securities which are capable of yielding exempt income by way of dividend etc. shall be included for the purposes of disallowance of expenditure incurred in relation to the earning of exempt income, as stipulated u/s. 14A of the Act. (ITA 8622 & 7738/

Mum/2010, ITA 1140 & 694/Mum/2012 , ITA 5627/Mum/2013 & ITA 1/Mum/2014, dt. 31.10.2016)(AY. 2007-08 to 2010-11)
DCIT v. The Saraswat Co-operative Bank Limited (Mum.)(Trib); www.itatonline.org

S. 14A : Disallowance of expenditure – Exempt income – Interest paid by assessee firm on its partner's capital cannot be disallowed.[R.8D] 372
Interest paid by the firm to its partner's capital account, cannot be disallowed applying the provisions of section 14A. Referred *CIT v. R. M. Chidambaram Pillai (1977) 166 ITR 292 (SC)* (AY. 2010-11)
Quality Industries v. JCIT (2016) 161 ITD 217 / (2017) 183 TTJ 350 / 145 DTR 215 (Pune) (Trib.)

S. 14A : Disallowance of expenditure – Exempt income – Interest paid to partners on capital contribution is not a statutory allowance hence disallowable. [S. 36(1)(iii), 40(b), R.8D] 373
Interest paid to partners on capital contribution is not a statutory allowance under section 40(b) but is an expenditure under section 36(1)(iii) and, hence, liable for disallowance under section 14A is incurred in relation to exempt income as envisaged under section 14A, same shall only be allowed as deduction only against exempt income. (AY. 2010-11)
ACIT v. Pahilajrai Jaikishin (2016) 157 ITD 1187 / 179 TTJ 148 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – Dealing in shares, held as stock-in-trade no disallowance can be made. [R.8D] 374
The Tribunal held that as the assessee was a dealer in shares and held shares as stock-in-trade, section 14A r/w Rule 8D would not apply and no disallowance was warranted. (AY. 2009-10)
UCO Bank v. Dy.CIT (2016) 49 ITR 34 (Kol.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – AO to restrict disallowance to 1% of exempt income for A.Y. 2007-08, for AY.2008-09 remanded to AO for fresh verification.[R.8D] 375
The CIT(A) affirmed disallowance of expenditure relating to exempt income earned by assessee u/s. 14A for AY. 2008-09, but for AY. 2007-08 held that disallowance was to be worked out under Rule 8D on reasonable basis. The Tribunal held that Rule 8D was not applicable to AY.s prior to 2008-09 therefore, the AO was to restrict disallowance to 1% of exempt income. In respect of AY. 2008-09, since the assessee raised new contentions that it held the shares as stock-in-trade and further interest-free funds were available far in excess of the investment, such facts have to be verified by the AO before adjudication and hence Tribunal remanded back for fresh verification. (AY. 2007-08, 2008-09)
Bank of India v. ACIT (2016) 49 ITR 62 (Mum.)(Trib.)

376 **S. 14A : Disallowance of expenditure – Exempt income – No disallowance can be made where no exempt income has been earned by assessee during year. [R.8D]**
Dismissing the appeal of the revenue, the Tribunal held that, No disallowance can be made where no exempt income has been earned by assessee during year. (AY. 2011-12)
ACIT v. Pardeep Kumar Aggarwal (2016) 159 ITD 54 (Chd.)(Trib.)

377 **S. 14A : Disallowance of expenditure – Exempt income – No expenditure had been incurred for purpose of earning dividend income from mutual funds hence no disallowance can be made, matter was remitted to the Assessing Officer for adjudication. [R.8D]**
Allowing the appeal of the assessee the Tribunal held that assessee claimed that no expenditure had been incurred for purpose of earning dividend income of mutual fund. Since AO had not rendered any finding that claim of assessee was incorrect, matter was set aside to the file of the Assessing Officer. (AY. 2008-09)
Cyber Park Development & Construction Ltd. v. Dy. CIT (2016) 159 ITD 648 / 181 TTJ 556 (Bang.)(Trib.)

378 **S. 14A : Disallowance of expenditure – Exempt income – Stock-in-trade – Disallowance can be made only in respect of shares in which dividend was received. [R.8D]**
Tribunal held that provisions of S. 14A, read with Rule 8D could be invoked in case of exempt dividend income earned by assessee from shares held as stock-in-trade and expenses incurred in relation to such income could be disallowed by applying said provision. Disallowance under Rule 8D with respect to income not includible in total income has to be computed by taking into consideration only those shares, which has yielded dividend income in year under consideration. (AY. 2009-10)
Dy.CIT v. Teenlok Advisory Services (P.) Ltd. (2016) 159 ITD 991 (Kol.)(Trib.)

379 **S. 14A : Disallowance of expenditure – Exempt income – Disallowance cannot be made in respect of shares held as stock-in-trade. [R.8D]**
Allowing the appeal of the assessee, Tribunal held that disallowance cannot be made in respect of shares held as stock-in-trade. (AY 2009-10)
Fiduciary Shares & Stock (P.) Ltd. v. ACIT (2016) 159 ITD 554 / 181 TTJ 750 (Mum.)(Trib.)

380 **S. 14A : Disallowance of expenditure – Exempt income – Recording of satisfaction by Commissioner of Income tax (Appeals) – Matter was set aside to the Assessing Officer to decide the issue for *de novo* determination of the issue on merits. [R. 8D]**
The assessee challenged the order of the Assessing officer disallowing the expenses on the ground that no satisfaction was recorded. In appeal Commissioner of Income tax (Appeals) recoded the satisfaction and confirmed the addition made by the Assessing officer. The Tribunal, after examining various aspects, concluded that the matter needs to be set aside and restored to the file of the AO for *de novo* determination of the issue on merits after considering the submissions of the assessee having regard to the accounts of the assessee as to the quantum of disallowance to be made u/s. 14A of the Act. The order of the ld. CIT(A) was set aside and the issue is remitted back to the file of the A.O. for *de novo* determination of the issue on merits. (AY. 2008-09)
Abbot India Limited v. ACIT (2016) 50 ITR 369 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – When the assessee has surplus funds it could be presumed that investments had been made from surplus funds, hence no disallowance can be made.[R.8D] 381

Tribunal held that; it was apparent from record that assessee had surplus funds, it could be safely presumed that investments had been made from surplus funds, therefore, no disallowance of interest u/s. 14A r.w. Rule 8D(2)(ii) could be made. (AY. 2008-09)

DCIT v. Mahendra Brothers Exports (P.) Ltd. (2016) 161 ITD 772 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – No evidence to relate expenditure incurred with exempt income and relate exempt income to investment yielding exempt income – Disallowance not justified – Restored back to AO to re-calculate disallowance. 382

The assessee had disallowed a sum of ₹ 31,544/- under Section 14A of the Act in its computation of income. The AO however applied Rule 8D and made total disallowance of ₹ 4,90,274. On appeal to Tribunal, it was held that the AO had adopted the formula for estimating expenditure on the basis of investments but the justification for calculating the average investment was missing. The disallowance under Section 14A was made without due deliberation and analysis by the AO. The issue was restored to the file of AO for calculating the quantum of disallowance afresh after considering all the aspects. (AY. 2008-09)

Yama Finance Limited v. ITO (2016) 47 ITR 642 (Delhi)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – No borrowed funds utilized to earn exempt income – Disallowance should not exceed exempt income 383

The assessee, for the assessment year 2009-10, credited the dividend income of ₹ 1,82,262 in its profit and loss account. The Assessing Officer applied section 14A of the Income-tax Act, 1961, read with rule 8D of the Income-tax Rules, 1962, and disallowed ₹ 14,58,412. This was confirmed by the Commissioner (Appeals). The Tribunal held that the facts indicate that no borrowed funds were utilised for earning the exempt income by the assessee and further the dividend was directly credited in the bank account of the assessee and no expenditure was claimed. The assessee only received ₹ 1,82,362 as dividend income, therefore, there was no question of disallowance of ₹ 14,58,412 invoking section 14A read with rule 8D. On identical facts in earlier years, no disallowance was made. In the assessment year 2009-10 also, no borrowed funds were invested by the assessee for making investment in shares or for earning the dividend income. If any disallowance could be made that could be restricted to the sum of ₹ 1,485 claimed as demat charges. Disallowance under section 14A read with rule 8D cannot exceed the exempt income. (AY.2009-10)

Daga Global Chemicals Pvt. Ltd. v. ACIT (2016) 46 ITR 70 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – Rule 8D does not have retrospective application – AO directed to disallow 2% of exempt income – For AY 2008-09 and AY 2009-10 disallowance should not exceed exempt income 384

The Tribunal held that Rule 8D had no application since it was inserted with effect from March 24, 2008. Since Rule 8D had no retrospective effect, it could not be

applied for the assessment year 2007-08. Accordingly, for the assessment year 2007-08, the Assessing Officer was directed to disallow 2 percent of exempted income. For the assessment years 2008-09 and 2009-10, the disallowance under section 14A read with rule 8D should not exceed the exempt income. The alternative claim of the assessee was that disallowance if at all made, should be restricted to the exempt income earned and not beyond that. Accordingly, the Assessing Officer was directed to look at this issue on this angle and decide it afresh.(AY. 2007-08, 2008-09, 2009-10)
Accel Frontline Ltd. v. DCIT (2016) 46 ITR 138 (Chennai)(Trib.)

385 **S. 14A : Disallowance of expenditure – Exempt income – No Rule 8D in case of assessment year preceding AY. 2008-09.**
The Assessee earned dividend income and claimed exemption of long term capital gain. The AO made an addition u/s. 14A. The ITAT remitted the matter to the AO for *de novo* consideration since Rule 8D was not applicable to the impugned year and directed the Assessee to file evidence to prove that interest-free funds were deployed for making tax-free investments. (AY. 2006-07)
Casby Logistics P. Ltd. v. DCIT (2016) 47 ITR 230 (Mum.)(Trib.)

386 **S. 14A : Disallowance of expenditure – Exempt income – Disallowance to be restricted to the amount of dividend income received.**
The Assessee had received dividend income during the year from investments in its subsidiaries. The AO applied Rule 8D and disallowed certain amount u/s. 14A. The ITAT held that the disallowance u/s. 14A was to be restricted to the amount of dividend received by the assessee and also observed that the investments in subsidiaries were strategic investments. (AY. 2009-10)
Nimbus Communications Ltd. v. ACIT (2016) 47 ITR 496 (Mum.)(Trib.)

387 **S. 14A : Disallowance of expenditure – Exempt income – investment in foreign subsidiary – Provisions would not be applicable.**
The Tribunal held that the investments were made in 100 per cent foreign subsidiary companies for the assessment years 2006-07 and 2008-09. No fresh investment had been made in the financial years 2008-09 and 2009-10. Since the investment was made in the subsidiary companies in the form of equity, the Commissioner (Appeals) found that such investment was outside the scope of section 14A of the Act. When the funds were invested in subsidiary companies, admittedly, the intention of the assessee was not to earn exempt income but because of commercial expediency. The Commissioner (Appeals) was right in holding that the provisions of section 14A would not be applicable for the assessment years 2006-07 and 2008-09. (AY. 2006-07, 2008-09, 2009-10, 2010-11)
DCIT v. Helios and Matheson Information Technology Ltd. (2016) 46 ITR 172 (Chennai) (Trib)

388 **S. 14A : Disallowance of expenditure – Exempt income – Shares held from 1992-93 – Disallowance at 0.5 per cent was held to be justified.**
The assessee had brought forward the investment that was originally made in the year 1992-93 and earlier years. Thus, there was no change in the investment portfolio of the

assessee during the years 2004-05 to 2007-08 either by purchase of new shares or by disposal of the existing shares. The assessee had held the shares in only one company and had, thus, received dividend from one company only. For the assessment years under consideration, 2004-05 and 2007-08, the provisions of Rule 8D of the Income tax Rules, 1962, were not be applicable. The disallowance computed at 0.5 per cent of the investment value of shares was reasonable. The Assessing Officer was to compute the disallowance at 0.5 per cent of the value of investment in these two years under section 14A. (AY. 2004-05, 2007-08)
Mazgaon Dock Ltd. v. ITO (2016) 46 ITR 162 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure – Addition on account of disallowance under S. 14A read with Rule 8D being expenditure in relation to earning of exempt income to book profit under S. 115JB justified.[S. 115JB] 389
Section 115JB of the Act starts with *non-obstante* clause 'Notwithstanding anything contained in any other provision in this act…" meaning thereby that the Section 115JB shall be applicable notwithstanding anything contained in any other provision of the Act and shall have over-riding effect upon other provisions of the Act. Hence, A.O. has rightly disallowed the expenditure by invoking the provisions of Section 14A of the Act read with Rule 8D of Income Tax Rules, 1962 for computing book profit u/s 115JB(2) of the Act read with clause (f) to explanation 1 to clause 115JB(2) of the Act. (AY. 2008-09)
Dy. CIT v. Viraj Profiles Ltd. (2016) 156 ITD 72 / 46 ITR 626 / 177 TTJ 466 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – Disallowance of 5% expenditure on manpower was held to be justified. 390
The assessee had made an investment in shares and mutual funds on which it has earned a dividend income which was claimed as exempt. In response to the show cause notice, the assessee submitted that no direct or indirect expenditures have been incurred for earning of such dividend income because the entire investment was made out of its own funds and dividend earned have been directly credited to the bank account. In another assessment year, the Tribunal had deleted the similar disallowance. The DRP noted that the interest component cannot be disallowed because no borrowed funds have been utilized. However, for indirect expenses, the DRP has directed the AO to disallow 5% of expenditure incurred on manpower cost of the person directly concerned with the decision making on investment. Tribunal held that Rule 8D is not applicable, there is no interest expenditure attributable for the earning of exempt income and for the purpose of indirect expenses, findings by AO on direction of DRP for indirect expenses cannot be faulted with in absence of any proper rebuttal. (AY. 2007-08, 2008-09)
NYK Line India Ltd. v. ACIT (2016) 175 TTJ 180 / 132 DTR 7 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – Interest on borrowed funds that had been subject-matter of disallowance under section 36(1)(iii), could not be considered again for purpose of disallowance under section 14A. [S.36(1)(iii)] 391
During relevant year, assessee earned certain exempt dividend income. Assessing Officer applied provisions of section 14A, read with Rule 8D and disallowed certain amount. Commissioner (Appeals) held that interest on borrowed funds that had been subject-matter of disallowance under section 36(1)(iii), could not be considered again

for purpose of disallowance under section 14A. Tribunal held that payment of interest which was already disallowed under section 36(1)(iii), could not be considered again for section 14A disallowance as it would result in double addition - Therefore, impugned order of Commissioner (Appeals) did not require any interference. (AY. 2008-09)
ITO v. Snowtex Investment Ltd. (2015) 174 TTJ 875 / (2016) 129 DTR 203 (Kol.)(Trib.)

392 **S. 14A : Disallowance of expenditure – Exempt income – No disallowance can be made on shares held as stock-in-trade. [R.8D]**
Assessee, engaged in the business of share trading earned ₹ 12.04 lacs as exempt dividend income. The AO made a disallowance of ₹ 46,89,748/- u/s. 14A r.w Rule 8D. Before the CIT (A), the assessee stated that the Tribunal in assessee's own case for AY 2010-11 has held that no disallowance u/s. 14A r.w. Rule 8D can be made on dividend income from shares held as stock-in-trade. However, the CIT(A), disregarding the order of Tribunal passed in assessee's own case, followed the decision of Mumbai Bench of the Tribunal in the case of *HDFC Bank Ltd. v. DCIT* in ITA No. 374/Mum/2012 decided on 23-9-2015 and rejected the appeal.
Before the Tribunal, submitted that the order of the Tribunal in the case of HDFC Bank Ltd. (supra) on which the CIT had placed reliance had been reversed by the Hon'ble Bombay High Court in Writ Petition No. 1753 of 2016 decided on 25-2-2016. Held, CIT (A) erred in not following the order of Tribunal in asessee's own case. The Bombay High Court in the case of *CIT v. India Advantage Securities Ltd. (supra)* has confirmed the order of Tribunal wherein it was held that no disallowance u/s. 14A r.w. Rule 8D can be made on shares held as stock-in-trade. The Tribunal further observed that the CIT (A) should have maintained 'Judicial Propriety' in following the order of Appellate Authority. However, it restrained from commenting on the judicial indiscipline committed by the CIT (A) and expected that the CIT(A) concerned shall be more careful in future in honouring the orders of the higher Appellate Authorities. (ITA No. 1715/PN/2015, dt. 18.03.2016)(AY.2012-13)
Paresh Pritamlal Mehta v. ITO (Pune)(Trib.); www.itatonline.org

393 **S. 14A : Disallowance of expenditure – Exempt income – 2 per cent of exempt income was directed to be disallowed.**
Tribunal held that where assessee earned dividend income but did not claim any expenditure towards same, Rule 8D provisions being prospective in operation could not be applied during year, but since incurring of certain administrative expenses cannot be ruled out, Assessing Officer was directed to disallow 2 per cent of exempt income as expenditure towards earning that income. (AY.2008-09)
Super Auto Forge (P.) Ltd. v. ACIT (2016) 156 ITD 467 (Chennai)(Trib.)

394 **S. 14A : Disallowance of expenditure – Exempt income – Recording of satisfaction is mandatory – No disallowance can be made.**
In respect of tax free interest income earned on RBI bonds by assessee, Assessing Officer made disallowance under section 14A by invoking provisions of Rule 8D(2) without recording his satisfaction under Rule 8D(1), impugned disallowance was not sustainable. (AY. 2008-09, 2009-10)
Damodar Valley Corporation v. Add.CIT (2016) 157 ITD 415 / 139 DTR 201 / 180 TTJ 82 (Kol.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – Share application money cannot be included while working average value of investment. [R. 8D] 395

It was held that share application money cannot be included while working out the average value of the investments under Rule 8D(2)(iii). (AY. 2009-10)

ITO v. LGW Ltd. (2016) 130 DTR 201 (Kol.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – Disallowance can not exceed exempt dividend income. 396

The assessee was in the business of trading of shares, cloth, commission and real estate rent, and maintained the same books of account for all the businesses. Due to the exempt divided income and interest expenses incurred, the AO made disallowance u/s. 14A. The ITAT observed that the dividend was earned in the normal course of business, and if one assumed that some expenditure was incurred to earn the exempt income, then the disallowance could not exceed the amount of exempt income. (AY 2008-09)

K. Ratanchand and Co. v. ITO (2016) 45 ITR 608 (Ahd.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – Preference shares to be included while computing the disallowance u/s. 14A, though exempt income was received from another investment source. Disallowance u/s. 14A should not exceed exempt income. 397

The assessee, a Government company, earned exempt income from Mutual Funds. Further, it had also given loans to another company which was a Government JV. Under the directions of the State Government, this loan was converted into cumulative preference shares. The AO included this preference shares while computing the disallowance u/s. 14A. On appeal, the ITAT held that preference shares should be considered for computing the disallowance u/s. 14A since the dividend from it would be exempt from tax. Further, the ITAT also held that though exempt income, during the year, was not earned from preference shares, it would still be included for computing the disallowance u/s. 14A. However, the ITAT held that the disallowance u/s. 14A could not exceed the amount of exempt income. (AY. 2001-02, 2003-04 to 2008-09)

West Bengal Infrastructure Development Finance Corporation v. ACIT (2016) 45 ITR 285 (Kol.)(Trib.)

DCIT v. West Bengal Infrastructure Development Finance Corporation (2016) 45 ITR 285 (Kol.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – Disallowance of interest – Borrowed money was not utilized – No disallowance can be made – Disallowance under Rule 8D is restricted to 0.5% of average value of investments resulting in tax exempt income. 398

Tribunal held that the borrowed money was not utilsed for investment in shares hence disallowance of Interest borrowed money was not justified and disallowance under Rule 8D is restricted to 0.5% of average value of investments resulting in tax exempt income. (AY. 2008-09)

UFO Movies India Ltd. v. ACIT (2016) 175 TTJ 633 / 131 DTR 81 (Delhi)(Trib.)

399 **S. 14A : Disallowance of expenditure – Exempt income – Interest bearing funds were not used for investment in shares – No disallowance can be made in respect of interest.**
The Tribunal held that the assessee has not used interest bearing funds for the purpose of making investment in shares, therefore no disallowance can be made under section 14A on account of interest expenditure. As regards administrative expenses, AO is directed to make disallowance as per Rule 8D after setting off the *suo motu* disallowance made by assessee. (AY. 2009-10)
GlaxoSmithKline Consumer Healthcare Ltd. v. JCIT (2016) 175 TTJ 552 / 143 DTR 57 (Chd.)(Trib.)

400 **S. 14A : Disallowance of expenditure – Exempt income – Non interest bearing funds are more than the amount invested which generated exempt income – Matter remanded.**
Non-interest bearing funds available with assessee more than the amount of investment which generated exempt income. Matter remanded to AO to examine fund position of assessee and decide accordingly. (AY. 2008-09)
Yes Bank Ltd. v. ACIT (2016) 46 ITR 317 (Mum.)(Trib.)
Dy. CIT v. Yes Bank Ltd. (2016) 46 ITR 317 (Mum.)(Trib.)

401 **S. 14A : Disallowance of expenditure – Exempt income – No exempt income received during the previous year – No disallowance made – Portion of administrative expenses to be disallowed – Rule 8D(2)(iii) cannot be applied when securities were held as stock in trade. [R. 8D]**
Tribunal held that since the assessee did not receive exempt income during the previous year, there was no requirement to make disallowance under Rule 8D(2)(iii) of the Rules. However, a portion of the administrative expenses were required to be disallowed, even if no dividend was received since the assessee would have spent some portion of the expenses for purchase, sale and maintenance of investment. Since the object of the assessee in making investment was to hold them as stock in trade the AO was to restrict the disallowance under Rule 8D(2)(iii) of the rules. (AY. 2008-09)
Yes Bank Ltd. v. ACIT (2016) 46 ITR 317 (Mum.)(Trib.)
Dy. CIT v. Yes Bank Ltd. (2016) 46 ITR 317 (Mum.)(Trib.)

402 **S. 14A : Disallowance of expenditure – Exempt income – No interest expenditure was incurred – Disallowance was not justified.**
No interest expenditure was incurred for earning any exempt income hence disallowance made was not justified. (AY. 2006-07 and 2007-08)
Yes Bank Ltd. v. Dy. CIT (2015) 68 SOT 291 (URO) / (2016) 46 ITR 121 (Mum.)(Trib.)

403 **S. 14A : Disallowance of expenses – Exempt income – Assessing Officer straight away computed disallowance without recording his satisfaction, action of Assessing Officer was not in accordance with law. [R.8D]**
Since Assessing Officer had not considered claim of assessee at all and he had straight away embarked upon computing disallowance without recording his satisfaction, action of Assessing Officer in making disallowance was not in accordance with law. (AY. 2006-07, 2007-08)
ACIT v. Pawan Kumar Jhunjhunwala (2016) 157 ITD 667 (Kol.)(Trib.)

S.14A : Disallowance of expenditure – Exempt income – Provision for computing disallowance at 0.5 per cent justified in the absence of Rule 8D. 404
Investment originally made in year 1992-93 and earlier years. No change was made in the investment portfolio during years 2004-05 to 2007-08 either by purchase of new shares or by disposal of existing shares. Provision for computing disallowance at 0.5 percent justified in the absence of Rule 8D. (AY. 2004-05, 2007-08)
Mazgaon Dock Ltd. v. ITO (2016) 46 ITR 162 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure – Exempt income – No disallowance was made by the assessee – Invoking the provision read with rule 8D(2)(iii) was held to be justified. [R.8D] 405
Undisputedly, the assessee did not make any *suo motu* disallowance. Therefore, it was to be presumed that the assessee claimed that no expenditure was incurred by him in relation to income which would not form part of the total income under the Act. Therefore, the AO rightly disallowed the dividend by invoking the provisions of section 14A read with Rule 8D(2)(iii) of the rules. (AY. 2009-10)
Vipin Malik v. ACIT (2016) 45 ITR 589 (Delhi)(Trib.)

S. 17. "Salary", "perquisite" and "profits in lieu of salary" defined

S. 17 : Salary – Profits in lieu of salary – Tips received by employees is not salary hence not liable to deduct tax at source. [S. 15, 17(3), 192, 201(1), 201(IA)] 406
Held that as "tips" are paid to employees of the assessee from an outsider on a voluntary basis and the employees have no vested right to receive the same, the same is not "salary" and the assessee has no obligation to deduct TDS. (AY. 2003-04, 2004-05, 2005-06)
ITC Limited v. CIT (2016) 384 ITR 14 / 286 CTR 126 / 134 DTR 273 / 239 Taxman 372 (SC)
CJ International Hotels Ltd. v. CIT (2016) 286 CTR 126 / 134 DTR 273 (SC)
American Express Banking Corporation v. CIT (2016) 286 CTR 126 / 134 DTR 273 (SC)
Standard Chartered Bank Ltd. v. CIT (2016) 286 CTR 222 / 134 DTR 273 (SC)

S. 17 : Salary – Perquisite – Uniform allowance – Fringe benefits – Benefit could not be included in income of employee treating it as a perquisite – Not liable to be deducted tax at source.[S. 115WA] 407
ONGC reimbursed conveyance, maintenance and repair expenditure and uniform allowance to assessee employee. Assessing Officer found that ONGC had not deducted tax at source. He made addition in income of assessee. Court held that, the impugned benefits were held to be fringe benefits and employer taxed accordingly under Chapter XII-H, therefore the said benefit could not be included in income of employee treating it as a perquisite. (AY. 2007-08)
Kamlesh K. Singhal General Manager (MM) v. CIT (2016) 389 ITR 247 / 243 Taxman 250 (Guj.)(HC)

408 **S. 17 : Salary – Perquisite Constitutional validity of provision – Fringe benefit or amenity – Method of valuing concessional loan from employer – Provision is valid. [S.17(2), R. 3(7)(i), Constitution of India, Art. 14]**

The rule making authority prescribed under Rule 3(7)(i) a definite indicia for finding out the value of the fringe benefit.

The attack on this rule the basis that the rule did not stipulate different methods of valuation of the perquisite or seek to apply a uniform rate for different categories of persons irrespective of the huge difference in their pay packets was meaningless. Section 17(2)(viii) and Rule 3(7)(i) are valid.

All India Union Bank Officers Federation v. UOI (2016) 385 ITR 114 / 240 Taxman 92 / 141 DTR 101 / 289 CTR 61 (Mad.)(HC)

409 **S. 17 : Salary – Profits in lieu of salary – Amount paid by employer to employee in order to put an end to litigation which was related to employee's termination of service was not in nature of "profit in lieu of salary". [S.15, 17(3)]**

Assessee, an individual, was an employee of company 'G'. He was discharged from service under the relevant Service Rules after giving three month's pay. Further, the assessee was also paid certain amount as ex-gratia compensation on premature cessation of his services. The assessee treated the said ex-gratia payment as a capital receipt and consequently did not offer it to tax. The AO took a view that compensation so received was to be taxed u/s. 17(3) as 'profits in lieu of salary'. The Tribunal confirmed the order passed by AO.

On appeal, the HC held that the assessee's services came to be terminated under the relevant service rules after giving three months' pay. Therefore, in so far as the obligation of the employer to pay any amount to the assessee in relation to the termination of his services, the same came to an end in view of the discharge of his services under relevant rule. The amount in question was paid only in terms of the settlement, without there being any obligation on the part of the employer to pay any further amount to the assessee in terms of the services rules. The employer, voluntarily at its discretion, agreed to pay the amount in question to the assessee with a view to bring an end to the litigation. There was no obligation cast upon the employer to make such payment and, therefore, the same would not be taxable as 'profits in lieu of salary' as envisaged u/s. 17(3)(i).(AY. 1994-95)

Arunbhai R. Naik v. ITO (2016) 131 DTR 402 / 284 CTR 284 (Guj.)(HC)

410 **S. 17 : Salary – Profits in lieu of salary – Amount received from his employer on retirement is profits in lieu of salary and not non-compete fees – Liable to tax. [S. 4, 15, 17(3)]**

At the time of retirement, the assessee received various retirement benefits from the company. Further, the assessee was also paid certain amount as compensation which was claimed as non-compete fees, not chargeable to taxable. However, the AO re-characterized the nature of payment to be 'profits in lieu of salary' as the assessee failed to provide explanation the manner in which the compensation was computed and negotiated with the company. The CIT(A) and Tribunal upheld the order of the AO.

On appeal, the HC held that the assessee has worked with the company for more than

33 years and received handsome retirement package and would not compete with his former employer. Hence, the payment shown as non-compete fees is a camouflage transaction to reduce tax implication. (AY. 2003-04)
B. L. Shah v. ACIT (2016) 131 DTR 265 / 284 CTR 165 (Bom.)HC)

S. 17 : Salary – Profits in lieu of salary – Amount received by an assessee, acting as a Managing Director of a Company, at the time of termination of his relation with the Company in consideration of him not providing benefit of his knowledge to any other person carrying on similar activity was not taxable either u/s. 17(3) or 28(va). [S. 17(3), (28(va)] 411

On appeal, the Tribunal held:
The role assigned to the assessee clearly shows that he was not subject to the direct control or supervision of Suzuki India, but was managing all affairs of the company, evolving business strategies and advising the company. His role was clearly that of a joint venture partner in Suzuki India and not that of an employee of the company and hence the assessee was not an employee of Suzuki India, and thereby the amount received by him from the company could not be taxed as 'profits in lieu of salary' under section 17(3). Further the amount was paid by Suzuki India to the assessee in consideration of not providing 'the benefit of his knowledge of regulatory matters, negotiating skills and strategic planning expertise to any other person in India in the two wheeler segment' it cannot be regarded as non-competition fee because it has not been paid for not competing with the payer, but for not providing the benefit of his knowledge, expertise, skills etc. to any other person in the two wheeler segment. The contention of assessee that section 28(va) taxes a sum received for a restrictive covenant in relation to a business, but not a profession is supported by the observations in paragraph 28 on page 692 of Kanga and Palkhivala's 'Law and Practice of Income-tax' that clause (va) of section 28 'taxes a sum received for a restrictive covenant in relation to a business, but not a profession'; and, therefore, does not fall within the ambit of section 28(va). The Supreme Court in the case of *Guffic Chem. (P.) Ltd. v. CIT (2011) 332 ITR 602* held that compensation attributable to a negative/restrictive covenant is a capital receipt. Hence, the sum received by the assessee did not fall within the ambit of section 28(va), and it was not chargeable to tax as it constituted a capital receipt.
In view of the above, the claim of the assessee that the sum received by him from Suzuki India is not taxable under section 17(3)(b) and also, said sum does not fall within the ambit of section 28(va), being a capital receipt is not taxable under the Act, is upheld (AY. 2010-11)
Satya Kant Khosla v. ITO (2015) 174 TTJ 825 / 63 taxmann.com 293 / (2016) 129 DTR 19 (Delhi)(Trib.)

S. 17 : Salary – Perquisite – An incentive plan was promoted by holding company of Indian employer company – Assessee employees were residents in India at time of exercise of Stock Appreciation Rights, they were liable to tax in India on same irrespective of fact that they were non-residents during vesting period. [S.15] 412

Tribunal held that an incentive plan which was promoted by holding company of Indian employer company. Assessee employees were residents in India at time of exercise of

Stock Appreciation Rights, they were liable to tax in India on same irrespective of fact that they were non-residents during vesting period. Assessees claim that value of SARs was subjected to taxation in USA, it had to be examined in light of India-USA tax treaty, matter was remanded back to AO for examining whether assessees have paid tax in USA on same Stock Appreciation Rights. (AY. 2011-12, 2012-13)
Soundarrajan Parthasarathy v. Dy. CIT (2016) 159 ITD 21 (Chennai)(Trib.)

413 **S. 17 : Salary – Perquisite – Rent free accommodation – Addition cannot be made on notional interest on deposit made for rent-free accommodation in income of assessee. [S. 17(2), R. 3]**
Tribunal held that ;notional interest on deposit paid by employer to landlord for securing accommodation, while computing perquisite value of the residential accommodation included the same in income of the assessee is not sustainable in view of express words used in Rule 3 of the Income-tax Rules, 1962 as amended w.e.f. 01.04.2001. Therefore, the same is required to be deleted.
Vikas Chimakurty v. Dy. CIT (2016) 159 ITD 413 (Mum.)(Trib.)

S. 22. Income from house property

414 **S. 22 : Income from house property – Gross rent received was less than from the let out property – Tax effect was below limit prescribed in CBDT circular – Appeal was dismissed leaving question of law open.**
High Court held that the Tribunal was right in law on directing the Assessing Officer to adopt the gross rent received by the assessee being lessor from the let out property for the purpose of computation of income from house property in place of much higher fetched by the lessee by sub letting the same property. On appeal by revenue, Apex Court dismissed the appeal as the tax effect was below limit prescribed in CBDT circular, leaving the question of law open. (AY. 1991-92)
CIT v. Hemraj Mahabir Prasad Ltd. (2016) 382 ITR 170 / 237 taxman 379 / 286 CTR 112 (SC)

415 **S. 22 : Income from house property – Annual letting value – Held to be liable to pay tax on annual value of unsold property. [S. 23]**
Assessee was engaged in business of construction of house property. Many flats were lying unsold - High Court by impugned order held that provisions of sections 22 and 23 would be applicable and assessee would be liable to pay tax on annual letting value of unsold flats as income from house property. *Chennai Properties and Investments Ltd. v. CIT (2015) 373 ITR 673 (SC)* distinguished. (AY. 1994-95)
CIT v. Ansal Housing & Construction Ltd. (2016) 389 ITR 373 / 241 Taxman 418 (Delhi) (HC)
Editorial: Special Leave Petition filed against impugned order was granted.) Ansal Housing & Construction Ltd. v. CIT (2016) 389 ITR 5(St), 243 Taxman 144 (SC)

S. 22 : Income from house property – Business income-Assessee leasing out property to restaurant for 12 years renewable for further period of 12 years – Intention of assessee to enjoy rental income – Assessable as income from house property. [S. 28(i)] 416

Dismissing the appeal of assessee the Court held that the Tribunal categorically recorded that upon perusal of the memorandum of understanding between the assessee and the lessee, it showed that the property was given for use for a period of 12 years which was renewable for a further period of 12 years and nowhere was it shown that the intention was to let it out was only for a temporary period. This showed the intention of the assessee to enjoy rental income, which was rightly treated as income from house property by the Assessing officer. The view adopted by the Tribunal was a plausible view and the assessee failed to show any illegality or perversity in that order. (AY. 2005-06)

Batra Palace P. Ltd. v. CIT (2016) 385 ITR 144 (P&H)(HC)

S. 22 : Income from House Property – Income From other sources – Receipt from licensing of terrace floor for antenna was assessable, as income from house property and is neither assesses business income nor income from other sources.[S. 28(i), 56] 417

Issue was whether receipt from licensing of terrace floor for antenna was assessable as under the head 'Income from other sources' as opposed to 'Income from House Property' returned by the appellant?". Allowing the appeal of the assessee, Hon'ble HC held that assessee giving its terrace space to licence for raising telecom antenna, constructing a room for its personnel and storage, receipts are income from House Property. Same was neither business income nor income from other sources. Fact that assessee has shown the terrace as stock in trade was of no consequence. Assessee continued to be the owner of the terrace floor. Licence was virtually given for exclusivity in utilizing the terrace floor for achieving the objectives set out in the agreement.

Niagam Hotels & Builders (P) Ltd. v. CIT (2016) 134 DTR 158 (Delhi)(HC)

S. 22 : Income from house property – Income from letting out of office premises to be decided based on the judgment of Chennai Properties and Investments Ltd. – Matter remanded. 418

The assessee, engaged in the business of property leasing, had earned rental income from letting out of office premises which it had disclosed as income from business profits. The AO treated it as Income from House Property. The ITAT remanded the matter to be decided afresh in light of the decision of the Hon'ble Supreme Court in the case of Chennai Properties and Investment Ltd. (AY. 2008-09, 2009-10)

Damsak Projects P. Ltd. v. DCIT (2016) 45 ITR 278 (Mum.)(Trib.)

S. 22 : Income from house property – Notional rent – Additional evidence – Matter remanded to AO to determine afresh income from house properties. [S. 23] 419

The AO while computing the income from house property did not make enquiry with respect to the properties in accordance with the Act and failed to follow the principles laid down by the Court to determine the prevailing market rent of these properties and rather computed the annual letting value based on notional rent on cost of properties. The department failed to consider the additional evidence produced by the assessee thus vitiating the principles of natural justice. Matter remanded. (AY. 2007-08)

Vishwanath Acharya v. ACIT (2016) 157 ITD 1032 / 45 ITR 554 (Mum.)(Trib.)

S. 23. Annual value how determined

420 **S. 23 : Income from house property – Annual value – Maintenance charges, etc., which is stipulated to be payable by licensee or lessor, must form a part of rent for purpose of computing annual value of property. [S. 22, 24]**
Assessee was a sub-licensee of a builder in a rented property. Assessee entered into sub-sub-licence agreement with one RSM. On appeal by the assessee, dismissing the appeal Court held that; Maintenance charges paid by sub-sub-licencee RSM directly to builder would also be chargeable under head 'income from house property' and assessee would get benefit of deduction under section 24 and under proviso to section 23. In the circumstances, the questions of law are answered in favour of the revenue and against the assessee. (AY. 2002-03)
Sunil Kumar Gupta v. ACIT (2016) 389 ITR 38 / 243 Taxman 65 (P&H)(HC)

421 **S. 23 : Income from house property – Annual value – Failed to let out the property – Annual value to be treated as nil [S. 23(ia), 23(1)(c)]**
ALV of property remaining vacant for whole year has to be computed with reference to S. 23(1)(c). Therefore, where assessee intended to let property and took appropriate efforts in letting property but ultimately failed to let same, in terms of s. 23(1)(c) its ALV had to be treated as nil being less than sum referred to in s. 23(1)(a).(AY.2009-10)
Vikas Keshav Garud v. ITO (2016) 160 ITD 7 (Pune)(Trib.)

422 **S. 23 : Income from house property – House Property inherited under will which is not yet probated, no notional rent can be assessed. [S. 22]**
It was held that Assessee having inherited the house property from his mother through her will which has not yet been probated, he is not the owner of the said property and, therefore, no notional rent can be assessed in the hands of the assessee while computing his income under the head income from house property. (AY. 2005-06)
Dilip Loyalka v. ACIT (2016) 130 DTR 73 / 175 TTJ 334 (Kol.)(Trib.)

423 **S. 23 : Income from house property – Annual value – Estimation of notional rent without any basis was held to be not justified. [S. 22]**
Allowing the appeal of assessee the Tribunal held that; where Assessing Officer estimated notional rent of house property without giving any basis, same was to be rejected. (AY. 2006-07)
Sunil Kumar Saha v. ITO (2016) 156 ITD 1 (Kol.)(Trib.)

424 **S. 23 : Income from house property – Annual value – Vacancy period – Estimation of annual value being highest rent received in last three years was held to be justified. [S. 22]**
Where assessee utilized property for personal purposes and let out property occasionally but did not give any details for rent received and vacancy period of property, there was no illegality in annual value taken by Assessing Officer being highest of rent received in last three years. (AY. 2006-07)
Sunil Kumar Saha v. ITO (2016) 156 ITD 1 (Kol.)(Trib.)

S. 23 : Income from house property – Notional income in respect of unsold shops cannot be charged to tax under the head income from house property. [S.22] 425
Allowing the appeal of assessee the Tribunal held that notional income in respect of unsold shops cannot be charged to tax under the head income from house property. (ITA No 4277/ Mum/ 2012 dated 13-05-2015 Bench 'C') (AY. 2009-10)
C. R. Developments Pvt. Ltd. v. JCIT (2016) BCAJ - February-P. 34 (Mum.)(Trib.)

S. 23 : Income from house property – Annual value – Brokerage paid to give out premises on rent and to earn lease rent is not deductible in computing the Income from house property. [S. 22, 24] 426
Brokerage paid to give out premises on rent and to earn lease rent is not deductible in computing the Income from house property. (ITA No. 5494/Mum/2013, dt. 05.06.2015) (AY. 2010-11)
Radiant Premises Pvt. Ltd. v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 24. Deductions from income from house property

S. 24 : Income from house property – Deductions – Deduction for interest paid on loan is not available when loan was taken after acquisition of the house property. [S. 22] 427
Assessee, an individual, filed return of income claiming deduction for interest paid on loan under section 24(b) of the Act. The Assessing Officer denied the deduction on the ground that the property was purchased in November 2005 and loan was taken only in December 2005. The CIT(A) and Tribunal upheld the order of the Assessing Officer. On appeal, the High Court held that deduction under section 24(b) is available only if loan was utilized for acquisition of the property therefore, assessee was not entitled to claim the deduction under section 24(b). (AY. 2007-08)
Vijay Aggarwal v. CIT (2016) 236 Taxman 542 / 135 DTR 276 / 286 CTR 452 (P&H)(HC)

S. 24 : Income from house property – Deduction – Interest paid on loan taken over while acquiring mortgaged property would be deductible under section 24(1)(vi) against rental income from said property. [S. 22] 428
The assessee was having rental income and claimed deduction of interest from the said income under section 24(1)(vi). The Assessing Officer disallowed the said deduction as the assessee had not purchased/constructed any building from the funds on which the interest was paid. On appeal, the Commissioner (Appeals) upheld the disallowance. On second appeal, the Tribunal allowed deduction under section 24(1)(vi) to assessee by recording finding that said loan liability was undertaken by assessee for acquiring its mortgaged property.
The High Court held that Section 24(1)(vi) of the Act at the relevant time provided that where the property had been acquired, constructed, repaired, renewed or re-constructed with borrowed capital, the amount of interest payable on such capital was a permissible deduction from income from house property. Thus, it would be required to be seen in the present case whether the deduction of interest paid by the assessee on the borrowed funds satisfied the requirements of clause (vi) of sub-section (1) of Section 24 of the Act. The Court further observed that the tribunal had come to a finding that there was

a nexus between the loan taken and the acquisition of the property. The Revenue was unable to show any perversity in the findings of the Tribunal and accordingly the High Court dismissed the Revenues appeal. (AY. 1997-98)
CIT v. Harayana Television Ltd. (2016) 237 Taxman 247 (P&H)(HC)

429 **S. 24 : Income from house property – Deductions – Interest paid – No condition that property must both be acquired and constructed with borrowed capital. [S. 22, 24(b), 80C]**
Assessee was joint owner of farm land that was acquired by raising a house loan from a bank. The owners entered into a development agreement for construction of farm house on property. The developer was entitled to 70% of the rent and joint owners were entitled to 30% of the rent received from the farm house. AO rejected deduction claimed u/s. 24(b) on the ground that loan amount was not spend on construction of farm house. CIT(A) upheld order of AO. On Appeal, the Tribunal held that explanation to the proviso to section 24 clarifies that the property can either be acquired or constructed with borrowed capital, no requirement/condition that property must be acquired as well as constructed with borrowed capital. Assessee borrowed the amount for acquiring the property, income from which was assessed under the head "Income from house property" and made the repayment of the loan. Hence deduction u/s. 24(b) allowed. (AY. 2010-11)
Samiksha Mahajan (Mrs.) v. ACIT (2016) 47 ITR 59 (Delhi)(Trib.)
Anita Rani (Mrs.) v. ACIT (2016) 47 ITR 59 (Delhi)(Trib.)

430 **S. 24 : Income from house property – Interest on borrowed capital – Until house property is self-occupied, interest expenditure would not be allowed. [S 23,24(b)]**
Assessee claimed to have purchased a residential property Bungalow DM by taking loan and claimed deduction of interest paid to bank on borrowed amount. Bungalow DM was not ready for self-occupation, assessee was not entitled for deduction of interest expenditure u/s. 24(b). (AY.2008-09)
Madanlal F. Jain v. DCIT (2016) 160 ITD 1 / 143 DTR 150 / 181 TTJ 948 (Ahd.)(Trib.)

431 **S. 24 : Income from house property – Deductions – Society maintenance and other charges is held to be allowable [S. 23]**
The assessee declared income from house property. She claimed a deduction of an amount of ₹ 1,17,825 on account of society maintenance and other charges and declared the net annual value. The Assessing Officer held that according to the proviso to section 23 for the purpose of computation of annual value, the assessee was allowed deduction only for the payment of taxes levied by the local authority in respect of the property. Hence, he made an addition of ₹ 1,17,825 to the income of the assessee under the head "Income from house property". However, he allowed the standard deduction to the assessee as provided under section 24(a). The Tribunal held that the assessee paid the society maintenance charges of ₹ 1,17,825 which was stated to be the obligation of the lessee and the charges was duly included in the rent received by the assessee. Therefore, the assessee was entitled to deduction of ₹ 1,17,825 under section 23 apart from the standard deduction under section 24(a). The Assessing Officer was directed

to verify the claim of deduction of the assessee of the society maintenance charges of ₹ 1,17,825 paid by the assessee but stated to be obligation of the lessee and stated to be duly included in the gross rent received by the assessee before allowing the claim of the assessee. (AY. 2006-07)
Asha Ashar v. ITO (2016) 46 ITR 492 (Mum.)(Trib.)

S. 24 : Income from house property – Deductions – Interest – Borrowed capital could be used towards acquisition of property or construction of property – Non cumulative condition – Interest is deductible [S.24(b)] 432
The assessee was the co-owner of farm land with A, acquired by taking loan from bank, both having equal shares and entered into an agreement with a developer for constructing a farm house on the land who was supposed to bear all the expenses incurred on the development and construction of farm house. The AO observed that the assessee had claimed deduction of interest under Section 24(a) of the Act. The AO disallowed the interest on the ground that the assessee had not spent any amount on construction of the farm house. On appeal to Tribunal, it was held that from the Explanation appended to the proviso to Section 24, the property could either be acquired or constructed with borrowed capital. Nowhere was it mentioned that the property must be acquired as well as constructed with borrowed capital. The assessee raised loan from a bank and acquired the property, income from which was assessed under the head, 'Income from house property'. Therefore the interest paid was deductible under Section 24(b). (AY 2010-11)
Samiksha Mahajan (Mrs) v. ACIT (2016) 47 ITR 59 (Delhi)(Trib.)

S. 28. Profits and gains of business or profession

S. 28(i) : Business income – Mutuality – Company formed to deal in real estate – Shareholders allotted floor area with absolute right against share capital – Occupants given absolute right to occupy, alienate or sell property – Profit motive involved – Principle of mutuality not applicable – Maintenance deposit to be treated as business income – Review petition was dismissed. [S. 4] 433
Company formed to deal in real estate. Shareholders allotted floor area with absolute right against share capital. Occupants given absolute right to occupy, alienate or sell property. Profit motive involved, therefore principle of mutuality is not applicable. That on the issue of short-term capital gains with respect to property T1 and T2 and maintenance deposit there was no infirmity in the order of the High Court so as to require any modification. On a petition for review: The Supreme Court dismissed the petition holding that no grounds were made out for review. Decision of the Supreme Court in *G. S. Homes and Hotels P. Ltd. v. Deputy CIT (2016) 387 ITR 126 (SC)* reaffirmed. (AY. 1996-97)
G. S. Homes and Hotels P. Ltd. v. Dy. CIT (2016) 389 ITR 78 (SC)
Editorial: Review petition was dismissed; decision of the Supreme Court in G. S. Homes and Hotels P. Ltd. v. Dy. CIT (2016) 387 ITR 126 (SC) reaffirmed.

434 **S. 28(i) : Business income – Mutuality – Company formed to deal in real estate – Shareholders allotted floor area with absolute right against share capital – Occupants given absolute right to occupy, alienate or sell property – Profit motive involved – Principle of mutuality not applicable – Maintenance deposit to be treated as business income. [S. 4]**

Company formed to deal in real estate. Shareholders allotted floor area with absolute right against share capital. Occupants given absolute right to occupy, alienate or sell property. Profit motive involved, therefore principle of mutuality is not applicable. That on the issue of short-term capital gains with respect to property T1 and T2 and maintenance deposit there was no infirmity in the order of the High Court so as to require any modification. (AY. 1996-97)

G.S. Homes and Hotels P. Ltd. v. Dy. CIT (2016) 387 ITR 126 / 242 Taxman 58 / 289 CTR 105 / 141 DTR 201 (SC)

Editorial: Decision in G.S. Homes and Hotels P. Ltd. v. Dy. CIT, ITA No 16 of 2003 dt. 16-09-2011 is partly affirmed.

435 **S. 28(i) : Business income – Income from house property – Rent received from property – Finding that assessee had discontinued all other business activities and only carried on leasing of property – Business of assessee to lease property and earn rent – Rent taxable as income from business, not house property. [S. 22]**

Assessee had only one business and that was of leasing its property and earning rent therefrom. The business of the company was to lease its property and to earn rent and therefore, the income so earned should be treated as its business income. The income of the assessee was to be subject to tax under the head "Profits and gains of business or profession". (AY. 2003-04 to 2008-09)

Rayala Corporation P. Ltd. (2016) 386 ITR 500 / 243 Taxman 360 / 139 DTR 265 / 288 CTR 121 (SC)

436 **S. 28(1) : Business income – Refundable deposits received by a housing company for allotment of flats and future maintenance is business income. [S.4, 45]**

The Karnataka High Court held, following *Shree Nirmal Commercial Ltd. v. CIT (1992) 193 ITR 694 (Bom.)(HC),* and *CIT v. Shree Nirmal Commercial Ltd v. CIT (1995) 213 ITR 361 (FB)(Bom.)(HC)* that the refundable deposits received by a housing company from its shareholders in consideration of allotting area to them is assessable as business profits. It was also held that the principles of mutuality are not applicable. It was also held that deposits received from the shareholders for future maintenance is assessable as business income. On appeal to the Supreme Court Held: After hearing the learned counsels for the parties and perusing the relevant material, in so far as the issue of short term capital gains with respect to property T1 and T2 and maintenance deposit is concerned, we do not find any infirmity in the order of the High Court so as to require any modification. (AY.1996-97)

G. S. Homes & Hotels P. Ltd. v. CIT (2016) 141 DTR 201 / 289 CTR 106 (SC)

Editorial: Review petition was dismissed, G. S. Homes & Hotels P. Ltd. v. Dy. CIT (2017) 291 CTR 240 (SC)

S. 28(i) : Business income – Accrual of income – Differential amount of interest will be taxable in the year in which the same had accrued to the assessee. [S.4, 5] 437
Dismissing the appeal of the revenue, the Court held that the differential amount would accrue to the assessee only as and when such interest amount in excess of the agreed amount was recovered by it. Such amount would, therefore, be taxable in the year in which the same had accrued to the assessee. Further, the assessee had already paid tax on the said income in the subsequent years. Accordingly, the appeal of Revenue was dismissed. (AY. 2001-02 to 2003-04).
PCIT v. Gruh Finance Ltd. (2016) 242 Taxman 444 (Guj.)(HC)

S. 28(i) : Business income – Income from other sources – leasing of manufacturing facility for ten years was held to be assessable as business income. [S. 22] 438
Assessee-company was engaged in manufacturing malt. It leased out its entire malting facility to another company for a period of ten years. Authorities below opined that rental income earned by assessee was taxable as income from other source. On appeal allowing the appeal Court held that it was apparent that in terms of lease agreement, assessee retained its interest in plant and machinery and only minor repairs were to be carried out by lessee. Moreover, lessee had to continue its business operations with employees of assessee - Whether on facts, it was clear that assessee wanted to resume its business operations after expiry of period of lease and, therefore, income arising from leasing out of business assets was to be regarded as business income. (AY. 2004-05)
Maltex Malsters Ltd. v. CIT (2016) 243 Taxman 581 (P&H)(HC)

S. 28(i) : Business income – Compensation received from insurance company for loss of stocks-in-trade and other goods due to fire is assessable as business income. 439
On reference the Court held that the Appellate Tribunal was justified in treating the insurance claim received by the assessee from the insurance company on account of loss of stocks-in-trade and other goods due to fire as business income of the assessee. (AY. 1980-81)
Somaiya Organo Chemicals Ltd. v. CIT (2016) 388 ITR 423 / 290 CTR 30 / 142 DTR 361 (Bom.)(HC)

S. 28(i) : Business income – Income from house property – Hotel – Rent from transmission tower of mobile telecommunications company installed in terrace – Assessable as business income.[S.22] 440
Court held that the terrace of that hotel was utilised for the purpose of installing a tower and the income arose out of the rental of the terrace. The business of the assessee was, in a sense, to let out the rooms to the guests for consideration, though strictly speaking in law it was not a case of letting out. It may be a case of licensing. The Tribunal was justified in holding that the rental income from the tower was assessable as business income. (AY. 2003-04)
New Kenilworth Hotel P. Ltd. v. CIT (2016) 387 ITR 201 / (2017) 292 CTR 336 (Cal.)(HC)

441 **S. 28(i) : Business income – Income is taxable in the year when the possession of land was given. [S.4]**

On appeal, the Tribunal held that in terms of the agreement, the licence to enter upon Assessee's land was to be given within 90 days of SMPL obtaining all requisite permissions to develop the property. This licence was given on 25-4-2011 and thus, the business income, if any arose in the AY 2012-13 when possession of land was given. The Tribunal also recorded that this part of its income had been offered to tax for Assessment Year 2012-13. The High Court held that the view taken by the Tribunal on the basis of a factual finding that no income accrued to the Assessee before 25-4-2011 when necessary licence was granted to SMPL to enter upon its plot of land for the purpose of construction activities is a possible view and not shown to be arbitrary and/ or perverse. In view of the above findings of fact, no substantial question of law arose from the Tribunal's order. (AY. 2009-10)

CIT v. Skyline Great Hills (2016) 238 Taxman 675 (Bom.)(HC)

442 **S. 28(i) : Business income – Capital gains – Mere non-introduction of interest-bearing funds is not sufficient to conclude that gains from sale of shares are not business income. [S.45]**

The Tribunal, by the impugned order dated 30th August 2013, after considering the Circular No.4 of 2007 dated 15th June 2007 issued by the Central Board of Direct Taxes, observed that there are various factors such as frequency, volume, entry in the books of account, nature of funds used, holding period etc. which are relevant in deciding the true nature of transactions and no single factor is conclusive. Thus, mere non-introduction of interest bearing funds will not alone determine the nature of the transactions. The impugned order, after analyzing the statement of capital gains which were available before it, came to the conclusion that most of the shares have been sold within 30 days of its purchase and upheld the order of the CIT(A)… In view of the above, we see no reason to interfere with the above concurrent findings of fact which has not been shown to perverse or arbitrary. (ITA No. 2242 of 2013, dt 22.02.2016) (AY. 2008-09)

Pine Tree Finserve Pvt. Ltd. v. CIT (Bom.)(HC); www.itatonline.org

443 **S. 28(i) : Business income – Individual engaged in manufacture and sale of pharmaceutical products – Income earned from sale of undivided share of land and construction of flats on said land - treated as business income.**

The assessee was originally a partnership-firm engaged in the business of manufacturing and selling pharmaceutical items, it purchased land which was depicted as the business asset of the partnership firm. After retirement of two partners, the firm became a sole proprietary concern and the assessee became the sole proprietor. In AY 1999-2000, assessee sold the said land by registered sale deeds conveying undivided shares. The Department was of the view that sale of properties was not part of the business of the assessee, hence, the income cannot be treated as business income. However, CIT(A) did not concur with the Department's view and ruled in favour of Assessee.

On appeal, the High Court held that department's contention is fallacious. As the assessee is an individual, he need not necessarily confine his activity to a particular line of business. High Court noted that Assessee, was a partnership firm, which purchased the property only as a part of its business assets. Therefore there cannot

be a presumption that the Assessee cannot carry on any activity other than that of manufacture and sale of pharmaceutical products. Hence High Court upheld Tribunal decision that sale of undivided shares of land and the construction of flats cannot be subject to computation of capital gains and that the same would be treated as business income. (AY. 2000-01 to 2005-06)
CIT v. R. Sethuraman (2016) 237 Taxman 581 (Mad.)(HC)

S. 28(i) : Business income – Interest income – Fixed deposit was kept as margin money – Interest income earned was attributable to and incidental to business carried on by assessee it would be assessable as business income and not as income from other sources. [S. 56] 444
Dismissing the appeal of the Revenue, the Tribunal held that the assessee earned interest income on Fixed Deposits kept by it as margin money with NSE through its broker in order to enable it to trade in Future & Options. Since interest income earned on said Fixed Deposits was directly attributable to business of assessee, treating same as business income of assessee instead of income from other sources is correct.
Dy. CIT v. Teenlok Advisory Services (P.) Ltd. (2016) 159 ITD 991 (Kol.)(Trib.)

S. 28(i) : Business income – Income from house property – Sub-license of property along with other facilities was held to be assessable as business income and not as income from house property.[S. 22, 27] 445
Allowing the appeal of the assessee, the Tribunal held that The consideration received by the assessee as licensor from the sub-licensee, comprised of licence fees and service fee and air condition fees. Keeping in mind the objects of the assessee and keeping in mind the facts and circumstances of the present case, it can be safely concluded that the assessee carried on a systematic and regular activity in the nature of business and therefore the income earned from granting the premises on sub-license was to be assessed as income from business. (AY. 2006-07, 2007-08)
Bombay Plaza (P.) Ltd. v. ACIT (2016) 161 ITD 552 / (2017) 184 TTJ 412 / 148 DTR 11 (Kol.)(Trib.)

S. 28(i) : Business income – Interest – When Memorandum and Articles of Association permits the assessee to lend money and also to receive the money on interest the said interest income is assessable as business income. [S. 56] 446
The Tribunal held that Memorandum and Articles of Association permits the assessee to lend money and also to receive the money on interest. Therefore, interest income constituted business income of the assessee. (AY. 2010-11)
ACIT v. Rama Panels P. Ltd. (2016) 181 TTJ 698 (Jab.)(Trib.)

S. 28(i) : Business income – Income from house property – Receiving rent and facility service charges, since facility service charges were being received by assessee in return of providing specific services like housekeeping, security, etc., same was liable to be assessed as business income. [S. 22] 447
The AO held that facility service charges were also received from person from whom rental income was received and, therefore, same was also taxable under head 'Income

from house property' as a part and parcel of rental income. Allowing the appeal of the assessee, the Tribunal held that since facility service charges were being received by assessee in return of providing specific services like housekeeping, security, etc., same was liable to be assessed as business income. (AY. 2009-10)
Kavita Marketing (P.) Ltd. v. ITO (2016) 159 ITD 547 (Mum.)(Trib.)

448 **S. 28(i) : Business income – Share holder agreement – Accrual – Yearly increase in option price would be business income. [S.5, 145A]**
Under a shareholder agreement, 74 per cent of equity shares in AT&T-India, was to be held by US company AT&T-Global. 26 per cent by assessee and AT&T-Global had an irrevocable call option to increase its holding in AT&T-India. Assessee had to sell shares only to AT&T-Global making holding highly illiquid and share/option price would increase at fixed rate annually irrespective if performance of AT&T-India. Tribunal held that yearly increase in option price would be business income of assessee. (AY. 2008-09)
Mahindra Telecommunications Investment (P.) Ltd. v. ITO (2016) 159 ITD 600 / 180 TTJ 434 (Mum.)(Trib.)

449 **S. 28(i) : Business income – Purchase of agricultural land on borrowed money and sale with in one and half months is assessable as business income. [S. 2(13), 2(14), 45]**
The assessee is an advocate by profession sold immovable property (land) on which gains arising therefrom were claimed to be exempt from tax being Agricultural lands, taking shelter of section 2(14) read with section 45. Assessing Officer treated the transaction as business income. Which was confirmed by CIT(A). Dismissing the appeal the Tribunal held that; assessee purchased large tracts of land from borrowed funds. Entire money towards purchase of land had been financed by persons to whom land was ultimately sold within a marginal time gap of about one and half months of its acquisition without putting purported agricultural land for its use at any point of time. Clearly demonstrates implicit intention of assessee that transaction entered was nothing but an adventure in nature of trade, i.e., a business transaction under extended definition of S. 2(13).(AY. 2009-10).
Dilip Battu Karanjule v. ITO (2016) 161 ITD 172 (Pune)(Trib.)

450 **S. 28(i) : Business income – Income from house property – Property was sub-leased along with amenities such as use of lifts, water supply, watch and ward facilities etc. – Income from such activity was to be assessed as income from business. [S.22, 32]**
Main objects as per Memorandum and Articles does not specify that the assessee would take any premises on lease and would in turn sub-lease the same on leave and license basis, but the intention to exploit the asset leased by it is clear from activities carried on by the assessee. Income generated from such activities was to be assessed to tax in the hands of the assessee as income from business and entitled for expenditure including depreciation of assets but not on the building. (AY. 2008-09)
Soham Trading & Investments (P.) Ltd. v. (2016) 161 ITD 761 (Mum.)(Trib.)

S. 28(i) : Business income – Receipt on sale of film scripts was to be taxed as 'Income from Other Sources' in the absence of the said activity being a part of the objects of the assessee company. [S.56] 451

The assessee company was engaged in provision of technical services in connection with cine equipment. During the year it had received an amount on sale of film scripts, which was considered to be a part of its business profits. The AO treated the same as 'Income from other sources' and disallowed the expenses claimed by the Assessee. On appeal, the ITAT held that script writing was not a part of the main, ancillary or incidental objects of the assessee and the assessee never intended to do the business of script writing. Thus, the said receipt was rightly taxed under 'Income from Other Sources' since no evidence was submitted by the assessee to prove that the said receipt was a part of its business. (AY. 2009-10)

Film Logic India P. Ltd. v. ACIT (2016) 47 ITR 769 (Mum.)(Trib.)

S. 28(i) : Business income – Capital gains – Sale of shares – Holding period less than one month, business income. [S.45] 452

The Assessing Officer, for the Assessment Year 2006-07, found that the assessee had entered into over 200 transactions of purchase and sale of shares each which was offered by the assessee as short term capital gains. The assessee dealt in over 100 different scrips during the assessment year. Out of the total transactions, the period of holding in over 100 instances was less than three months, out of which in 65 instances the holding period was less than one month. On this finding, he held that buying and selling of shares was done by the assessee with a motive to maximise profits and that there was no intention to derive income by way of dividend from the shares. The Assessing Officer concluded that income declared by the assessee under the head "Capital gains" on account of the buying and selling of shares was assessable as 'business income'. The Commissioner (Appeals) confirmed AO order. The Tribunal in view of the peculiar facts held that the gains arising from sale of shares held by the assessee up to one month were to be classified as income from business despite being delivery based transactions, while the gains arising from sale of shares held for more than one month and up to twelve months should be classified as short term capital gains. The prime objective of such transactions which were concluded within one month was to earn and maximise profits in the shortest period of time which was akin to intention of doing business by maximising profits while dealing in sale and purchase of shares rather to hold shares as investment with a vision to earn dividend and other benefits attached to holding of shares such as entitlement to rights shares or bonus shares. (AY. 2006-07)

Asha Ashar v. ITO (2016) 46 ITR 492 (Mum.)(Trib.)

S. 28(1) : Business income – Foreign Exchange fluctuation gain as part or operating revenue. 453

The Tribunal held that in view of the decision of Bangalore Bench of Tribunal in the case of *Sap Labs India (P) Ltd. v. ACIT (2011) 44 SOT 156 (Bang.),* the foreign exchange fluctuation gains are required to be added to operating revenue. (AY. 2010-11)

Obopay Mobile Technology India (P) Ltd. v. Dy. CIT (2016) 157 ITD 982 / 177 TTJ 191 / 46 ITR 42 (Bang.)(Trib.)

454 **S. 28(i) : Business income – Income from house property income – Business of hotels – Rental income assessable as business income.[S. 22]**

In Memorandum of Association, main object of assessee was to carry on business of hotels, resorts, boarding, lodges, guest houses, etc., Assessee earned only rentals for occupation of premises on daily basis, said income would be taxed as business income and not as income from house property. (AY.2007-08)

Heritage Hospitality Ltd. v. Dy. CIT (2016) 158 ITD 179 (Hyd.)(Trib.)

455 **S. 28(i) : Business income – Accrual – Non-refundable upfront premium from various parties for permitting them to develop various facilities such as docking of ships, loading and unloading of containers on land provided by it for a period of 30 years, entire amount of premium was to be brought to tax in assessment year in question itself. [S. 145]**

Assessee was carrying on business of providing port, berthing and docking facilities at New Mangalore Port. It had control and domain over vast tracks of land known as 'designated port area'. Assessee provided various facilities for docking of ships, loading and unloading of container on ships and warehousing within designated port area. Assessee formulated a scheme of BOT Model under which it permitted some of companies to develop aforesaid facilities on land provided by assessee. In terms of BOT scheme, assessee received from Concessionaires upfront lump sum premium for allowing those companies to develop facilities and use same for a period of 30 years. In computation of income, assessee offered 1/30th of upfront premium as income for year under consideration and showed balance received as liability being in nature of pre-paid income. Assessing Officer treated entire amount of upfront premium received by assessee from three companies/concessionaires as income for year under consideration. CIT(A) up held the order of AO. On appeal Tribunal held that from records that assessee had completed and discharged all its obligation by executing agreement and no further liability was to be discharged by assessee for next 30 years under concession agreement. It was also undisputed that upfront premium amount was admittedly non-refundable amount irrespective of premature termination of concession/lease agreement therefore on facts, there would be no question of accrual of income in future years and, therefore, impugned order passed by Assessing Officer was to be upheld. (AY. 2009-10)

New Mangalore Port Trust v. ACIT (2016) 157 ITD 399 (Bang.)(Trib.)

456 **S. 28(i) : Business income – Commission income to be treated as business income and not as income from other sources. [S. 14, 56]**

The assessee earned commission income along with income from management of hotels. As per the objects clause in its MOA and AOA, it could carry on the business of hotels as well as work as a consultant commission agent in India and abroad. The AO treated the commission income as income from other sources. The ITAT held that the commission income would be chargeable under the head of Business Profits since it is covered in the objects clause of the assessee. (AY. 2008-09, 2009-10)

Mahagun Hotels P. Ltd. v. DCIT (2016) 45 ITR 347 (Delhi)(Trib.)

S. 28(i) : Business income – Interest income from fixed deposit and short-term parking of surplus funds to be treated as business income.[S. 14, 56] 457

The assessee earned interest income on fixed deposits maintained for the purpose of obtaining a performance guarantee from the bank. The furnishing a bank guarantee was a mandatory condition to start construction of the hotel, which was the business of the assessee. The assessee also earned interest income on loan funds disbursed which was parked for a short duration. The AO treated both the interest income as income from other sources. The ITAT held that the interest income on fixed deposit was inextricably linked to the business of the assessee and hence was to be treated as business income. Further, the interest income from short-term parking was also business income since it was an act of prudency to earn interest income for 9 days before the loan could be utilised, so as to reduce the interest cost. (AY. 2008-09, 2009-10)

Mahagun Hotels P. Ltd. v. DCIT (2016) 45 ITR 347 (Delhi)(Trib.)

S. 28(i) : Business income – Income from house property – Lease of hotel premises along with facilities like restaurant, crockery, etc. will be business income. [S.22] 458

The assessee offered to tax rental income from lease of two hotels as Income from Business Profits. The AO treated the same as Income from House Property. The ITAT held that it would be business income on the ground that the Assessee had given the premises on rent along with facilities like restaurant, crockery, electronic appliances, etc. so as to make the premises known as a hotel. (AY. 2007-08)

Enn Zen Enterprises (P) Ltd. v. ACIT (2016) 45 ITR 382 (Chd.)(Trib.)

S. 28(i) : Business income – Income from house property – Rental income from commercial complex assessable as business income. [S. 22] 459

The Tribunal held that the assessee's objects are not in respect of letting of any particular property, the very object is the commercial exploitation of the properties. The assessee is providing hosts of amenities and facilities which amounts to composite business activity. The income from the multiplex is liable to be assessed as business income and not as income from house property. (AY. 2007-08 to 2009-10)

Dy. CIT v. M. S. Luvish Projects (P) Ltd. (2016) 175 TTJ 153 (Mum.)(Trib.)

S. 28(i) : Business loss – Forfeiture of licence fees paid on cancellation of excise licence – Transfer of licence by assessee prior to forfeiture – Assessee was not entitled to set off loss. 460

Supreme Court in *CIT v. Preetam Singh Luthra (2016) 386 ITR 408 (SC)* has held that where assessee had transferred his excise licence before forfeiture of same, loss if any, on account of forfeiture was not by assesse but by transferee and thus, assessee was not entitle to claim said loss as business loss. Review petition against said order was dismissed. (AY. 2006-07)

Preetam Singh Luthra v. CIT (2016) 389 ITR 447 (2017) 291 CTR 595 / 77 taxmann.com 222 / 145 DTR 440 (SC)

Editorial: Review petition was dismissed, decision of the Supreme Court in CIT v. Preetam Singh Luthra (2016) 386 ITR 408 (SC) reaffirmed

461 **S. 28(i) : Business loss – Set off – Forfeiture of licence fees paid on cancellation of excise licence – Transfer of licence by assessee prior to forfeiture – Assessee not entitled to set off loss.**
Forfeiture of license fees by the Excise Department deposited by the assessee was entitled to set off. (AY.2006-07)
CIT v. Preetam Singh Luthra (2016) 386 ITR 408 / 289 CTR 476 (SC)

462 **S. 28(i) : Business loss – Partial transfer of business – Business continued – Expenses is allowable. [S. 37(1), 71]**
Dismissing the appeal of the revenue, the Court held that the assessee has transferred only partial business and continued with other business hence expenses are to be allowed. (AY 2008-09)
CIT v. ISC Investments & Finance (P) Ltd. (2016) 242 Taxman 218 / (2017) 393 ITR 195 (Mad.)(HC)

463 **S. 28(i) : Business loss – Mark to market loss – Loss suffered in foreign exchange transactions entered into for hedging business transactions cannot be disallowed as being "notional" or "speculative" in nature. [S. 43(5), 73]**
Dismissing the appeal of revenue the Court held that; Loss suffered in foreign exchange transactions entered into for hedging business transactions cannot be disallowed as being "notional" or "speculative" in nature. The Court also observed that, the judgment of *S. Vinodkumar Diamonds Pvt. Ltd. v. Addl (2013) 89 DTR 129 (Mum.)(Trib.)*, has been referred and held that, however, it appears that the decision of this court in *CIT v. Badridas Gauridas (P) Ltd. (2004) 261 ITR 256 (Bom.)(HC)* was not brought to the notice of the Tribunal. (AY.2009-10)
CIT v. D. Chetan & Co (2016) 243 Taxman 356 / (2017) 390 ITR 36 / 151 DTR 277 (Bom.) (HC)

464 **S. 28(i) : Business loss – Division of subsidiary company demerged and credit facility enjoyed by it transferred by bank to new company – Amount paid by the assessee to the bank in settlement of the debt owed by the new company was not loss of the assessee – Not allowable.**
Allowing the appeal of revenue the Court held that Amount paid by the assessee to the bank in settlement of the debt owed by the new company was not loss of the assessee. The money paid by the assessee in discharging the new company's debts, even assuming that the assessee was interested to pay, was recoverable and payable by that new company. The suit filed by the creditor bank was against the new company and not against the assessee. The assessee was neither a party to the suit nor a guarantor. The Tribunal was wrong in proceeding on the basis that it was due to the pressure exerted by the Reserve Bank of India that the assessee was made to pay the debts due by the group company to the bank. Even assuming that a caution notice was published it had already been withdrawn by the Reserve Bank of India. There was nothing before the Tribunal to show that the bank would not have advanced further money to the assessee except upon payment by the assessee of the dues owed by the group company to it. (AY. 1998-99)
CIT v. Duncan Industries Ltd. (2016) 385 ITR 150 / 138 DTR 241 / 288 CTR 107 (Cal.) (HC)

S. 28(i) : Business loss – Accommodation entries – Not discharging onus – Department's failure to summon witnesses immaterial – Disallowance of loss held to be justified. [S. 131] 465

Dismissing the appeal of assessee the Tribunal held that the Appellate authorities were justified in maintaining the additions of the sums claimed by the assessee on account of loss. The onus was on the assessee to prove the genuineness of the transactions by producing the relevant evidence and material on record which he had failed to do. The assessee was unable to produce the witnesses for cross examination from the broker firm of which he claimed to be a client. Further, the evidence collected from the stock exchange and confronted to the assessee had proved that the commodity transactions had not been actually carried out but were mere accommodation entries. The assessee having failed to discharge the primary onus of proving the genuineness of the transactions, no right accrued in his favour on account of non-summoning of the witnesses by the AO under section 131. The assessee had been unable to show any material to controvert the findings recorded by the authorities below. (AY. 2006-07)

Sham Sunder Khanna v. CIT (2016) 386 ITR 461 (P&H)(HC)

S. 28(i) : Business loss – Write-off of dues from government authorities – Held to be allowable as business loss. 466

It was held that the write off of deposit with Government bodies, refund from excise authorities, advances to various employees etc were allowable as there was a finding of fact by appellate authorities that the same were incidental to the carrying on of business. (AY. 2002-03)

CIT v. ITC Ltd. (2016) 237 Taxman 533 / 134 DTR 293 (Cal.)(HC)

S. 28(1) : Business loss – Foreign exchange forward contracts – Hedging loss was held to be allowable as business loss. [S.43(5)] 467

Tribunal held that Assessee engaged in manufacture and export of processed food products, in order to safeguard itself against fluctuations in exchange rates of foreign currency, entered into foreign exchange forward contracts with banks against confirmed export order, hedging loss suffered by assessee in respect of said forward contracts was to be allowed as business loss. (AY. 2010-11)

Foods and Inns Ltd. v. ACIT (2016) 159 ITD 1007 (Mum.)(Trib.)

S. 28(i) : Business loss – Allocation of administrative expenses was held to be justified. 468

The Tribunal held that allocation of common expenses on the basis of turnover is one of the recognized methods. Therefore, CIT(A), was justified in allowing the claim by loss from the trading activities worked out after allocating the administrative expenses between the trading activities and manufacturing activities of the assessee. (AY. 2010-11)

ACIT v. Rama Panels P. Ltd. (2016) 181 TTJ 698 (Jab.)(Trib.)

S.28(i) : Business loss – Hedging contract loss – Part of hedging loss could not be considered as speculation loss only on ground that exposure did not tally with month wise transaction. [S.43(5)] 469

Assessee was engaged in business of purchase of rough diamonds through import from various countries and sale of manufactured polished diamonds by way of export

to various countries. During the year he claimed loss incurred on account of foreign currency forward/option hedging contract as business loss. The AO having noticed that the loss was actually suffered on account of its forward and option contract any foreign currency which were not deliverables at first place and no break-up of currency forward/ option contract was given, but it admitted that majority of the contracts on which the loss was suffered was of forward and option contracts considered the loss in question as speculation loss u/s. 43(5).Since all receipts, payments, receivables and payables were in foreign currency which was inseparable and inextricably linked with diamond business, loss was nothing but business loss. Said loss could not be considered as speculation loss simply on ground that exposure did not tally with month wise transaction. (AY.2008-09)
DCIT v. Mahendra Brothers Exports (P.) Ltd. (2016) 161 ITD 772 (Mum.)(Trib.)

470 **S. 28(i) : Business loss – Open derivative contracts – Loss in open derivative contracts due to valuation on basis of marked-to-market values was to be allowed. [S. 145]**
Assessee Company is share broking, trading and investment in shares and securities booked losses on open derivative contracts by marking them to market value as at year end. Said 'loss' was to be allowed in current year while AO would be at liberty to withdraw said loss on settlement date(s); likewise, brought forward 'gain' from contracts would stand to be taxed in its entirety on settlement. (AY.2008-09)
Mili Consultants & Investment (P.) Ltd. v. DCIT (2016) 160 ITD 72 (Mum.)(Trib.)

471 **S. 28(i) : Business loss – Speculative – Derivative loss on reinstatement of foreign currency forward contracts is not speculative and is an ascertained liability. [S.43(5)]**
The Assessee incurred a derivative loss arising out of reinstatement of foreign currency forward contracts entered into to hedge against the forex risk on account of receivables. The AO held that it was speculative loss and that it was notional in nature. The ITAT held that derivative transactions on foreign exchange were exempt from the purview of speculative transactions since they were settled by actual delivery. Further, the ITAT also held that the marked-to-market loss on reinstatement of the derivative is not a notional or contingent loss, but an ascertained liability which had crystallized on the date of balance sheet. (AY. 2009-10)
Inventurus Knowledge Services P. Ltd. v. ITO (2016) 156 ITD 727 / 45 ITR 57 / 177 TTJ 269 / 143 DTR 113 (Mum.)(Trib.)

472 **S. 28(i) : Business loss – Forfeited advance money – Held to be allowable as business loss.**
Assessee builder paid advance money to buy a land for construction of residential flats thereupon and said money was forfeited, such loss was to be treated as revenue loss as it was incurred to acquire stock-in-trade i.e. land. (AY. 2010-11)
Vijayashanthi Builders Ltd. v. Jt.CIT (2016) 158 ITD 635 / 48 ITR 310 (Chennai)(Trib.)

473 **S. 28(i) : Business loss – Valuation of stock – Loss arising on revaluation of securities – Allowable.**
Loss arising on re-valuation of securities was required to be allowed. (AY. 2008-09)
Yes Bank Ltd. v. ACIT (2016) 46 ITR 317 (Mum.)(Trib.)
Dy. CIT v. Yes Bank Ltd. (2016) 46 ITR 317 (Mum.)(Trib.)

S. 28(i) : Business loss – Banks – Valuation of stock – Provision made for revaluation in respect of securities transferred from Held to Maturity' to 'Available for Sale' was deductible 474

Since the profits on sale of investments and income from investments were always treated as business income, it was to be implied that the investments were treated as stock-in-trade and not as capital asset. The classification of security made and the loss arose on account of revaluation of securities were required to be allowed. The provision for revaluation in respect of securities transferred from held to maturity category to available for sale category was to be allowed as a deduction. Depreciation in respect of HDFC Bonds and debentures which were held to be 'held for trading' was allowable. (AY. 2006-07 and 2007-08)

Yes Bank Ltd. v. Dy. CIT (2015) 68 SOT 291 (URO) / (2016) 46 ITR 121 (Mum.)(Trib.)

S. 28(1) : Business loss – Dealing in land – Advance given in the course of business – Non-refund of advance is a business loss allowable as deduction. 475

On appeal, the Tribunal held that the assessee could not establish that the advance amount of ₹ 31 lakhs was returned to it but the transaction in land was part of the business of the assessee and non-refund of the advance amount to the assessee was a business loss incidental to the business of the assessee. Thus, the loss was an allowable deduction u/s. 28 of the Act. (AY. 2006-07)

Today Homes and Infrastructure Pvt. Ltd. v. Dy. CIT (2016) 46 ITR 586 (Delhi)(Trib.)

S. 28(iv) : Business income – Value of any benefit or perquisites – Converted in to money or not – If transfer was conditional and if assessee failed to comply with condition and, thus, shares could not be transferred in his name, then provisions of section 28(iv) would not be applicable. [S. 2(24)] 476

Appeal by the revenue dismissing the appeal the Court held that The ITAT held that if the transfer was conditional and if the assessee failed to comply with condition and, therefore, the shares could not be transferred in his name, then the provisions of section 28(iv) would not be applicable. It relied upon the decision of the coordinate bench of ITAT in the case of *CIT v. Kaizen Commercial (P.) Ltd.* High Court held that the said judgment of the Tribunal was confirmed by the same court in IT Appeal No. 94/2012 by an order dated 24-3-2014. It also held that, the finding of facts by the lower authorities were that the assessee failed to abide by the condition and therefore, no benefit or perquisite arose to the asssessee. Accordingly, it held that nothing more need be investigated or probed further and did not admit the question of law.

CIT v. Ashish P. Deora (2016) 242 Taxman 214 (Bom.)(HC)

Editorial : The SLP of the revenue is dismissed; CIT v. Ashish P. Deora (2016) 242 Taxman 172 (SC).

S. 28(iv) : Business income – Waiver of loan by Bank assessable as business income. [S.28(i)] 477

The waiver by the lender of even the principal amount of loan constitutes a "benefit" arising from business and is assessable to tax as income. (AY. 2006-07)

CIT v. Ramaniyam Homes P. Ltd(2016) 384 ITR 530/ 239 Taxman 486 / 137 DTR 319 / 287 CTR 200 (Mad.)(HC)

478 **S. 28(iv) : Business income – Value of any benefit or perquisite, arising from business or exercise of profession – Assessee could not furnish details regarding advance received from parties against supplies hence addition was sustained. [S.28(i)]**
Assessee could not furnish details with regard to advance received from various parties against supplies. Further not produce any material regarding expenditure incurred in executing orders. Addition is correctly upheld. (AY. 2008-09)
Servall Engineering Works (P.) Ltd. v. DCIT (2016) 161 ITD 457 (Chennai)(Trib.)

479 **S. 28(va) : Business income – Compensation received towards negative covenant of non-compete agreement being capital receipt, is not liable to tax position prior to 1-4-2003 [S. 4]**
The amount equivalent to 4,99,000 pounds paid by the LI group was liable to be treated as a measure of compensation towards the negative covenant of non-compete agreement entered into by and between TTKMB and LI group. It was not necessary that the assessee shelves all its other sources of income as well, for the receipt of compensation to amount to a capital receipt. (AY. 2000-01)
CIT v. TTK Healthcare Ltd. (2016) 385 ITR 326 / 70 taxmann.com 263 (Mad.)(HC)
Editorial : Order in TTK Healthcare Ltd. v. ACIT (2008) 306 ITR (AT) 19 (Chennai) affirmed.

S. 30. Rent, rates, taxes, repairs and insurance for buildings.

480 **S. 30 : Repairs – Capital or revenue – Depreciation to extent apportioned as capital expenditure – Renovation resulting in extra accommodation – Enduring benefit to assessee-Capital expenditure. [S. 32, 37(1)]**
Held, there was a concurrent finding of fact by the appellate authorities that the expenditure incurred by the assessee claimed to be on account of repairs and maintenance was in fact on account of renovation of the premises. It led to a benefit of enduring nature to the assessee enabling it to accommodate more employees facilitating its trading activities. The benefit was available to the assessee over a long period of time and therefore the expenditure was capital in nature and eligible for depreciation as granted by the Tribunal to the extent the claim as revenue expenditure was disallowed. The assessee had failed to establish that the apportionment of expenditure by the Department, in the ratio of 75% and 25% between capital expenditure and revenue expenditure, on estimation based on facts, was arbitrary or perverse. The expense of renovation was capital expenditure. (AY. 1996-97)
RPG Enterprises Ltd v. Dy. CIT (2016) 386 ITR 401 / 240 Taxman 614 (Bom.)(HC)

481 **S. 30 : Repairs – Capital or revenue – Lease premises – Repairs would render premises fit for business – Held to be allowable.**
Dismissing the appeal of revenue the Court held that expenses were incurred towards repair of the premises taken on lease so as to make them fit for its business activity; Hence such expenditure would fall within the expression as repairs as appearing in section 30(a)(i) of the Act. (AY. 2005-06, 2006-07)
CIT v. U.G. Hospitals P. Ltd. (2016) 386 ITR 520 (P&H)(HC)

S. 30 : Repairs – Leasehold premises – Expenditure on interior designing of leasehold premises, said expenditure was to be allowed as revenue expenditure. [S. 32, 37(1)] 482
Allowing the appeal of the assessee, the Tribunal held that ;expenditure on interior designing of leasehold premises, said expenditure was to be allowed as revenue expenditure. (AY. 2009-10)
Peri (India) (P.) Ltd. v. JCIT (2016) 159 ITD 541 (Mum.)(Trib.)

S. 32 : Depreciation.

S. 32 : Depreciation – Carry forward and set off – Amendment in 1996 – Effect – Unabsorbed depreciation as on 1-4-1997 can be set off against income from any head for AY immediately following 1-4-1997 and thereafter unabsorbed depreciation if any to be set off only against business income for a period of eight assessment years. [S. 32(2)] 483
The depreciation, unabsorbed or otherwise or current, would be set off against the income arising from business or profession or any other income but the left over portion thereof could not be set off in the AY 1998-99 except against the income arising from business or profession. SLP of assessee was dismissed. (AY. 1998-99)
Peerless General Finance and Investment Co. Ltd. v. CIT (2016) 380 ITR 165 / 242 Taxman 173 (SC)
Editorial: Order in Peerless General Finance and Investment Co. Ltd. v. CIT (2016) 242 Taxman 209 (Cal.)(HC) is affirmed.

S. 32 : Depreciation – Charitable Trust – Capital asset was allowed as deduction – Depreciation was held to be allowable. [S.11, 12] 484
Assessee, a charitable trust, claimed depreciation in respect of its assets and Tribunal allowed claim of depreciation. On appeal by revenue, dismissing the appeal of Revenue, the Court held that Tribunal was right in allowing deprecation, as proposed for consideration of High Court, stood concluded by two decisions of Bombay High Court in favour of assessee and, therefore, it did not give rise to any substantial question of law. Followed, *CIT v. Institute of Banking Personnel Selection (IBPS), DIT(E) v. G.K.R. Charities (2013) 214 Taxman 555 (Bom)(HC)* (AY. 2007-08, 2008-09)
DIT v. G.D. Birla Medical Research & Educational Foundation (2016) 243 Taxman 209 (Bom.)(HC)
Editorial: SLP was granted to the revenue, DIT v. G.D. Birla Medical Research & Education Foundation (2016) 243 Taxman 145 (SC)

S. 32 : Depreciation – Charitable Trust – Capital asset was allowed as deduction – Depreciation was held to be allowable. [S.11, 12] 485
Assessee, an educational trust, claimed depreciation on capital assets for which capital expenditure had already been allowed in relevant assessment year. Tribunal allowed depreciation claimed by assessee. On appeal by revenue, dismissing the appeal of revenue the Court held that, in view of judgment of Division Bench of Rajasthan High Court in case of *CIT v. Krishi Upaj Mandi Samiti [2015] 229 Taxman 524*, issue involved

in instant appeal was no more *res integra* and, therefore, appeal preferred by revenue was liable to be dismissed.
PCIT v. Vijay Shanti Educational Trust (2016) 243 Taxman 212 (Raj.)(HC)
Editorial : SLP was granted to the revenue, CIT v. Vijaya Shanti Educational Trust (2016) 243 Taxman 175 (SC)

486 **S. 32 : Depreciation – Property held for charitable purposes – Assets whose cost allowed as application of income to charitable purposes – Entitle to depreciation – Section 11(6) denying depreciation on such assets inserted w.e.f. 1-4-2015 – Amendment is not retrospective.**
For assessment years prior to the introduction of section 11(6), i.e., prior to April 1, 2015, depreciation is allowable on assets, where cost of such assets has already been allowed as application of income in the year of acquisition/purchase of asset. (AY. 2009-10)
CIT v. Karnataka Reddy Janasangha (2016) 389 ITR 229 / 241 Taxman 147 (Karn.)(HC)
Editorial: SLP is granted to the revenue, CIT v. Karnataka Reddy Janasangha (2017) 247 Taxman 9 (SC)

487 **S. 32 : Depreciation – Tribunal was not right in its view to direct Assessing Officer to grant depreciation on assets not owned by assessee and treat toll roads as plant and machinery.**
The High Court following the order passed in ITA. No.2357 of 201 dt 21-3-2013, disposed of the above substantial questions of law raised by answering them in the negative i.e. in favour of the Appellant-Department and against the Respondent-Assessee. (AY. 2008-09)
CIT v. West Gujarat Expressway Ltd. (No.2) (2016) 242 Taxman 127 / (2017) 390 ITR 400 (Bom.)(HC)
Editorial: SLP was granted to the assessee West Gujarat Expressway Ltd. (No.2)(2016) 242 Taxman 115 (SC)

488 **S. 32 : Depreciation – Shuttering material and tabular scaffolding – 100% depreciation allowable was held to be proper.**
That the Appellate Tribunal was correct in allowing depreciation at the rate of 100% on shuttering material and tabular scaffolding. (AY. 1994-95)
CIT v. Ansal Housing & Construction (2016) 389 ITR 373 / 241 Taxman 418 (Delhi)(HC)

489 **S. 32 : Depreciation – Counting and stacking machines, etc,cannot be considered to be computer peripherals – Not entitled to higher rate of depreciation.**
Dismissing the appeal of the assessee the Court held that; The Tribunal was right in granting depreciation at the rate of 80% for instrumentation and monitoring systems. Only computer peripherals could be at the most considered as computers for the purpose of claiming depreciation at the rate prescribed in item III(5) of Appendix I to the 1962 Rules. All other items would fall in the category mentioned in item III(1) of Appendix I to the 1962 Rules. The disallowance of depreciation at a higher rate was

justified Assessee could not have invented its own nomenclature and added computer which was not there in invoice and proceed to claim depreciation at 60%. (AY. 2011-12)
Dinamalar v. ITO (2016) 389 ITR 94 / 242 Taxman 437 (Mad.)(HC)

S. 32 : Depreciation – Wind mill had been acquired and installed in relevant previous year – Entitled to depreciation. 490
Dismissing the appeal of revenue, the Court held that on the facts and circumstances of the case, the Tribunal was right in holding that the assessee was entitled to depreciation, as the assessee had taken possession of the wind mill, and it was put to use and started generating electricity before March 31, 2008, during the financial year relevant to the assessment year 2008-09.
CIT v. Sangu Chakra Hotels P. Ltd. (2016) 389 ITR 117 / 74 taxmann.com 76 / (2017) 150 DTR 259 (Mad.)(HC)

S. 32 : Depreciation – Written down value calculated for assessment year 1998-99 to be taken into account while computing depreciation for assessment year 1999-2000. 491
Dismissing the appeal of revenue the Court held that since the order of the Commissioner (Appeals) in the case of the assessee for the assessment year 1998-99 had resulted in higher written down value of the asset, and that order had been affirmed by the Tribunal in appeal, the depreciation for the assessment year 1999-2000 had been rightly directed to be worked out with reference to the written down value computed as a result of the order passed under section 250(6) of the Act for the assessment year 1998-99.
CIT v. Max India Ltd. (No. 1) (2016) 388 ITR 74 / 243 Taxman 40 (P&H)(HC)

S. 32 : Depreciation – Plant and machinery – Wind mill – Rate of depreciation on civil foundation and electric turbine generator for wind mill – Rate applicable to wind mill applies. 492
Dismissing the appeal of revenue the Court held that when the civil work and electric generator were a part of the wind mill, the rate as applicable to the wind mill would apply. (AY. 2008-09)
CIT v. Mehru Electricals and Mechanical Engineers Pvt. Ltd. (2016) 388 ITR 169 (Raj.)(HC)

S. 32 : Depreciation – Assets which are necessary for setting up and running of a windmill would be eligible for depreciation at the rate of 100%. 493
The Assessee, running windmill, claimed 100% depreciation on assets like temporary approach road, central control room, 33 KV Transformer Yard, 33 KV Grid Line, Metering Yard, Vacuum Circuit Breakers, additional meeting yard and earth pit. The Assessing Officer allowed the depreciation at the rate of 25%. On assessee's appeal, the CIT(A) confirmed the order of the Assessing Officer.
On further appeal, the Tribunal relied on its co-ordinate bench decision in the case of MET Developers & Builders, which involved identical facts and therefore, allowed the entire claim of depreciation at the rate of 100%.
On Revenue's further appeal, the High Court held that full amount of depreciation would be allowed, as the assets would be necessary for setting up of a windmill. (AY. 1997-98)
CIT v. Infrastructure Leasing & Financial Services Ltd. (2016) 239 Taxman 464 (Bom.)(HC)

494 **S. 32 : Depreciation – Dyes and moulds used for manufacture of switches are entitled to depreciation at the rate of 30%.**
The High Court held that the dyes and moulds used in manufacture of switches are entitled to a depreciation at the rate of 30% under sub-clause (vii) of clause (3) of Entry III in Part-A in the New Appendix I as the assessee is involved in manufacture of plastic goods (Switches). (AY. 2006-07)
PCIT v. L.K. India Pvt. Ltd. (2016) 240 Taxman 627 / 290 CTR 118 / 143 DTR 38 (Guj.) (HC)

495 **S. 32 : Depreciation – Goodwill – Retirement – Amount paid to retiring partner as compensation on retirement is to be treated as Goodwill and therefore, depreciation is to be allowed.**
The High Court held that the amount paid to retiring partner as compensation on retirement is to be treated as goodwill and following the decision of the Supreme Court of *CIT v. SMIFS Securities Ltd. (2012) 348 ITR 302 (SC),* held that the same has to be treated as "business or commercial right of similar nature" and therefore, depreciation is to be allowed.(AY. 2003-04 to 2006-07, 2008-09)
PCIT v. Swastik Industries (2016) 240 Taxman 510 (Guj.)(HC)

496 **S. 32 : Depreciation – Property given under lease – Lessee paying rent and charges for facilities such as elevators – Income is assessable as Income from other sources – Depreciation allowable on facilities. [S. 56]**
Charges received towards provision and maintenance of facilities and services could not be construed to be income from house property. The income had to be considered as income from business and therefore, the claim for depreciation was to be allowed. (AY. 2004-05 to 2008-09)
CIT v. IBC Knowledge Park P. Ltd. (2016) 385 ITR 346 / 287 CTR 261 / 69 taxmann.com 108 / 136 DTR 65 (Karn.)(HC)

497 **S. 32 : Depreciation – Depreciation should be allowed even if the entire capital expenditure has been allowed as application of income in earlier years. [S.11]**
The assessee was availing exemption under sections 11 to 13. It also claimed depreciation on assets. AO disallowed depreciation on the ground that the amounts expended on acquisition of depreciable capital assets were treated as application of income in earlier years and, therefore, any further claim of depreciation on assets will amount to claim for double deduction. High Court held that the amount of depreciation debited to the account of a charitable institution is to be deducted to arrive at the income available for application to charitable and religious purposes. (AY. 2006-07)
CIT v. Market Committee, Shahabad (2016) 240 Taxman 535 (P&H)(HC)

498 **S. 32 : Depreciation – Foreign exchange – Depreciation is not admissible on loss arising out of cancellation/booking of foreign exchange covers capitalized under section 43A. [S. 43A]**
The assessee incurred loss due to foreign exchange fluctuation. It was the contention of the Department that the said loss is intermittent and therefore, depreciation cannot be

allowed. It is held by the High Court that depreciation could not be allowed as there is no loss incurred by the assessee. (AY. 2002-03)
CIT v. ITC Ltd. (2016) 237 Taxman 533 / 134 DTR 293 (Cal.)(HC)

S. 32 : Depreciation – Benefit of unabsorbed depreciation and investment allowance is available even if return of income is filed belatedly. [S. 32A, 139(3)] 499
Assessee carried on the business of dealing in lint, cotton and cotton seeds. The return of income was filed claiming set off depreciation against the current years' income and carrying forward the unabsorbed depreciation and investment allowance. The AO disallowed the set off and carrying forward of depreciation in the assessment. An appeal was filed on several ground including the ground of carry forward of depreciation and investment allowance. The CIT(A) partly allowed the appeal and remanded many issues back to AO. However, the ground of set off and carry forward was untouched by CIT(A). While passing order giving effect to CIT(A)'s order, the AO did not allow the set off and carry forward of depreciation and investment allowance. Assessee filed an application under section 154 against the order which was rejected on the ground that CIT(A) had not given any relief in its order in respect of set off and carry forward of depreciation and investment allowance. Against this order, assessee preferred an appeal which was dismissed on the ground that return of income for earlier year was not filed in accordance with section 139(3) therefore, set off and carry forward of depreciation cannot be allowed. The order of CIT(A) was upheld by the Tribunal. On appeal, the High Court held that the benefit of set off and carry forward of depreciation and investment allowance is available even if return of income is filed after due date. Also held that unabsorbed depreciation and investment allowance stands on a different footing than business loss therefore, benefit of set off and carry forward has to be allowed. (AY. 1987-88 to 1989-90)
Rajeshwari Cotton Ginning & Pressing Industries v. ACIT (2016) 94 CCH 208 / 130 DTR 274 / 284 CTR 300 (Karn.)(HC)

S. 32 : Depreciation – Sale and lease back – Lessee not claiming depreciation – Entitled depreciation. 500
The assessee claimed 100 per cent depreciation on energy measuring devices purchased from Haryana State Electricity Board. After purchase they were leased back to the Board under a lease agreement. The Assessing Officer held that purchase and lease back transaction was in fact and in substance a finance lease agreement. He disallowed the depreciation relying on Circular No. 2 of 2001 dt 9th February 2001. CIT(A) and Tribunal allowed the claim of depreciation. On appeal by revenue, dismissing the appeal the Court held that the Transaction was genuine and the assessee is entitled to depreciation. Relied on *I.C.D.S. Ltd v. CIT (2013) 350 ITR 527 (SC) & West Cost Paper Mills Ltd. (2010) 322 ITR 9 (SC)(St.)*(AY. 1996-97)
CIT v. Apollo Fine Vest (I) Ltd. (2016) 382 ITR 33 (Bom.)(HC)

S. 32 : Depreciation – Additional depreciation allowed on manufacture/production of 'article or thing' – Depreciation is allowable on assets kept ready for use 501
Assessee was engaged in the business of FM Radio Broadcasting and was granted permission for operating FM Radio Broadcasting channels. In its return if income,

assessee claimed additional depreciation under section 32(1)(iia) of the Act, on new plant and machinery acquired for production of radio programmes. Assessing Officer did not concur with the assessee and did not consider production of radio programmes as production of article or thing. On appeal the Tribunal held that assessee was eligible for claiming additional depreciation under section 32(1)(iia) of the Act. Aggrieved by the Tribunal judgment, Revenue preferred an appeal before the High Court.

The High Court observed that production of radio programmes involved process of recording, editing and making copies prior to broadcasting, there comes into existence a 'thing' which is tangible and which can be transmitted and even sold by making copies. High Court placed reliance on *Gramophone Co India Ltd. v. Collector of Customs (1 SCC 549)(SC)* and *Collector of Central excise v. Rajasthan State Chemical Works (4 SCC 473) (SC)*. Thus it was held that Assessee had acquired and installed plant and machinery for manufacture of 'article or thing' and it is entitled to claim additional depreciation under section 32(1)(iia) of the Act.

For the year under consideration Assessing Officer had disallowed Assessee claim for depreciation on licence fee for radio station as the same were not used during the year. Contrary to the Assessing Officer's claim, radio stations were ready-to-use and had started trial runs. High Court placed relied upon Refrigeration & Allied Ind. Ltd (247 ITR 12)(Del) where it was held that an asset can be said to be 'used' when it is kept 'ready to use' and Capital Bus Service Pvt. Ltd. (123 ITR 404)(Del.) where similar view was taken. As a result it was held that assessee would be entitled to claim depreciation on licence fee as the same were kept ready-to-use for the year under consideration. (AY 2008-09)

CIT v. Radio Today Broadcasting Ltd. (2016) 382 ITR 42 / 237 Taxman 126 / 282 CTR 272 / 129 DTR 1 (Delhi)(HC)

502 **S. 32 : Depreciation – Electrically operated vehicles including battery power or fuel cell powered vehicles are entitled to 100 per cent depreciation under Appendix I, Part-A, Item III(3)(xiii)(o) of Income-tax Rules, 1962.**

The assessee claimed 100 per cent depreciation on battery power or fuel cell powered vehicles. The revenue authorities rejected assessee's claim, which was reversed by the Tribunal.

On appeal, the High Court held that electrically operated vehicles including battery power or fuel cell powered vehicles are entitled to 100 per cent depreciation under Appendix I, Part-A, Item III(3)(xiii)(o) of Income-tax Rules, 1962. (AY. 2002-03)

CIT v. ITC Ltd. (2016) 237 Taxman 533 / 134 DTR 293 (Cal.)(HC)

503 **S. 32 : Depreciation – Business purchased as a going concern – Goodwill to be valued at excess of amount paid over net value of assets as per AS 10 – Depreciation allowable on goodwill.**

The assessee purchased business of another company as going concern in slump sale. The amount paid over and above net value of assets was capitalized as goodwill. The valuation report trifurcated value of goodwill into (a) technical knowhow; (b) valuation for business on hand and (c) non-compete fees. The assessee claimed depreciation on above items. AO disallowed the depreciation claim. The ITAT accepted assessee's contention that entire sum paid towards intangibles could be considered as goodwill

on which depreciation must be allowed. It, however, remitted matter to the AO to determine whether valuation of goodwill was appropriate. High Court held that consideration paid by the assessee in excess of value of tangible assets was to be classified as goodwill especially in the case where the transaction in question was a slump sale which did not contemplate separate values to be ascribed to various assets (tangible and intangible). (AY. 2007-08)
Triune Energy Services (P.) Ltd. v. Dy. CIT (2016) 237 Taxman 230 / 129 DTR 422 (Delhi) (HC)

S. 32 : Depreciation – Fees paid to Registrar of Companies for increase in share capital, which was used for acquisition of Plant & Machinery, is eligible for depreciation @15% – Alternatively as amortization of expenses. [S. 35D(2)(c)] 504
Assessee company was carrying on the business of manufacturing yarn. During the year, the assessee had paid fees of ₹ 10 lakhs to Registrar of Companies for increasing the share capital. The money raised by the assessee was used for expansion of business and was capitalized as a part of Plant & Machinery and depreciation @15% was claimed. The Assessing Officer disallowed the depreciation claimed by the Assessee. The CIT(A) allowed the depreciation on the ground that fees paid to Registrar in view of the decision of Supreme Court in *Punjab State Industrial Development Corporation Limited v. CIT (225 ITR 792)*. The Tribunal reversed the decision of CIT(A) and disallowed the claim of depreciation. On appeal, the High Court held that assessee was entitled to depreciation as fees paid were capitalized as a part of Plant & Machinery. It was also held that if assessee was not eligible for depreciation under section 32 then, it would be entitled to amortization of expenses under section 35(2)(c)(iv). (AY. 2006-07)
Rana Polycot Ltd. v. CIT (2016) 236 Taxman 567 (P&H)(HC)

S. 32 : Depreciation – Additional depreciation – Half of twenty per cent allowable where plant and machinery put to use after October 31, 2006 and before March 31, 2007 – No restriction in claiming balance 50 per cent in next assessment year. [S. 32(1)(iia)]. 505
Additional depreciation allowable u/s 32(1)(iia) is a one-time benefit to encourage industrialisation and the relevant provisions have to be construed reasonably and purposively. The additional depreciation is allowed in the year of purchase and if in the year of purchase the assessee is eligible only for 50 per cent depreciation, the balance 50 per cent can be carried forward for the subsequent year. (AY. 2010-11)
CIT (LTU) v. Rittal India P. Ltd. (No.2) (2016) 380 ITR 423 / 282 CTR 431 / 129 DTR 153 (Karn.)(HC)

S. 32 : Depreciation – Meaning of "owner" – Lease of land for ninety-nine years – Lessee constructing buildings on land and in full control of such buildings – Entitled to depreciation on buildings and on sanitary fittings installed in them. 506
During the previous years relevant to the AYs in question the assessee was indeed in full control of the three buildings, viz., the hotel building, the World Trade Tower and the World Trade Centre and in any event, notwithstanding the clarificatory amendment inserted as Explanation 1 in section 32 with effect from April 1, 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 Ltd. (2016) 380 ITR 552 / 65 taxmann.com 39 (Delhi)(HC)

507 **S. 32 : Depreciation – Additional depreciation –Doing embroidery work on grey synthetic cloth, i.e. sari, it amounted to manufacturing activity hence entitled to additional depreciation.**
Assessee was engaged in doing embroidery work on grey synthetic cloth, i.e. sari, it amounted to manufacturing activity and, thus, assessee was entitled to get additional depreciation on machinery used for aforesaid activity. (AY. 2008-09)
ITO v. Yash Creation (2015) 70 SOT 130 (Ahd.)(Trib.)

508 **S. 32 : Depreciation – Transportation of goods – Higher rate of depreciation would be allowed on pay loaders, dozers and water tankers.**
Dismissing the appeal of the revenue, the Tribunal held that vehicles used in business of transportation of goods on hire would be entitled for higher rate of depreciation; benefit of higher depreciation would be allowed on pay loaders, dozers and water tankers. (AY. 2010-11)
DCIT v. Suthanther Assumtha (2016) 161 ITD 546 / 51 ITR 154 (Chennai)(Trib.)

509 **S. 32 : Depreciation – Truck registered in name of assessee – Wrong name of seller clerical error – Entitled to depreciation.**
Assessee claimed depreciation on a truck, which was disallowed due to absence of any documentary evidence to support the purchase of the truck. The Tribunal observed that the CIT(A) had categorically held that truck was registered in name of the assessee, and mention of incorrect name of the seller was held to be a mere clerical error. Therefore, the deduction on depreciation was allowed. (AY. 2010-11)
ACIT v. Modern Motors (2016) 48 ITR 579 / 142 DTR 0145 / 181 TTJ 813 (Jaipur)(Trib.)

510 **S. 32 : Depreciation – Additional depreciation – Manufacturing greetings cards, magazines, envelopes, printing on paper amounts to production hence eligible for additional depreciation.**
Allowing the appeal of the assessee, the Tribunal held that printing of greetings cards on paper amounted to manufacturing of new and marketable article, as a distinct product comes into existence. It was not necessary for an industrial undertaking to undertake manufacturing of a commercially new product, such activity as in the present case amounts to "production" as mentioned under S.32. Therefore, the assessee was eligible to claim depreciation on such activity. (AY. 2006-07)
Genius Printers P. Ltd. v. ACIT (2016) 48 ITR 588 (Mum.)(Trib.)

511 **S. 32 : Depreciation – Leasehold rights on land do not fall in category of intangible asset as defined u/s. 32(1)(ii), hence do not qualify for allowance of depreciation. [S. 32(1)(ii)]**
Tribunal held that the leasehold rights on land do not fall in category of intangible asset as defined u/s. 32(1)(ii). By virtue of lease only an interest in land is created which does not qualify for allowance of depreciation. (AY. 2008-09)
Cyber Park Development & Construction Ltd. v. Dy. CIT (2016) 159 ITD 648 / 181 TTJ 556 (Bang.)(Trib.)

S. 32 : Depreciation – Even if the income is assessed by applying net profit rate, depreciation is held to be allowable. 512

The Tribunal held that depreciation is allowable from net profit even if the total income is computed by applying net profit rate. (AY. 2011-12)

ACIT v. J. S. Grover Constructions (2016) 181 TTJ 23 (UO) (Asr.)(Trib.)

S. 32 : Depreciation – Charitable Trust – Depreciation on capital assets was held to be allowable. 513

Dismissing the appeal of the revenue, the Tribunal held that, depreciation on capital assets was held to be allowable. (AY. 2009-10)

ACIT (E) v. Vishwachetan Foundation IBMR (2016) 48 ITR 481 (Bang.)(Trib.)

S. 32 : Depreciation – Bogus purchase bills – Disallowance of depreciation was held to be not justified. 514

Allowing the appeal of the assessee, Tribunal held that, the assessee submitted copies of all bills and vouchers of Plant & Machinery and of Building material etc. together with copies of transport receipts before Authorities below which were available in assessee's paper book. Considering materials and documents available on record, it appeared that nobody visited site where factory of assessee was situated which indicated that AO merely proceeded on suspicion. The AO failed to bring contrary evidence on record, after lapse of considerable period and after installation and commencement of production, AO made enquiry in subjected year and merely proceeding on suspicion, disallowed claim of depreciation made by assessee. Claim of depreciation disallowed by AO and confirmed by CIT(A) was without any basis and deserved to be deleted, claim of depreciation was allowed. (AY. 2007-08)

Bina Malpani v. ITO (2016) 180 TTJ 1 (UO) / 50 ITR 48 (Jaipur)(Trib.)

S. 32 : Depreciation – Unabsorbed depreciation of AY. 1997-98 could be allowed to be carried forward and set off after a period of 8 years, in view of amended S. 32(2) w.e.f. 1-4-2002 [S.32(2)] 515

Allowing the appeal of the assessee the Tribunal held that Unabsorbed depreciation of AY. 1997-98 could be allowed to be carried forward and set off after a period of 8 years, in view of amended s. 32(2) w.e.f. 1-4-2002. (AY.2008-09)

JCT Ltd. v. CIT (2016) 159 ITD 983 (Kol.)(Trib.)

S. 32 : Depreciation – Charitable Trust – Assets purchased earlier years cost was allowed as deduction in earlier years, depreciation is not allowable.[S. 2(15), 11] 516

Dismissing the appeal of the assessee, the Tribunal held that; Assessee would not be entitled for depreciation on opening balance of written down value of assets, which were purchased in earlier years and their cost had already been considered as application of income in earlier assessment year while granting exemption u/s. 11. (AY. 2010-11)

Suguna Charitable Trust v. ITO (2016) 159 ITD 838 (Chennai)(Trib.)

517 **S. 32 : Depreciation – Depreciation on capitalized professional and legal charges incurred on acquisition of business is allowable.**
The assessee had made payment for professional and legal charges in relation to taking over the business of another entity, which was claimed as a revenue expenditure. The AO treated it as capital expense since it was incurred for the purpose of acquiring a capital asset. The CIT(A) allowed the claim of depreciation on the said expense. On appeal, the ITAT, following its own order for the earlier year, allowed the claim of depreciation since the said expense formed a part of the cost of acquisition. (AY. 2007-08)
DCIT v. AVTEC Ltd. (2016) 52 ITR 270 (Delhi)(Trib.)

518 **S. 32 : Depreciation – Discontinued business – Depreciation is allowable in the year in which business was recommenced.**
Depreciation is allowable in the year in which business was recommenced.(AY.2008-09 2009-10)
Triumph International Finance India Ltd. v. ACIT (2016) 161 ITD 464 (Mum.)(Trib.)

519 **S. 32 : Depreciation – Motor vehicle – Depreciation at higher rate of 50% would be admissible on new induction of motor car engaged in business of giving vehicles on hire but not used for public transportation. [S.2(11)]**
Assessee engaged in business of giving car on hiring, claimed higher rate of depreciation. The AO granted depreciation at rate of 15 per cent. ITAT held that depreciation claimed by assessee could be admissible on new induction of motor car in block of assets. (AY. 2010-11)
Shree Balaji Products v. ITO (2016) 161 ITD 598 (Ahd.)(Trib.)

520 **S. 32 : Depreciation – Computer software – Expenditure for software licence valid for long-term was a part and parcel of computer system is eligible for depreciation at higher.**
Expenditure on software licence valid for long term was a part and parcel of computer system therefore it was eligible for depreciation at higher rate of 60 per cent. (AY.2009-10)
ACIT v. Zydus Infrastructure (P.) Ltd. (2016) 161 ITD 611 (Ahd.)(Trib.)

521 **S. 32 : Depreciation – Additional depreciation – Electricity Manufacturing and production – Generation of electricity amounted to manufacturing/production of article or thing, assessee who had set up hydel power and thermal power plants would be entitled to additional depreciation.**
Assessee, a public sector undertaking was engaged in business of generation and distribution of electricity. Assessee established hydel power and thermal power plant, wherein water and coal were converted into electricity during manufacturing process. Generation of electricity amounted to manufacturing and production of article or thing and, thus, assessee was entitled for claiming additional depreciation. (AY. 2011-12)
Damodar Valley Corporation v. DCIT (2016) 160 ITD 78 / 50 ITR 583 / 182 TTJ 765 / (2017) 148 DTR 285 (Kol.)(Trib.)

S. 32 : Depreciation – Goodwill – Goodwill acquired by assessee on acquisition of a proprietary concern as a going concern is an asset hence eligible for depreciation 522

Assessee-company acquired a sole proprietary concern as a going concern with all assets and liabilities including goodwill. It claimed depreciation on such goodwill. ITAT held that goodwill is an asset within meaning of section 32 and assessee was entitled for depreciation on goodwill. (AY. 2008-09, 2009-10)

Fibres & Fabrics International (P.) Ltd. v. DCIT (2016) 160 ITD 102 / 182 TTJ 374 (Bang.) (Trib.)

S. 32 : Depreciation – Goodwill – Depreciation is allowable 523

Depreciation is allowable at the applicable rate on the payment relatable to goodwill. (AY. 2006-07, 2007-08, 2009-10, 2010-11)

Hinduja Foundries Ltd. v. ACIT (2016) 178 TTJ 88 (Chennai)(Trib.)

S. 32 : Depreciation – Amenities for which payment was made are not tools for carrying out the business, hence depreciation is not allowable. 524

The amenities for which the payment is made by the assessee are not the tools for carrying out the business of assessee, therefore, the assessee is not eligible for depreciation on the amount paid by the assessee. (AY. 2006-07, 2007-08, 2009-10, 2010-11)

Hinduja Foundries Ltd. v. ACIT (2016) 178 TTJ 88 (Chennai)(Trib.)

S. 32 : Depreciation – Additional depreciation – Carried forward not allowed. [S.32(1)(iia)] 525

The assessee made additions to fixed assets in the second half of the preceding and claimed additional depreciation under section 32(1)(iia) in the preceding assessment year at the rate of 10 per cent (50 per cent of 20 per cent) The assessee claimed the balance 50 per cent of the additional depreciation under section 32(1)(iia) of the Act in the assessment year in question. The Assessing Officer rejected the claim of the assessee on the ground that the additional depreciation was available only for new assets added during the year. The Commissioner (Appeals) confirmed the order of the Assessing Officer. The Tribunal held that in terms of section 32 of the Act, the additional depreciation was allowable on the plant and machinery only for the year in which the capacity expansion had taken place which had resulted in the substantial increase in the installed capacity. Each assessment year was separate and independent assessment year. The provisions of section 32 of the Act did not provide for carry forward of the residual additional depreciation. Thus, the assessee was not entitled to additional depreciation. (AY. 2005-06, 2008-09, 2009-10)

Brakes India Ltd. v. DCIT (2016) 46 ITR 212 (Chennai)(Trib.)

S. 32 : Depreciation – Automated teller machine – Computer – Higher rate of depreciation 526

The assessee claimed depreciation on the automated teller machine at 60 per cent the rate applicable to "Computers including computer software" as given in the Income Tax Rules, 1962. The Assessing Officer classified the automated teller machine as

other office machines and applied the depreciation rate of 25 per cent being the rate of depreciation on plant and machinery. The Commissioner (Appeals) upheld this. The automated teller machine carried out logical, arithmetic and memory functions by manipulations of electronic magnetic or optical impulses giving debit or credit cash and, thereafter, dispensed cash and gave printed receipts. The computer is an integral part of the automated teller machine and it was on the basis of the information processed by the computer in the automated teller machine that the mechanical functions of dispensation of cash or deposit of cash was carried out. Therefore, the Assessing Officer was directed to allow depreciation at the rate of 60 per cent. (AY. 2005-06, 2008-09)
Royal Bank of Scotland N.V v. DDIT (2016) 47 ITR 513 (Kol.)(Trib.)

527 **S. 32 : Depreciation – Lull in business – Dealing in wholesale trade of liquor – Not carry on its business during relevant year due to non-availability of licence under UP Excise Act, it could not be a temporary lull in business – Legal bar and, thus, assessee's claim for depreciation and deduction of other expenses was to be rejected. [S. 37(1)]**
Assessee was dealing in wholesale trade of liquor in State of Uttar Pradesh. It was not granted licence for trading in liquor for assessment year under appeal. Assessee, however filed its return claiming depreciation and deduction of other expenses. A.O. took a view that assessee was not carrying on any business and thus, it could not be said that assets for which expenses were claimed, were relatable to any business activity of assessee. He rejected assessee's claim. It was undisputed that s. 60 of Uttar Pradesh Excise Act, which was attracted to facts of present case, outlawed any business activity in liquor without licence, making it punishable with imprisonment. In view of statutory prohibition imposed by Uttar Pradesh Excise Act, it could not be said that there was a temporary lull in business of assessee but that there was a legal bar. Therefore, assessee was not entitled to deduction on account of depreciation and other expenses as claimed when no business of wholesale liquor trade was carried on by assessee in assessment year in appeal(AY. 2009-10)
Royal Beverages (P.) Ltd. v. Dy. CIT (2016)158 ITD 125 / 140 DTR 52 / 180 TTJ 521 (TM) (Chd.)(Trib.)

528 **S. 32 : Depreciation – Unabsorbed depreciation – Carry forward and set-off – Belated return – Unabsorbed depreciation carried forward was allowed to be set off. [S. 32(2)]**
Assessee was engaged in business of manufacturing of computers stationary, ATM cards, ITC cards etc. Assessee filed its return after due date claiming carry forward and set-off of unabsorbed depreciation. AO rejected assessee's claim on the plea that S. 80 restricted the same. CIT(A) allowed assessee's claim. ITAT held that even though S. 80 requires that return be filed as per section 139(3) to carry forward losses within due date, as envisaged under section 139(1), yet, within ambit of section 80 for carry forward losses, section 32(2) is not included. (AY. 2009-10)
ACIT v. Anil Printers Ltd. (2016) 158 ITD 665 / 143 DTR 295 / 182 TTJ 112 (Mum.)(Trib.)

529 **S. 32 : Depreciation – Hoarding structure cannot be considered as plant hence depreciation is allowable as building at 10%. [S 43(3)]**
Assessee firm was carrying on business of outdoor publicity through use of hoardings, during the year. Assessee claimed depreciation at rate of 15 per cent on hoarding

structure owned by it under category of 'plant and machinery'. The A.O. opined that hoarding structures were to be treated as 'building' and therefore he allowed depreciation at rate of 10 per cent. The Hon'ble ITAT had taken a view that hoarding structures did not play any operative role as apparatus or tool in carrying on trade by assessee firm or in functioning of assessee firm's business rather those hoarding structures were merely embedded in building and erected for entities to put their advertisements. Assessee failed to satisfy functional test of 'plant' as given in section 43(3) and therefore order of the AO was upheld.(AY. 2007-08)
Asian Advertising v. ITO (2016) 158 ITD 145 (Mum.)(Trib.)

S. 32 : Depreciation – Trademark not registered in its name – Depreciation is allowable. 530
The assessee claimed the depreciation on Trademark. The AO disallowed the depreciation on the ground that it is not the registered owner of the Trademark yet. Allowing the appeal the Tribunal held that for allowing depreciation it is not contingent upon its registration. (AY. 2007-08)
Trio Elevators Company (India) Ltd. v. ACIT (2016) 157 ITD 1170 / 178 TTJ 258 / 134 DTR 201 (Ahd.)(Trib.)

S. 32 : Depreciation – Work-over Rigs – Rig was inseparable/integral part of motor lorry hence higher depreciation at rate of 40 per cent is allowable. 531
Where assessee-company was engaged in business of oil and gas exploration like drilling of wells, oil fields, etc., claimed higher rate of depreciation on 'work-over rig', since said rig was inseparable/integral part of motor lorry which was used for rectifying defect, etc. in different wells and was moving from one well to another, assessee's claim for higher depreciation at rate of 40 per cent was allowable. (AY. 2002-03 to 2004-05)
John Energy Ltd. v. Dy. CIT (2015) 154 ITD 451 / 173 TTJ 713 / 130 DTR 348 (Ahd.)(Trib.)

S. 32 : Depreciation – Integral part of computer systems – Eligible to depreciation at 60%. 532
Printers, switches, net working equipments, UPS and pen drives, are integral part of computer system hence eligible depreciation at 60%. (ITA No.2806/ Del/ dt. 16-10-2015) (AY. 2007-08)
GE Capital Business Process Management Services (P) Ltd. (2016) Chamber's Journal-January–P. 95 (Delhi)(Trib.)

S. 32 : Depreciation – Routers and switches being input/output devices, are integral part of computer and, hence, entitled to higher rate of depreciation at 60 per cent. 533
CPU alone cannot be described as computer; routers and switches being input/output devices, are integral part of computer and, hence, entitled to higher rate of depreciation at 60 per cent. (AY. 2011-12)
IBAHN India (P.) Ltd. v. Dy. CIT (2016) 157 ITD 382 (Mum.)(Trib.)

534 **S. 32 : Depreciation – Unabsorbed depreciation allowance 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]**
Allowing the appeal of assessee the Tribunal held that unabsorbed depreciation allowance 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 (P.) Ltd. v. ITO (2016) 156 ITD 452 / 175 TTJ 129 / 129 DTR 113 (Mum.)(Trib.)

535 **S. 32 : Depreciation – Drilling rigs – Registered as heavy goods vehicle – Eligible depreciation @ 40%.**
It was held that workover mobile rigs owned by the assessee which are registered under category of heavy goods vehicle by the State Transport Authority are eligible for depreciation @ 40 per cent. (AY. 2002-03 to 2008-09)
John Energy Ltd. v. Dy. CIT (2016) 130 DTR 348 (Ahd.)(Trib.)

536 **S. 32 : Depreciation – Depreciation not allowed on tools and machinery used in construction of hotel building since the assessee was in the hotel business.**
The assessee, engaged in the business of hotels, claimed depreciation on tools/machines used for construction of its hotel. The AO did not allow the same since it was not in the business of construction. The CIT(A) upheld the disallowance and also rejected the alternative claim of accumulating the depreciation towards the cost of construction. The CIT(A) did not allow the alternative claim on the basis that if the cost of depreciation was allowed to be accumulated, then the same would be allowable to depreciation when the hotel was completed. The ITAT upheld the disallowance and held that the Assessee was not eligible for depreciation on tools and machinery purchased since they were a cost of construction of the hotel building. (AY. 2008-09, 2009-10)
Mahagun Hotels P. Ltd. v. DCIT (2016) 45 ITR 347 (Delhi)(Trib.)

537 **S. 32 : Depreciation – Claim for higher depreciation on windmill is allowable if it is made in the return of income filed u/s. 139(1). [S. 139(1)]**
The assessee made a claim for depreciation at the rate of 80% on windmills in its return of income for the impugned year instead of filing a claim as per the procedure mentioned in rule 5(1A). The AO disallowed the claim of additional depreciation at the rate of 80% on wind mills holding that the assessee did not exercise the option for claiming higher depreciation. The assessee submitted before the ITAT that it had filed the requisite form in the previous AY and there was no need to exercise the claim again. The ITAT allowed the claim of depreciation at higher rate and held that the claim would be allowable if it was made in the return filed in accordance with s. 139(1) in the form prescribed therein, and no separate procedure of filing a letter of request or intimation with regard to the exercise of option would be required to be followed. (AY. 2010-11)
DCIT v. Power Soaps P. Ltd. (2016) 45 ITR 250 (Chennai)(Trib.)

S. 32 : Depreciation – Plant – Building constructed with a specific design – Necessary for the assessee's business – Provides strong foundation and structure to existing factory building – To be treated as 'plant'. 538

The assessee was engaged in the business of manufacturing intermediaries and bulk drugs, which was undertaken at the manufacturing facility of the assessee. One of the grounds related to capitalization of civil construction expenses under the head plant and machinery. The assessee claimed depreciation @ 15%. On appeal to the Tribunal, it held that the civil construction expenses incurred were for building strong foundation and structure for existing factory building. Where a building was constructed with a specific design keeping in view specified technical requirements without which the assessee's business could not be carried on, it quailed to be treated as plant. Any reinforcement to civil construction to be treated as installation cost of plant and machinery and qualifies for depreciation as plant and machinery. (AY. 2010-11)

DSM Sinochem Pharmaceuticals India P. Ltd. v. DCIT (2016) 176 TTJ 322 (Chd.)(Trib.)

S. 32 : Depreciation – Charitable trust – Not entitled depreciation. [S. 11] 539

The Tribunal held that the assessee charitable institution claiming exemption under section 11 not being engaged in any business, is not entitled for any depreciation. (AY. 2010-11)

Dy. DIT (E) v. Vels Institute of Science, Technology & Advanced Studies (2016) 157 ITD 237 / 130 DTR 331 / 175 TTJ 593 (Chennai)(Trib.)

S. 32 : Depreciation – Additional depreciation – Production of fabricated piles for construction business, it did not involve production or manufacture of an article or thing hence not eligible for additional depreciation. 540

Tribunal held that the; production of prefabricated piles which were going to be used by assessee in its business of piling, would form part of construction activity irrespective of fact whether such piles were constructed at project site or at some other place with help of machinery; it did not involve production or manufacture of an article or thing entitling assessee to additional depreciation on said machinery.(AY. 2008-09)

Stefon Constructions (P.) Ltd v. CIT (2016) 156 ITD 615 (Mum.)(Trib.)

S. 32A. Investment allowance

S. 32A : Investment allowance – Effluent treatment plant – Exclusion does not apply – Allowance available. 541

Where the High Court granted the benefit of investment allowance under section 32A on the investment made by the assessee in respect of an effluent treatment plant in its unit for manufacture of alcoholic liquor, held, affirming the decision of the High Court, that keeping in view the specific provisions contained in sub-section (2C) of section 32A of the Act, there was no error in the view taken by the High Court in this behalf. (AY. 1989-90)

CIT v. United Spirits Ltd. (2016) 386 ITR 718 / 242 Taxman 98 / 289 CTR 655 (SC)

Editorial : Decision in McDowell and Co. v. ACIT (2007) 291 ITR 439 (Karn.)(HC) is affirmed.

542 **S. 32A : Investment allowance – As the plant and machinery were not in a state to use prior to 31st March, 1987 the Investment allowance could not be granted.**
The High Court held that there was no dispute between parties with respect to the interpretation of expression 'installed'. The Plant and machinery may not have been used for production was not relevant provided that plant and machinery was in a state where it could be brought to use. As the plant and machinery were not in a state to use prior to 31st March 1987 the Investment allowance could not be granted to the Assessee. Accordingly, the second question is answered in favour of the Department and against the Assessee.
Dayawanati (Smt.) Through LH Smt. Sunita Gupta v. CIT (2016) 143 DTR 209 (Delhi)(HC)

543 **S. 32A : Investment allowance – Unabsorbed investment allowance – Deduction to be allowed before set-off under section 72 and before deducting unabsorbed investment allowance of earlier years. [S. 32AB, 72]**
Allowing the appeal the Court held that; Sections 28 to 44DB of the Income-tax Act, 1961 are grouped together under the heading "D-Profits and gains of business or profession" under Chapter IV which deals with "Computation of total income". A close look at sections 28 and 29 of the Act would show that all types of income need not necessarily be chargeable to tax under the head "Profits and gains of business or profession". Issues relating to set-off or carry forward and set-off are dealt with in Chapter VI. Sub-section (2) of section 72 states that where any allowance is to be carried forward in terms of section 32(2) or section 35(4), effect should first be given to the provisions of section 72. Section 32AB was amended by the Finance Act, 1987. The words inserted in section 32AB(1), by the Finance Act, 1987 were "such deduction being allowed before the loss, if any, brought forward from earlier years is set-off under section 72". Therefore, it is clear that any deduction under section 32AB has to be allowed before a set-off is made under section 72 in respect of the loss brought forward from the earlier years. Hence unabsorbed investment allowance has to be deducted from profits for the purpose of computing and allowing deduction under section 32AB. Deduction under section 32AB has to be allowed before set-off under section 72 and hence before deducting unabsorbed investment allowance from the earlier years. (AY. 1988-89)
Sundaram Finance Ltd v. Dy. CIT (2016) 387 ITR 155 (Mad.)(HC)

S. 32AB : Investment deposit account

544 **S. 32AB : Investment deposit account – Deduction is to be allowed from total composite income derived from growing and manufacturing tea and only thereafter rule 8 should be applied to apportion resultant income into 60 per cent agricultural income not taxable under Act and balance 40 per cent which is taxable under Act. [Rule, 8]**
The assessee-company was engaged in the business of growing, manufacturing and selling of tea in India and abroad. It claimed a deduction at the rate of 20 per cent on the composite income. AO held that deduction u/s. 33AB had to be allowed only from the non-agricultural component of the composite income determined under rule 8. High Court, relying upon the judgment in case of *CIT v. Williamson Financial Services*

[2008] 297 ITR 17 / 165 Taxman 638 (SC), held that apportionment prescribed by rule 8(1) can be applied only after deducting the allowance u/s. 33AB. It was also held that the expression 'profits of such business' in clause (b) of section 33AB relates to the expression 'business of growing and manufacturing tea' as appearing in the beginning of sub-section (1) of section 33AB. (AY. 2000-01)
Singlo (India) Tea Ltd. v. CIT (2016) 382 ITR 537 / 238 Taxman 666 / 286 CTR 242 / 135 DTR 31 (Cal.)(HC)

S. 35. Expenditure on scientific research.

S. 35 : Expenditure on scientific research – Initial grant of approval was ordered by Finance Minister and the refusal for extension was conveyed by Director – Order of High Court striking down/refusing the extension was held to be not proper. [S.35(1)(ii) – Government of India (Transaction of Business) Rules, 1961, r. 3] 545
Assessee-company filed an application for extension of approval of deductions on scientific research expenditure. Initial grant of approval was ordered by Finance Minister and same was conveyed by Director. Extension was rejected on the ground that the same was conveyed by the Director and not by the Competent authority. On writ the refusal of extension was set aside. On appeal by revenue, allowing the appeal the Court held that, As per rule 3 of Government of India (Transaction of Business) Rules, 1961 such decisions were required to go to CBDT and thereafter to Minister, which requirement was complied with, therefore the High Court was not justified in striking down/refusing extension of approval on ground that same was passed by Director and not by Finance Minister. (AY. 2008-09)
UOI v. Central India Institute of Medical Sciences (2016) 243 Taxman 151 / 389 ITR 4 / 144 DTR 370 / (2017) 291 CTR 19 (SC)
Editorial: Decision of Bombay High Court in Institute of Medical Sciences v .UOI WP No 5956 of 2010 dt 17-11-2011 was reversed.

S. 35 : Expenditure on scientific research – Certain cost were reduced from claim of deduction u/s. 35(2AB) – No opportunity given to assessee – Violation of principle of natural justice – Secretary was directed to reconsider the claim of deduction.[S. 352AB] 546
Assessee applied to Dept. of Scientific & Industrial Research for approval of expenditure incurred by it on research and development ('R&D') work for the claim of weighted deduction u/s. 35(2AB). The total R&D expenditure was reduced by the cost of motor vehicles purchased for testing the parts and the salary and wages paid to trainees and apprentices. The said reduction in R&D expenditure was made without giving any opportunity of hearing to the assessee.
On filing of writ petition to High Court, it was held that non-granting of opportunity to assessee to present its case is clear violation of principle of natural justice. Thus, High Court instead of going into the merits of the claim of deduction directed that the Secretary should reconsider the case of claim of deduction u/s. 35(2AB) by providing reasonable opportunity of hearing to the assessee. (AY. 2011-12, 2012-13)
Bosch Ltd. v. Secretary, Dept. of Scientific & Industrial Research Ministry of Science & Technology, Government of India (2016) 239 Taxman 480 / (2017) 147 DTR 115 / 293 CTR 355 (Karn.)(HC)

547 **S. 35 : Expenditure on scientific research – Weighted deduction – Realisation on sale of assets used in scientific research must be deducted – Realisation from sale of products of scientific research not deductible. [S. 35(2AB)]**
Dismissing the appeal of revenue the Court held that, only realisation on sale of assets used in scientific research must be deducted. Realisation from sale of products of scientific research not deductible. (AY. 2009-10)
CIT v. Microlabs Ltd. (2016) 383 ITR 490 (Karn.)(HC)
Editorial : Order of Tribunal in Dy. CIT v. Microlabs Ltd. (2015) 39 ITR 585 (Bang.)(Trib.)

548 **S. 35 : Expenditure on scientific research – Expenditure could not be disallowed only on ground that benefit of research were not shown in relevant year.[S. 37(1)]**
Allowing the appeal of the assessee, the Tribunal held that; Expenditure could not be disallowed only on ground that benefit of research were not shown in relevant year. (AY. 2001-02)
FFC Aromas (P.) Ltd. v. ITO (2016) 161 ITD 539 (Mum.)(Trib.)

549 **S. 35 : Expenditure on scientific research – The AO is bound to grant deduction if the R&D facility is approved by the competent authority. He has no jurisdiction in situ in judgment over the approval. The fact that the competent authority did not file the report with the department as prescribed is a technical lapse for which the assessee is not liable. [S. 35(2AB)]**
Allowing the appeal the Tribunal held that; The AO is bound to grant deduction if the R&D facility is approved by the competent authority. He has no jurisdiction in situ in judgment over the approval. The fact that the competent authority did not file the report with the department as prescribed is a technical lapse for which the assessee is not liable. (ITA No. 188/Vizag/2015, dt. 21.10.2016)(AY. 2011-12)
Effronics Systems Pvt. Ltd. v. ACIT (Vizag)(Trib.), www.itatonline.org

S. 35B : Export markets development allowance.

550 **S. 35B : Export markets development allowance – Packing expenses of goods exported is not eligible for allowance. [S. 256(1)]**
That the packing expenses incurred on account of exported goods did not qualify for the export markets development allowance under section 35B.(AY. 1976-77, 1977-78)
Bajaj Auto Ltd. v. CIT (2016) 389 ITR 259 / (2017) 244 Taxman 31 / 146 DTR 210 (Bom.)(HC)

551 **S. 35B : Export markets development allowance – Sub-contractor and not providing technical know-how to person outside India, was held to be not entitled to claim waited deduction. [S.35B(IA)]**
Answering the reference against the assessee, the Court held that assessee must be exporter of goods or technical know-how and expenditure should be incurred by him in connection with that business. Assessee sub-contractor and not providing technical know-how to person outside India therefore the assessee was not entitled to claim deduction. (AY. 1979-80)
Bombay Suburban Electric Supply Ltd v. CIT (2016) 389 ITR 273 / 75 taxmann.com 264 (Bom.)(HC)

S.35D. Amortisation of certain preliminary expenses

S. 35D : Amortisation of preliminary expenses – Expenses relating to issue of shares to public – Allowed in earlier years – Benefit to continue for ten years – Amortisation cannot be refused for subsequent year. [S.37(1)] 552

Allowing the appeal the Court held that the Assessing Officer had allowed the claim of the assessee in respect of the expenses on the public issue for the assessment years 1994-95 and 1996-97. Section 35D provides for amortisation of such expenses for a period of 10 years at one-tenth each year for ten years. When it was again claimed for the assessment year 1996-97, though it was disallowed and on directions of the appellate authority, the Assessing Officer made physical verification of the factory premises. He was satisfied that there was expansion of the facilities to the industrial undertaking of the assessee. It was on this satisfaction that for the assessment year 1996-97 also the expenses were allowed. Once this position was accepted and the clock had started running in favour of the assessee, it had to complete the entire period of 10 years and the benefit granted in the first two years could not have been denied in the subsequent years. The decision in Brooke Bond was rendered when section 35D was not on the statute book. The assessee was entitled to the benefit of section 35D for the assessment years in question. (AY. 1999-2000, 2001-02)

Shasun Chemicals and Drugs Ltd v. CIT (2016) 388 ITR 1 / 243 Taxman 47 / 289 CTR 97 / 141 DTR 161 (SC)

Editorial : Decision of the Madras High Court in CIT v. Shasun Chemicals and Drugs Ltd. [2012] 347 ITR 532 (Mad) reversed on this point.

S. 35D : Amortisation of preliminary expenses – Write off in the sixth year of incorporation was held to be justified. [S.37(1)] 553

The assessee company was incorporated om 19-6-1998. It had debited part of preliminary expenses in the financial year 1998-99. The Tribunal held that the deduction was to be allowed for a period of five years begin with the previous year in which the business was commenced. The Court held that the Tribunal was justified in allowing the claim even though the year under appeal was the sixth year since incorporation. (AY. 2004-05)

CIT v. J. M. Financial Securities (P) Ltd. (2016) 241 Taxman 551 (Bom.)(HC)

S. 35D : Amortisation of preliminary expenses – Preliminary expenses incurred by assessee-company in connection with issue of right shares qualify for benefit of section. [S. 35D(2)(c)(iv), Companies Act, S. 61, 81] 554

Allowing the appeal of assessee the Court held that Preliminary expenses incurred by assessee-company in connection with issue of right shares qualify for benefit of section. (AY. 1999-2000 & 2003-04)

Nitta Gelatine India Ltd. v. ACIT (2016) 243 Taxman 245 (Ker.)(HC)

555 **S. 35D : Amortisation of preliminary expenses – Claim for amortization of expenses disallowed when there was no material on record to prove that the issue of GDR was for capital expansion.**

The assessee made a claim for amortization of expenses incurred towards issue of Global Depository Receipts. The same was disallowed by the Assessing Officer and upheld by the High Court for the reason that the finding that the issue of GDR was not for capital expansion was not controverted by the assessee. (AY. 1997-98)

Tube Investments of India Ltd. v. JCIT (2016) 240 Taxman 543 (Mad.)(HC)

556 **S. 35D : Amortisation of preliminary expenses – Debenture issue expenses – Expenditure on issue of convertible debenture is to be treated as capital expenditure hence not eligible for deduction.**

Expenditure on issue of convertible debenture, which is directly related to expansion of capital base of company, is to be treated as capital expenditure not eligible for deduction u/s. 35D.

Gruh Finance Ltd. v. ACIT (2016) 160 ITD 89 (Ahd.)(Trib.)

557 **S. 35D : Amortisation of preliminary expenses – Initial public offer – The expenditure incurred for issue of shares to and raise share capital for working capital requirements could not be allowed as revenue expenditure. [S.144A]**

The assessee claimed certain amount as deduction under section 35D for the assessment year 2006-07 as expenses incurred in connection with the initial public offer. The Assessing Officer disallowed the sum claimed by the assessee following the directions given by the Additional Commissioner in his order under section 144A to disallow the expenditure claimed by the assessee since the expenditure was not related to the extension of its own undertaking or for setting up of a new unit as stated under section 35D(1)(ii). The Commissioner (Appeals) held that the expenses permissible for amortisation were (i) underwriting commission, (ii) brokerage, and (iii) charges for drafting, typing, printing and advertisement of the prospectus. On appeal, the ITAT held, (i) that the expenses were not incurred before the commencement of the business. Therefore, the first condition was not complied with. The second condition was that the expenses incurred after commencement of the business should be incurred in connection with extension of its business or in connection with setting up of a new unit. There was no case of setting up of a new unit. Business expansion and market expansion of an existing business would not amount to extension of the undertaking. The expression "undertaking" denotes visible expenditure on physical facilities for manufacture and production. The expansion made by the assessee was acquisition of the existing undertaking. Therefore, the expenditure incurred by the assessee in connection with the issue of shares did not qualify to be amortised under section 35D.

(ii) That the funds raised by the assessee through issue of shares automatically increased the capital volume of the company. The funds raised by increasing the capital in that manner may be used by the company for various purposes. The capital funds may be used to set up the business to purchase capital assets - or to pay off liabilities - or to augment its working capital, etc. The scope of expenditure incurred for raising the share capital by issuing shares must also stop at that point and should not be enlarged further.

Raising the capital and utilising the funds are different. Application of funds did not decide the character of the money collected against the issue of shares. Money collected against the issue of shares always remains capital. Therefore, the expenditure incurred for issue of shares to and raise share capital for working capital requirements could not be allowed as revenue expenditure. (AY. 2007-08, 2008-09, 2009-10)
Accel Frontline Ltd. v. DCIT (2016) 46 ITR 138 (Chennai)(Trib.)

S. 35D : Amortization of preliminary expenses – Shares acquired cannot be treated as land or building, plant or machinery etc., but only as 'cost of project' for purpose of allowing deduction. [S. 263] 558
Allowing the appeal of assessee the Tribunal held that shares acquired cannot be treated by any stretch of imagination as land or building, plant or machinery etc., and treated as 'cost of project' for purpose of allowing deduction under section 35D. Share premium cannot be considered as part of 'issued share capital' while allowing deduction under section 35D. FCCBs can be considered as 'debentures' and taken as part of capital employed for allowing deduction under section 35D. (AY. 2008-09)
Subex Ltd. v. CIT (2016) 156 ITD 938 / 182 TTJ 846 (Bang.)(Trib.)

S. 35D : Amortization of preliminary expenses – Claim for deduction cannot be disallowed when it was allowed in earlier AYs. 559
The assessee incurred registration fees for amending the objects clause of its memorandum of association. 10% of the amortised fees was claimed as deduction u/s. 35D during the said year. The claim was disallowed by the AO, though it was allowed in previous AYs. The ITAT allowed the claim of the AO and held that AO could not disturb the claim deduction in the impugned AY, which was accepted in earlier years. (AY. 2001-02, 2003-04 to 2008-09)
West Bengal Infrastructure Development Finance Corporation v. ACIT (2016) 45 ITR 285 (Kol.)(Trib.)
DCIT v. West Bengal Infrastructure Development Finance Corporation (2016) 45 ITR 285 (Kol.)(Trib.)

S. 35D : Amortisation of preliminary expenses – Assessee a banking company – Deduction is not allowable. 560
The claim of deduction u/s. 35D of the Act was not allowable to the assessee, a banking company. (AY. 2008-09)
Yes Bank Ltd. v. ACIT (2016) 46 ITR 317 (Mum.)(Trib.)
Dy. CIT v. Yes Bank Ltd. (2016) 46 ITR 317 (Mum.)(Trib.)

S. 36. Other deductions

S. 36(1)(ii) : Bonus or commission – Dispute settled and payment of bonus made to workers before due date – Deduction to be allowed. [S. 40A(9), 43B] 561
Allowing the appeal the court held that there was no dispute that the amount representing bonus was paid by the assessee to its employees within the stipulated time. The embargo specified under section 43B or section 40A(9) of the Act would not come

in the way of the assessee. Therefore, the High Court was wrong in disallowing this expenditure as deduction while computing the business income of the assessee and the decision of the Tribunal was correct. (AY.1999-2000, 2001-02)
Shasun Chemicals and Drugs Ltd v. CIT (2016) 388 ITR 1 / 243 Taxman 47 / 289 CTR 97 / 141 DTR 161 (SC)
Editorial : Decision of the Madras High Court in CIT v. Shasun Chemicals and Drugs Ltd. [2012] 347 ITR 532 (Mad.) reversed on this point.

562 **S. 36(1)(ii) : Bonus or commission – Sum paid as bonus or commission to employee – Commission paid in recognition of services provided by director – Payment cannot be questioned on mere speculation by revenue that same was to avoid payment of dividend tax – Disallowance was deleted.**
The assessee company had paid commission to Directors for their hard work and extra efforts for procuring the contract and its subsequent execution. The CIT(A) disallowed the same holding that the commission was paid to directors who had substantial shareholding in the assessee. Further it stated that assessee-company had earned substantial profits, and the same could have been distributed as dividend. On appeal to ITAT, it held that merely because the assessee was a private limited company and had agreed to pay the commission to the directors by passing resolution in this regard before the close of year, the same could not be disallowed in the hands of assessee on mere surmises. It further held that where the directors had given services and in recognition thereof, there was payment of commission to the said directors, then the same could not be questioned merely on the basis of speculation by the revenue on the ground that it was to avoid payment of dividend tax. It should be noted that the directors had paid taxes on its income. (AY. 2007-08, 2009-10, 2010-11)
Arihantam Infraprojects (P.) Ltd. v. JCIT (2016) 156 ITD 425 / 176 TTJ 202 / 132 DTR 105 (Pune)(Trib.)

563 **S. 36(1)(iii) : Interest on borrowed capital – Capital borrowed for acquisition of asset – Asset not put to use in relevant accounting year, interest was not deductible.**
Dismissing the appeal of the assessee, the Court held that; asset not put to use in relevant accounting year, interest was not deductible. Insertion of proviso to section 36(1)(iii), w.e.f 1-4-2004. (AY. 2009-10)
Thukral Regal Shoes v. CIT (2016) 241 Taxman 361 / 290 CTR 596 / (2017) 391 ITR 119 (P&H)(HC)

564 **S. 36(1)(iii) : Interest on borrowed capital – Interest-free advances to group company – Where both interest bearing funds and interest fee funds are available then a presumption would arise that investments to sister companies would be out of its interest free funds, disallowance cannot be made.**
Dismissing the appeal of the Revenue, the Court held that where both interest bearing funds and interest fee funds are available then a presumption would arise that investments to sister companies would be out of its interest free funds. Reliance in this regards was placed on the judgment of the same court in case of *CIT v. Reliance Utilities*

& Power Ltd. (2009) 313 ITR 340 (Bom.). Accordingly, it was held that disallowance u/s. 36(1)(iii) cannot be sustained. (AY. 2007-08, 2008-09)
CIT v. Gujarat Reclaim & Rubber Products Ltd. (2016) 383 ITR 236 / 136 DTR 138 / 287 CTR 83 (Bom.)(HC)

S. 36(1)(iii) : Interest on borrowed capital – Advance of loans at lower rate of interest to subsidiary concerns in financial difficulty for business purposes – Commercial expediency – Assessee is entitled to deduction. 565
Allowing the reference of the assessee, the Court held, that financial condition of the assessee's sister concerns was not good and to help them run smoothly, the assessee advanced them loans at a lower rate of interest. Both sister concerns were subsidiaries of the assessee and there was nothing *per se* adverse. For the welfare and proper functioning of the sister concerns, the assessee had decided to advance loans so that ultimately they could function properly, and the assessee being the holding company would also benefit. Therefore, the loans advanced to its sister concerns were for commercial expediency and the assessee was entitled to the deduction of interest under section 36(1)(iii).(AY 1989-90)
Hindalco Industries Co. v. CIT (2016) 389 ITR 430 (All.)(HC)

S. 36(1)(iii) : Interest on borrowed capital – Film production – No evidence was furnished to demonstrate that the expenditure was incurred for depositing the security deposit hence disallowance was held to be justified. 566
Assessee was engaged in business of film production, distribution and exhibition. It stated that business premises was taken on rent from landlord after making a security deposit and accordingly claimed deduction under section 36(1)(iii) of interest expenditure incurred in connection with security deposit. Assessing Officer disallowed interest expenditure. Tribunal upheld disallowance made by Assessing Officer holding that assessee could not submit any evidence to prove that said premises was used for its business purpose. On appeal dismissing the appeal the Court held that as facts were dealt with in detail by Tribunal and no cogent evidence could be adduced by assessee in support of its claim, in view of order of Tribunal deserved to be upheld. (AY. 1998-99)
Jalan Distributors (P.) Ltd. v. CIT (2016) 243 Taxman 205 (Cal.)(HC)
Editorial : SLP filed against order of High Court is dismissed, Jalan Distributors (P.) Ltd. v. CIT (2016) 243 Taxman 146 (SC)

S. 36(1)(iii) : Interest on borrowed capital – Advance to group concern – Sufficient fund in balance sheet – Disallowance of interest was not justified. 567
Dismissing the appeal the Court held that it was after considering the facts that the Tribunal concluded that the assessee had interest-free capital from which he was entitled to make interest-free advances to his sister concerns. It had not been established that the assessee did not have sufficient interest-free capital. No material was produced to indicate that it was the interest-bearing loans which were in turn advanced free of interest to the assessee's sister concerns. The Commissioner (Appeals) had observed that the assessee had not rebutted the Assessing Officer's contention that he had also made investment out of his capital during the year which had exceeded the capital

of the assessee. No part of the record established the assertion. Further the nature of the investment was also not indicated. Nor was there anything to indicate that such investment was made out of the capital. There was no co-relation of the investment made and the interest-bearing loan and the capital available to the assessee. The Tribunal's appreciation of the facts to the contrary was not absurd or perverse. No question of law arose. (AY. 2006-07)
CIT v. Satish Bala Malhotra (Smt.) (No.1) (2016) 387 ITR 403 (P&H)(HC)

568 **S. 36(1)(iii) : Interest on borrowed capital – Failure by authorities to apply test of commercial expediency laid down by Supreme Court regarding benefit – AO to reconsider issue by applying rule laid down by Supreme Court.**
The AO disallowed interest expenses relatable to interest-free advances in terms of the provisions contained in section 36(1)(iii). The Commissioner (Appeals) allowed the deduction. The Tribunal confirmed this. On appeal:
Held, that all the three orders, i.e. the orders by the AO, Commissioner (Appeals) and the Tribunal were totally unsustainable for the reason that the test for extending the benefit of section 36(1)(iii) laid down by the High Court and the Supreme Court were not applied to the facts of the case. Therefore, the matter was to be remitted to the AO to reconsider the case of the assessee, after issuing notice to the parties. Matter remanded. (AY. 2004-05)
CIT v. Alapatt Jewellery (2016) 386 ITR 338 / 242 Taxman 129 (Ker.)(HC)

569 **S. 36(1)(iii) : Interest on borrowed capital – Advances to sister concern – Disallowance was held to be justified.**
The disallowance of the interest expenditure incurred was a question of fact. The assessee had advanced interest-free loans or advances to its sister concerns whereas the assessee had borrowed money in respect whereof it was liable to pay interest. The concurrent findings of fact by the authorities below could not be interfered with and the additions of interest expenditure was justified. No question of law arose. (AY. 2003-04)
DPIL Ltd. v. CIT (2016) 386 ITR 539 / 241 Taxman 66 (Cal.)(HC)

570 **S. 36(1)(iii) : Interest on borrowed capital – Interest would be deductible if borrowed capital were used for purposes of business – Matter remanded.**
With regard to interest on borrowed capital once it was established that there was nexus between the expenditure and purpose of business it would be deductible. Matter remanded. (AY. 2005-06, 2006-07)
CIT v. U.G. Hospitals P. Ltd. (2016) 386 ITR 520 (P&H)(HC)

571 **S. 36(1)(iii) : Interest on borrowed capital – Advance of loans to sister concern – Disallowance of interest was not justified.**
Allowing the appeal of assessee the court held that where both assessee and its sister concern to whom loans were advanced were in the same business without indicating difference in nature of their business activities, revenue could not disallow interest on borrowed capital on the ground that loan was advanced for non-business purpose.(AY. 1991-92)
Industrial Feeders v. ACIT (2016) 240 Taxman 506 (Mad.)(HC)

S. 36(1)(iii) : Interest on borrowed capital – Where the assessee company borrowed certain amount to set up a new plant for expanding its business, interest paid on amount borrowed was to be allowed as deduction. [S.43(1)] 572

On Revenue's further appeal, the High Court held that the CIT(A)'s and Tribunal's findings of glass manufacturing being an existing business and commonality of management and funds have not been perverse and therefore, no question of law arose. Where the assessee company borrowed certain amount to set up a new plant for expanding its business, interest paid on amount borrowed was to be allowed as deduction. (AY. 1998-99)

CIT v. Nicholas Piramal (India) Ltd. (2016) 239 Taxman 470 (Bom.)(HC)

S. 36(1)(iii) : Interest on borrowed capital – Prior to insertion of proviso to S. 36(1)(iii) by Finance Act, 2003, w.e.f. 1-4-2004, there was no prohibition in claiming interest paid in respect of borrowings for the acquisition of capital assets till such time it is first put to use. 573

Assessee, a company, claimed interest expenditure on acquisition/purchase of capital assets as a deduction u/s. 36(1). The AO disallowed the interest expenditure as according to him, the interest paid went into the computation of cost of capital asset. On appeal of the assessee, the CIT(A) allowed the assessee's deduction.

On appeal, the Tribunal dismissed the revenue's appeal relying on its orders for AY 1993-94 and AY 1994-95.

On further appeal, the High Court held that the proviso to S. 36(1)(iii) which prohibits claiming interest expenditure in respect of amounts borrowed for acquisition of capital assets till such time it is first put to use has to be capitalized was introduced by Finance Act 2003, w.e.f 1-4-2004. The impugned assessment year was i.e. AY 1997-98, thus, there was no prohibition in claiming interest paid on funds borrowed for the acquisition / purchase of capital asset till such time it is first put to use. (AY. 1997-98)

CIT v. Infrastructure Leasing & Financial Services Ltd. (2016) 239 Taxman 464 (Bom.)(HC)

S. 36(1)(iii) : Interest on borrowed capital – Borrowed capital should be used wholly and exclusively for purposes of business or for earning income – Borrowed capital utilised to purchase shares in loss-making companies – Interest not deductible [S. 57(iii)] 574

Loans were taken by the assessee on interest and invested in loss making companies of the same group. Thus, the transactions were not exclusively and wholly for the purpose of business. The interest was not deductible. (AY. 1995-96, 1996-97, 1997-98, 1998-99)

CIT v. O.P. Srivastava (2013) 219 Taxman 133 / (2014) 265 CTR 481 / (2016) 385 ITR 547 (All.)(HC)

CIT v. Subrata Roy (2013) 219 Taxman 133 / (2014) 265 CTR 481 / (2016) 385 ITR 547 (All.)(HC)

Editorial: The decision was recalled by order dt 21st February, 2014. The Supreme Court set-aside the order of recall. (CIT v. Subrata Roy (2016) 385 ITR 570 (SC)

575 **S. 36(1)(iii) : Interest on borrowed capital – Disallowance of discount and interest on borrowing through commercial papers and non-convertible debentures was held to be not proper.**

Held, the Commissioner (Appeals) and the Tribunal had concluded correctly that the discount and interest on borrowing through commercial papers and non-convertible debentures were allowable. There was no re-structuring and purchase of shares in the year under consideration as these events had taken place in the preceding year. As on the first day of the year under consideration, the companies stood merged and all the funds available at that time were, in the course of the year, deployed in the business of the assessee. Therefore, the Assessing Officer could not have disallowed the discount and interest on borrowing through commercial papers and non-convertible debentures. (AY. 2008-09)

CIT v. Amar Ujala Publication Ltd. (2016) 385 ITR 54 / 72 taxmann.com 159 (Delhi)(HC)

576 **S. 36(1)(iii) : Interest on borrowed capital – Interest-free advance to sister concern of assessee – Necessary to consider whether nexus between expenditure and purpose of business and whether particular interest-bearing borrowing in turn advanced interest-free – Matter remanded to Tribunal.**

The Assessing Officer made a proportionate disallowance of the interest on borrowed funds claimed under section 36(1)(iii) of the Act on the ground that the assessee had given interest-free advances to its sister concern. The assessee filed an appeal before the Commissioner (Appeals) contending that the advances made to the sister concern were not made out of interest-bearing borrowed funds and could not be disallowed. Both the Commissioner (Appeals) and the Tribunal dismissed the appeals of the assessee. On appeal held, remanding the matter to the Tribunal, that the issue had to be decided afresh in the light of the decisions of the Supreme Court in *Hero Cycles (P.) Ltd. v. CIT [2015] 379 ITR 347 (SC)* and the High Court in *CIT v. Kapsons Associates (2016) 381 ITR 204 (P&H)* after hearing the parties. (AY. 2004-05)

Trident Infotech Corporation Ltd. v. CIT (2016) 385 ITR 335 (P&H)(HC)

577 **S. 36(1)(iii) : Interest on borrowed capital – Borrowed capital used for purposes of business – Sale of flats not necessary – Interest deductible – Balance sheet not showing accrual of interest – Not relevant.**

Sale of constructed properties was not a *sine qua non* for commencement of business. The assessee's business commenced when it had purchased land, obtained plan sanction and put up construction. Thus, when the business of the assessee had commenced during the financial year 2003-04, interest paid by the assessee on borrowed capital was deductible. (AY. 2004-05 to 2008-09)

CIT v. IBC Knowledge Park P. Ltd. (2016) 385 ITR 346 / 287 CTR 261 / 69 taxmann.com 108 (Karn.)(HC)

578 **S. 36(1)(iii) : Interest on borrowed capital – Interest free loan to subsidiary company – Disallowance of interest was held to be not justified.**

Dismissing the appeal of revenue the Court held that Term loan taken for acquisition of fixed assets for new unit, balance loan for working capital requirement of existing units.

Tribunal held that the loan not used for advancing to subsidiary companies and the AO has not established his case with any material hence, interest cannot be disallowed. High Court also held that by now it is well settled that the business wisdom of the assessee cannot be substituted by the AO. (AY. 2007-08)
CIT v. Himatsingka Seide Ltd. (2016) 388 ITR 463 / 240 Taxman 753 (Karn.)(HC)

S. 36(1)(iii) : Interest on borrowed capital – Where action of assessee to make advances to group companies at a lower rate of interest – Assessee borrowed funds at higher rate – There cannot be any business expenditure – Disallowance of differential interest was justified. [S. 40A(2)] 579

The Assessee had borrowed huge amount from various group companies and had, in turn, advanced large amount to certain companies at interest rate much lower than the interest rate at which it had borrowed funds. The AO concluded that the assessee had merely acted as conduit and there was no business expediency on part of the assessee and disallowed the differential portion of interest.
The High Court held that Tribunal committed two errors in reversing the decisions of the revenue authorities - the first was of applying the principles 'for the purpose of business' being wider than 'for the purpose of earning income' in abstract. Such principles had to be applied in the context of business expediency which was demonstrated in the present case. The second error committed by the Tribunal was to hold that the AO had applied the principles of S.40A(2) of the Act which, according to the Tribunal, was not permissible. In other words, view of the Tribunal was that the AO could have either allowed or disallowed the entire interest component relatable to a particular borrowing of the Assessee. However, once the AO decided to grant deduction of interest on a particular loan, it was not open for the AO to disallow the portion of interest component. In fact the AO applied the deduction to the extent the rate of interest at which the advances were made by the Assessee. However, the action of the Assessee to make advances at a lower rate of interest than the interest liability discharged by the Assessee in borrowing such funds was not shown to be in any manner actuated by business expediency. The Assessing Officer was perfectly justified in disallowing such component of interest. The Tribunal's decision was reversed and Revenue's appeal was allowed. (AY. 1995-96)
CIT v. Cornerstone Exports (P.) Ltd. (2016) 238 Taxman 465 (Guj.)(HC)

S. 36(1)(iii) : Interest on borrowed capital – Interest had been charged on advances given by assessee but by mistake interest was shown as loans and advances – Disallowance was held to be not justified. 580

Dismissing the appeal of the Revenue, the Tribunal held that assessee explained that, interest had been charged on those advances during year, but, on account of a clerical mistake, interest was shown as 'loans and advances.(AY. 2011-12)
ACIT v. Pardeep Kumar Aggarwal (2016) 159 ITD 54 (Chd.)(Trib.)

581 **S. 36(1)(iii) : Interest on borrowed capital -Amount of loan was given by assessee was less than interest free funds available with it, disallowance of interest was unjustified**
Dismissing the appeal of the revenue, the Tribunal held that the amount of loans given by assessee was less than interest free funds available with it, disallowance of interest was not warranted. (AY. 2008-09)
Dy. CIT v. JSR Constructions (P.) Ltd. (2016) 159 ITD 749 (Bang.)(Trib.)

582 **S. 36(1)(iii) : Interest on borrowed capital – Fund flow statement was not filed – Disallowance of interest was held to be justified.**
Tribunal held that, the assessee has not filed fund flow statement was not filed-Disallowance of interest was held to be justified. (AY. 2001-02)
ACIT v. Autolite (India) Ltd. (2016) 143 DTR 98 / 180 TTJ 223 (Jaipur)(Trib.)

583 **S. 36(1)(iii) : Interest on borrowed capital – Assessee had given interest-free loans and advances for business purposes out of its own funds – Matter to be considered *denovo* in case**
The Assessee claimed interest expenses, while it had given interest-free loans and advances to various parties. The AO disallowed the claim of the Assessee of interest expenses on account of the fact that it had not charged interest on loans and advances. The Assessee claimed that the advances were trade advances and the ITAT in the preceding years had deleted similar disallowances in case of advances to 16 parties. Further, it was also claimed that it had adequate interest-free funds. The ITAT remanded the matter to the AO to consider the earlier year order with respect to the said 16 parties and directed the assessee to file cogent evidences to prove that the advances were for prudent business purposes. (AY. 2006-07)
Casby Logistics P. Ltd. v. DCIT (2016) 47 ITR 230 (Mum.)(Trib.)

584 **S. 36(1)(iii) : Interest on borrowed capital – Fresh loans were only utilized for purpose of repaying old loans – Interest on new loans should be allowed as deduction as used only for business purpose**
Fresh loans were utilized only for purpose of repaying old loans which in earlier assessment years had been held to have been utilised only for business purpose, interest on new loans should be allowed as deduction as used only for business purpose. (AY. 2009-10)
Senate v. Dy. CIT (2016) 158 ITD 315 (Bang.(Trib.)

585 **S. 36(1)(iii) : Interest on borrowed capital – Construction business – New project was not commenced – Interest was held to be allowable as deduction.**
Interest on funds borrowed for a new project, same was to be allowed as revenue expenditure even though said new project was not commenced as there was no restriction for assessee to use borrowed funds for other projects. (AY. 2010-11)
Vijayashanthi Builders Ltd. v. JCIT (2016) 158 ITD 635 / 48 ITR 310 (Chennai)(Trib.)

586 **S. 36(1)(iii) : Interest on borrowed capital – Interest free loans – No disallowance can be made to the extent of availability of own funds.**
During course of assessment proceedings Assessing Officer found that assessee on one hand had made borrowings and suffered interest thereon, whereas on the other hand

it had advanced monies to parties free of interest. He thus disallowed entire interest payment as not being incidental to assessee's business activity. Commissioner (Appeals) granted relief to assessee to extent of availability of own funds used for giving interest free loans. On facts, impugned order passed by Commissioner (Appeals) did not require any interference. (AY. 2008-09)
ITO v. Snowtex Investment Ltd. (2015) 174 TTJ 875 (Kol.)(Trib.)

S. 36(1)(iii) : Interest on borrowed capital – No disallowance in case there are sufficient shareholder's funds without interest burden and borrowing had been used for the purpose of business only. 587
The AO disallowed the interest debited to the P&L A/c for the reason that the Assessee had given share application money to another company which was not yielding any interest income and that there was no surplus funds with the Assessee. On appeal, the ITAT deleted the disallowance and held that the Assessee had proved that it had sufficient shareholder's funds without interest burden and the borrowing had been used for business purpose. (AY. 2008-09)
DCIT v. Sindhu Realtors Pvt. Ltd. (2016) 45 ITR 448 (Delhi)(Trib.)

S. 36(1)(iii) : Interest on borrowed capital – No material proving that it was for non-business exigencies brought on record by the AO – Interest on unsecured loan allowed. 588
The Assessee paid interest at the rate of 15% on unsecured loan. The Assessee had also paid interest on advances and loans from its Director, while it had advanced interest-free loan to the same director. The AO restricted the claim to 8%. On appeal, the ITAT allowed the interest expense at the rate of 15% and held that the AO had not brought on record any material to prove that the interest was not for business exigencies and that the loan was used for purpose other than its business. (AY. 2009-10)
ACIT v. Windlass Steel Craft (2016) 45 ITR 259 (Delhi)(Trib.)

S. 36(1)(iii) : Interest on borrowed capital – Payment of interest on unsecured loans at higher rate – No justification in restricting the deduction at 8% as against 15% claimed by the assessee. 589
The Tribunal held that the AO has not brought any material on record to substantiate that the interest paid by the assessee to the creditor was not for the business exigencies or the loans were utilized by the assessee elsewhere and not for business purposes. Therefore, there was no justification in restricting the deduction of interest at 8 per cent instead of the actual rate of interest at 15%. (AY. 2009-10)
ACIT v. Windlass Steel Craft (2016) 175 TTJ 1 (UO)(Delhi)(Trib.)

S. 36(1)(iii) : Interest on borrowed capital – Extension of existing business – Interest is not allowable till capital asset acquired was put to use. 590
Assessee paid interest on borrowed capital which was used for acquisition of wind mill for extension of existing business of generation of electricity through windmill, interest could not be allowed till capital asset acquired by assessee was put to use.(AY. 2011-12)
Narasu's Spinning Mills v. ACIT (2016) 157 ITD 512 (Chennai)(Trib.)

591 **S. 36(1)(iii) : Interest on borrowed capital – Sufficient interest free funds – Presumption is advances were from interest free funds – No disallowance can be made.**
Dismissing the appeal of revenue the Tribunal held that where assessee had enough interest-free funds to advance interest-free sums to its sister concern, presumption would be that advances were out of interest-free funds and, therefore, interest expenses could not be disallowed under section 36(1)(iii) (AY. 2008-09)
ACIT v. Omax Bikes Ltd. (2016) 156 ITD 566 (Chd.)(Trib.)

592 **S. 36(1)(iii) : Interest on borrowed capital – Interest free advances provided to subsidiary – No interest burden could be attributed in hands of assessee by virtue of loan advanced to its subsidiary.**
On appeal, the Tribunal held that the nexus between the interest-free loans and the interest-free advance had been established by the assessee and when there was no interest burden on the assessee by virtue of the loan advanced to its subsidiary, no such interest could be attributable in the hands of assessee. (AY. 2006-07, 2007-08)
Rain Commodities Ltd. v. Dy. CIT (2016) 46 ITR 1 (Hyd.)(Trib.)
Rain Cements Ltd. v. Dy. CIT (2016) 46 ITR 1 (Hyd.)(Trib.)

593 **S. 36(1)(v) : Contribution approved gratuity fund – Application by assessee for approval of scheme neither approved nor rejected by competent authority – Entitled to allowance. [S.40A(9)]**
Dismissing the appeal of revenue the Court held that the assessee could not be made to suffer for the inaction of the authorities and the Assessing Officer ought not to have disallowed the claims of contribution to gratuity scheme merely because the Commissioner had not granted the approval to the gratuity scheme. The assessee was sponsored by the UCO bank, a Government of India undertaking and had duly complied with the conditions laid down for approval under section 36(1)(a) of the Income-tax Act, 1961. Both the appellate authorities had found the expenses allowable based on material and evidence on record. The assessee had fulfilled the condition laid down for approval having created a trust with the Life Insurance Corporation of India and had deposited the amount. The Tribunal was justified in holding that the claims were proper and allowable. No question of law arose. (AY. 2007-08, 2008-09, 2009-10)
CIT v. Jaipur Thar Gramin Bank. (2016) 388 ITR 228 (Raj.)(HC)

594 **S. 36(1)(v) : Contribution to approved gratuity fund – Actual payment towards gratuity fund was made hence claim was allowable. [S. 43B]**
Assessee had made provision and had also made actual payment towards gratuity fund, hence claim for deduction is respect of same was allowed. (AY. 2009-10, 2010-11)
CIT v. Shri Siddeshwar Co-operative Bank Ltd. (2016) 240 Taxman 588 (Karn.)(HC)

595 **S. 36(1)(v) : Contribution to approved gratuity fund – Group gratuity scheme – Application filed by assessee for approval pending with Commissioner for almost 25 years – Application for approval not having been rejected, deduction cannot be denied.**
The assessee had applied in the year 1981 for approval for the group gratuity scheme. Once an application had been moved for approval and had not been rejected, the

claim on the sum of contribution could not have been disallowed merely because the Commissioner had not accorded approval. (AY. 2009-10)
PCIT v. Rajasthan State Seed Corporation Ltd. (2016) 386 ITR 267 (Raj.)(HC)

S. 36(1)(v) : Contribution approved gratuity fund – Employees Group Gratuity Fund to LIC – Approval is pending – Eligible deduction. 596
Tribunal held that; where assessee paid amount towards Employees Group Gratuity Fund to LIC and application made by assessee was still pending before Commissioner for approval and assessee had no control over Fund created by LIC for benefit of its employees, disallowance under section 36(1)(v) was not to be made. (AY. 2011-12)
Narasu's Spinning Mills v. ACIT (2016) 157 ITD 512 (Chennai)(Trib.)

S. 36(1)(vii) : Bad debt – Claim for write off of bad debts disallowed as it does not pertain to stock-in-trade or purchase or sale of goods. 597
The assessee advanced a sum of money on interest for a short period. A part of it was received and the assessee had written off the balance and a claim was made under section 36(1)(vii). It was held that 'Bad debts' is a commercial name for trade debts and it cannot include loans made to one's own employee or moneys overdrawn by an employee on commission account, which are entirely private matters independent of the business and that the expression 'bad debts' also includes doubtful debts. Applying the correct legal position, it was held that the Assessing Officer has given a finding that the alleged debt was not part of the assessee's stock-in-trade and that as it has not been incurred while purchasing or selling the goods, in which the company was dealing with and, therefore, the expenditure involved cannot be treated as a debt and therefore, it is not an admissible deduction. (AY. 1997-98)
Tube Investments of India Ltd v. JCIT (2016) 240 Taxman 543 (Mad.)(HC)

S. 36(1)(vii) : Bad debt – Write-off of bad debts were held to be allowable as the pending cases against the debtors cannot deter an assessee from making a claim in respect of write off. 598
The assessee made a claim of write-off of losses which were partly allowed by the Assessing Officer. The Tribunal allowed the entire claim by finding that the same were incidental to the business of the assessee and that pending cases against the debtors before the Courts cannot deter an assessee from writing off the losses and claim the same under section 36(1)(vii) as it is a forseeable business loss. The said finding was upheld by the High Court. (AY .2008-09)
PCIT v. RJD Impex (P) Ltd. (2016) 240 Taxman 502 (Guj.)(HC)

S. 36(1)(vii) : Bad debt – Assessee writing off sum in accounts. Conditions for allowance satisfied. [S.36(2)] 599
On appeal by the Department: Held, dismissing the appeal, that the assessee was entitled not to treat the debt as bad so long as it believed that the money could be recovered. Law did not require the assessee to treat any amount as bad debt if recovery thereof was apprehended. The Tribunal as the last fact finding authority had concluded that 50 per cent of the capital of the assessee was deployed in money lending and

hence the fact that the assessee was in money lending business could not be doubted. Therefore, the Tribunal was right in affirming the allowance.
CIT v. Vivek Engineering and Casting Ltd. (2016) 383 ITR 480 (Cal.)(HC)

600 **S. 36(1)(vii) : Bad debt or part thereof – Claim of bad debts on write off of loans given against the security of stolen property, is allowable. [S.36(2)]**
The assessee had claimed bad debts of loans which had become bad during the year. The said loans were advanced against the security of stolen gold pledged by thieves, who had cheated the assessee, and was later on seized by the police, being property of crime. The AO did not allow the claim of bad debts. Following the guidelines of the RBI, the ITAT allowed the claim of bad debts. (AY. 2010-11)
Muthoot Finance Ltd. v. Addl. CIT (2016) 52 ITR 241 (Cochin)(Trib.)

601 **S. 36(1)(vii) : Bad debt – Investment by assessee in joint venture distribution business – Not able to recover the amount invested inspite of various efforts – Conditions laid down in section 36(1)(vii) read with Section 36(2) are satisfied – No addition can be made.**
Once Assessee fully satisfied conditions laid down in S. 36(1)(vii) read with S.36(2) and impugned amount written off by assessee is irrevocable being bad debt, shall be allowable as revenue expenditure and same could not be added to income of Assessee. (AY. 2008-09)
Satish B. Kaushik v. ACIT (2016) 47 ITR 739 (Mum.)(Trib.)

602 **S. 36(1)(vii) : Bad debt – Advances given in ordinary course of business not adjusted due to absconding of supplier – Assessee entitled to write off advances as business loss.**
The Appellate Tribunal has held that the advances were given in the ordinary course of business and when the advances made remained unadjusted due to absconding of suppliers from the open market, the assessee had no other alternative but to write off the advances as business loss. (AY. 2006-07)
Admire Sign and Display P. Ltd. v. ITO (2016) 51 ITR 81 (Mum.)(Trib.)

603 **S. 36(1)(vii) : Bad debt – It was enough if bad debt was written off as irrecoverable in accounts of assessee. [S. 36(2)]**
Dismissing the appeal of the revenue the Tribunal held that; It was enough if bad debt was written off as irrecoverable in accounts of assessee. (AY. 2008-09)
ACIT v. Living Media India Ltd. (2015) 70 SOT 536 / 40 ITR 610 (Delhi)(Trib.)

604 **S. 36(1)(vii) : Bad debt – Bad debts claimed by assessee in year under consideration has to be allowed though recovered in subsequent assessment year and offered for taxation proved the genuineness of the debtors.**
Dismissing the appeal of the Revenue, the Tribunal held that bad debts claimed by assessee in year under consideration has to be allowed though recovered in subsequent assessment year and offered for taxation proved the genuineness of the debtors. (AY. 2005-06)
DCIT v. Xpro India Ltd. (2016) 161 ITD 93 (Kol.)(Trib.)

S. 36(1)(vii) : Bad debt – Bad debts allowed if written off in the books of account – Merely because the claim was not made in the return of income, cannot be a reason to deny the same. 605

The assessee had written off bad debts in the impugned year. However, during the course of assessment, it realised that a lower amount was claimed inadvertently in its return of income. The AO did not allow the claim of the assessee. On appeal, the ITAT allowed the entire bad debts to the assessee. The ITAT held that there was no estoppel on legal issues to prevent the assessee from making a lawful claim, and a claim not made in the return of income, can be made subsequently before an authority who is competent to grant relief. It was held that what was granted by substantive law cannot be taken away by the adjudicating authorities on mere technicalities. (AY. 2009-10)

DCIT v. CMS Securities Ltd. (2016) 47 ITR 378 (Mum.) (Trib)

S. 36(1)(vii) : Bad debt – Cash system of accounting – Amount advanced for distribution of films – Non realization – Allowable as revenue expenditure. [S. 36(2)] 606

Assessee, a film actor and director, made investment with Prachi Narmada Films Pvt. Ltd. ('PNF') of ₹ 10 lacs in 2001 for distribution of film Nayak. The Assessee had 25% share in distribution the film. The total cost of the film was ₹ 36,53,525/- whereas the business done was of ₹ 14,07,090/-. Thus loss of ₹ 22,26,020 was incurred in which assessee's share was ₹ 5,61,605/-. After providing for the loss ₹ 4,38,395/- was receivable from PNF. Despite several reminders the amount was not received and the amount was written off as bad debts. Inadvertently the advance given was shown in balance sheet as 'investment' instead of 'loans and advances'. The Assessing Officer disallowed on the ground that Assessee followed cash system of accounting and the said amounts were reflected as advances and not debtors. It was in the nature of capital advance and non-recovery can be capital loss and not revenue loss. CIT(A) confirmed the same. On appeal the Tribunal held that income from the film Nayak was offered for taxation in AY 2002-03 although it was loss and it is well established and settled proposition that income include losses and hence the negative income, i.e. loss is also an income which was offered to taxation in AY 2002-03. The assessee filly satisfied the conditions of 36(1)(vii) r.w.s. 36(2) and the amount of ₹ 4,38,395/- were written off as bad debts is allowable as revenue expenditure. (AY. 2008-09)

Satish B. Kaushik v. ACIT (2016) 47 ITR 739 (Mum.)(Trib.)

S. 36(1)(vii) : Bad debt – Write off of interest income on non-preforming assets will be allowed as bad debts since a reduction from interest income will have the effect of debit to P&L A/c. 607

The assessee, an NBFC, reversed interest income accounted for in the earlier years since the assets concerned had become non-performing assets. The interest income treated as irrecoverable and deduction was claimed u/s. 36(1)(vii). However, in the books of account, it was reduced from the interest income, instead of a debit to the P&L A/c. The claim was not allowed by the Revenue authorities on the ground that it was not debited to the P&L A/c. The ITAT allowed the claim and held that a reduction from the credit side of the P&L A/c would have the effect of a debit to the P&L A/c

and hence the write off should be allowed a bad debts u/s. 36(1)(vii). (AY. 2001-02, 2003-04 to 2008-09)
West Bengal Infrastructure Development Finance Corporation v. ACIT (2016) 45 ITR 285 (Kol.)(Trib.)
DCIT v. West Bengal Infrastructure Development Finance Corporation (2016) 45 ITR 285 (Kol.)(Trib.)

608 **S. 36(1)(viia) : Bad debt – Provision for bad and doubtful debts – Schedule bank – Deduction allowed only to extent of provision made in books of account.**
The Tribunal held that assessee cannot claim deduction over and above the provision created in its books of account. It is mandatory that the assessee should make provisions equal to the amount claimed as deduction. (AY. 2009-10)
UCO Bank v. Dy. CIT (2016) 49 ITR 34 (Kol.)(Trib.)

609 **S. 36(1)(viia) : Bad debt – Provision for bad and doubtful debts – Schedule bank – Deduction allowable for a Government company engaged in the eligible business of financing infrastructural facilities.**
The assessee was a Government owned NBFC and claimed deduction u/s. 36(1)(viia) which was deduction of 5% allowable to public financial institutions or State Financial Corporation. The AO held that it was not a notified entity u/s. 4A(2) of Companies Act, 1956. The ITAT allowed the claim of the Assessee on the ground that it was a Government company and engaged in the eligible business of financing infrastructural facilities. (AY. 2001-02, 2003-04 to 2008-09)
West Bengal Infrastructure Development Finance Corporation v. ACIT (2016) 45 ITR 285 (Kol.)(Trib.)
DCIT v. West Bengal Infrastructure Development Finance Corporation (2016) 45 ITR 285 (Kol.)(Trib.)

610 **S. 36(1)(viia) : Bad debt – Provision for bad and doubtful debts – Schedule bank – provision made against advances of rural branches only.**
Provision for doubtful debts as allowable under section 36(1)(viia) is in respect of provision made against advances of rural branches only; bad debts in respect of advances of non-rural branches is to be allowed fully and is not required to be set off against provision for bad debts claimed.(AY. 2003-04, 2004-05)
Allahabad Bank v. ACIT (2016) 157 ITD 693 / 46 ITR 678 (Kol.)(Trib.)

611 **S. 36(1)(viii) : Eligible business – Special reserve – Each clause of section 36 was independent from other in its operation – Deduction under section 36(1)(viii) and 36(1)(viia) would be granted independently without reducing/restricting the amount of deduction granted in either of two. [S. 36(1)(viia)]**
The AO had held that the deduction claimed by the assessee under section 36(1)(viia)(c) of the Act would be granted after reducing from the total income the deduction claimed under section 36(1)(viii) of the Act. The CIT(A) and Tribunal had upheld the decision of the AO that the deduction under clause (viii) of section 36(1) would have to be computed first before applying the deduction under clause (viia)(c) of section 36(1).

On appeal by assessee, the High Court held that it was clear that sub-section (1) of section 36 lists out the matters in respect of which deductions that can be allowed while computing the income referred to in section 28. Clauses (i) to (xi) of sub-section (1) of section 36 did not make any of those matters dependent upon one another. If an Assessee was entitled to the benefit under one clause of sub-section (1) of section 36, the Assessee was not deprived of the benefit of the other clause. This is how several clauses in sub-section (1) have been arranged. Thus if each of the clauses under sub-section (1) of section 36 are independent in its operation and if each one of them does not depend upon the other clause for the extension of the benefit, then the interpretation given by the Revenue could not be accepted. Thus the High Court ruled all the above issues in favour of the Assessee. (AY. 2000-01, 2001-02)
Infrastructure Development Finance Co. Ltd. v. ACIT (2016) 238 Taxman 212 (Mad.)(HC)

S. 36(1)(viii) : Financial corporation – Assignment of loan – Interest income from those accounts upto date of assignment would qualify for deduction. 612
Where assessee assigns loan portfolio in respect of certain finance accounts to other company and by such assignment there is no change in character of loan accounts, i.e., their lifespan is more than five years, which continues even after assignment, then interest income from those accounts up to date of assignment would qualify for deduction u/s. 36(1)(viii) in hands of assessee.
Gruh Finance Ltd. v. ACIT (2016) 160 ITD 89 (Ahd)(Trib.)

S. 36(1)(viii) : Financial corporation – Amount of bad debt recovered during year, which had been reduced from eligible profits derived from long-term housing finance in earlier year, would be considered for calculating claim. 613
Assessee was deriving interest income from long-term finance which was eligible for deduction u/s. 36(1)(viii). In earlier year as certain loans had gone bad and assessee had written off them, eligible profit derived from long-term housing finance was reduced by amount written off by assessee as bad debt - In relevant assessment year, assessee had recovered said bad debt. Amount of bad debts recovered by assessee would be included for calculating claim u/s. 36(1)(viii).
Gruh Finance Ltd. v. ACIT (2016) 160 ITD 89 (Ahd.)(Trib.)

S. 36(1)(viii) : Financial corporation – EMI from various customers on loan portfolios, which had already been sold/transferred by assessee to HDFC, could not be considered as income derived from long-term housing finance business for claiming deduction. 614
Assessee, a non-banking finance company, had sold loan portfolio of individual home loans to HDFC but it was obliged to act as receiving and paying agent for effecting recoveries from individual borrowers until point of time when all these loans were fully recovered - Under this arrangement, assessee was entitled to retain interest in excess of agreed rate of interest recovered from borrowers. In this backdrop, assessee computed certain surplus being difference between EMI recoverable from borrowers during remaining loan tenure, and amount payable by assessee to HDFC and included such amount for calculating deduction under section 36(1)(viii). Income from EMI residual represented difference of interest charged by assessee for services rendered by

it for collecting EMI, etc., on behalf of HDFC and it being not linked with long-term finance would not form part of eligible profit derived from long-term finance for purpose of calculating 40 per cent of amount to claim deduction u/s. 36(1)(viii). (A.Y. 2001-02)
Gruh Finance Ltd. v. ACIT (2016) 160 ITD 89 (Ahd.)(Trib.)

615 **S. 36(1)(viii) : Financial corporation – Eligible business – Special reserve – Banking company entitle to deduction.**
Banking company has been duly included in 'specified entity' to which provisions of section 36(1)(viii) are applicable. Therefore, deduction has to be allowed to assessee-bank which is engaged in business of providing long-term finance for industrial, agriculture and infrastructure development in India and is a Govt. company; however said deduction will be restricted to amount transferred to special reserve subject to limit of prescribed percentage of profits derived from providing long-term finance for approved purposes mentioned in section 36(1)(viii). (AY. 2003-04-, 2004-05)
Allahabad Bank v. ACIT (2016) 157 ITD 693 / 46 ITR 678 (Kol.)(Trib.)

S. 37. General

616 **S. 37(1) : Business expenditure – Accrued or contingent liability – Provision for interest for default in payment of instalments in terms of compromise agreement with bank – Ascertained liability hence deductible.**
The assessee obtained a loan from a bank which it was unable to repay. It entered into a compromise with the bank by which the total liability was reduced and the reduced sum was payable in a phased manner with interest on the reducing balance and in case of delay by a period of one year in payment of respective instalments, interest was to be charged. The assessee made a provision for interest at ten % as a default of compromise. For the AY. 1995-96, the Assessing Officer disallowed the provision and the disallowance was confirmed by the Commissioner (Appeals). However, the Tribunal allowed the interest amount and on appeal by the Department, the High Court held, dismissing it, that even if the amount of loan was not paid by the assessee as per the agreement, the liability could not cease to exist, that the bilateral consented action on behalf of the parties was binding in terms of the agreement, and that therefore, the interest liability was not a contingent liability, but an ascertained liability. On appeal to the Supreme Court: The Supreme Court dismissed the appeal holding that the matter was covered against the Department by the decision in *Taparia Tools Limited v. Joint CIT [2015] 372 ITR 605 (SC)*. (AY. 1995-96)
CIT v. Modern Spinners Ltd. (2016) 382 ITR 472 / 243 Taxman 437 (SC)
Editorial : Decision in CIT v. Modern Spinners Ltd. [2006] 284 ITR 308 (Delhi) is affirmed.

617 **S. 37(1) : Business expenditure – Enhanced rent paid under agreement was held to be allowable.**
Dismissing the appeal of revenue the Court held that in view of the revamp of the machinery a fresh agreement had been entered in to, warranting the payment of higher rent and that agreement was not a sham transaction, and the High Court affirmed the findings of the Tribunal. (AY. 1988-89, 1989-90, 1990-91)
CIT v. Khoday Breweries Ltd. (2016) 382 ITR 1 / 243 Taxman 229 (SC)

S. 37(1) : Business expenditure – Interest paid for broken period should not be considered as part of the purchase price, but should be allowed as revenue expenditure in the year of purchase of securities. 618

Interest paid for broken period should not be considered as part of the purchase price, but should be allowed as revenue expenditure in the year of purchase of securities. (CANo. 1549 of 2006, dt. 12-8-2008)(AY.1978-79)

CIT v. Citi Bank N.A. (SC); www.itatonline.org

Editorial: American Express International Banking Corporation v. CIT (2002) 258 ITR 601 (Bom.)(HC) is affirmed. Vijay Bank Ltd v. CIT (1991) 187 ITR 541 (SC) is distinguished.

S. 37(1) : Business expenditure – Amount payable to the purchasers of the plot of land equal to the cost of plot after a period of 5 years under "Money back Novel scheme" is allowable in the year in which the liability is crystallised. [S. 145] 619

The High Court held that the amount payable to the purchasers of the plot of land equal to the cost of plot after a period of 5 years under "Money back Novel scheme" is allowable in the year in which the liability is crystallised but only the payment is postponed. It cannot be deferred over a period of 5 years, which is the contention of the Assessing Officer. (AY. 1994-95)

Macro Marvel Projects Ltd. v. ACIT (2016) 142 DTR 358 (Mad.)(HC)

S. 37(1) : Business expenditure – Capital or revenue – Abandoned project – No new business – Expenditure was held to be allowable as business expenditure 620

The assessee cellular company claimed the expenditure as revenue expenditure being the amount written off by the assessee in respect of expenses incurred on projects originally set up to put cell sites, but later abandoned. The AO disallowed the expenses as capital in nature to bring in to existence of new asset. On appeal Tribunal allowed the claim of the assessee holding that cellur towers were set up for purpose of assesse's 'own business of providing cellular services to customers more efficiently conveniently and profitably. Towers were not to be set up for leasing out to third party and, thus it could not be said that towers were new source of income hence the said expenditure was revenue in nature. On appeal by the revenue, dismissing the appeal of the revenue, the Court held that, since no new business was set up, expenditure was held to be allowable as business expenditure. (AY. 2001-02)

CIT v. Idea Cellur Ltd. (2016) 76 taxmann.com 77 (Bom.)(HC)

Editorial : SLP of revenue is accepted, CIT v. Idea Cellur Ltd. (2017) 247 Taxman 313 (SC)

S. 37(1) : Business expenditure – Gratuity – Scheme of voluntary retirement – Commercial obligation – Payment made by assessee to its subsidiary is amount expended for purpose of business of assessee, and is, thus, admissible deduction. 621

Payment made to subsidiary under commercial obligation was held to be allowable as business expenditure.

Wallace Flour Mills Co. Ltd. v. CIT (2016) 142 DTR 1 / 289 CTR 444 (Bom.)(HC)

622 **S. 37(1) : Business expenditure – Stay by supreme Court – Deduction on account of 'Cess' and 'Cess Surcharge' subsequently held as invalid and admissibility of deduction claim made in the computation of income, entries in the books of account is not relevant for claiming deduction [S. 145]**

Assessee was a public company having its registered office at Dalmiapuram in State of Tamil Nadu. During the year, it had claimed a deduction on account of accrued liability of 'cess' and 'cess surcharge' levied under the Madras Panchayats Act, 1958 as amended by Madras Act No. 18 of 1964, even though such amount was not debited by the assessee in the profit and loss account and claimed as deduction in the computation of income filed along with return of income.

AO rejected aforesaid claim of assessee holding that liability had not accrued in view of stay granted by Supreme Court of India on levy of the 'cess' and 'cess surcharge' subsequently and also same was not debited in the books of account by the assessee. CIT(A) also held that no deduction was permissible since levy of cess and cess surcharge had been held to be unconstitutional, no liability as claimed by Assessee was in existence at time of making assessment. Tribunal upheld the action of AO/CIT(A).

On appeal, the High Court held that the computation of income chargeable to tax in a given assessment year is not dependent on the date on which the assessment for that year is completed. The events having a bearing on the income of Assessee have to be accounted for in the year in which the events occur. Thus, the effect of cessation of liability by virtue of the decision of the Supreme Court would have to be assessed year in which Supreme Court decision is delivered and hence, the claim of expense on account Cess and Cess Surcharge is to be allowed in the year under consideration.

Further, the High Court placing reliance on the decision *CIT v. Kedarnath Jute Mfg. Co. Ltd(1971) 82 ITR 363 (SC)* has held that AO was required to assess income of assessee based on accounting system followed as well as provisions of the Act and if assessee under some misapprehension or mistake failed to make an entry in books of account and although under the law, a deduction must be allowed by Income Tax Officer. Thus the question was answered in favour of assessee and against Revenue.

Dalmia Cement (Bharat) Ltd. v. CIT (2016) 137 DTR 217 (Delhi)(HC)

623 **S. 37(1) : Business expenditure – SEBI registration fee – Held to be allowable expenditure. [S. 145]**

AO disallowed the claim on the ground that there was no supporting documents . The Tribunal allowed the claim on the ground that the payment was made by account payee cheque. Dismissing the appeal of the revenue the Court held that the payment was made along with the interest by cheque hence the order of Tribunal was upheld. (AY. 2004-05)

CIT v J. M. Financial Securities (P) Ltd. (2016) 241 Taxman 551 (Bom.)(HC)

624 **S. 37(1) : Business expenditure – Capital or revenue- Expansion of business – Expenses credited to capital account – Not conclusive – Expenses is deductible**

In a case of a new unit being merely an expansion of the existing business of the assessee and not setting up of a new business the expenses incurred in that regard would be allowable as revenue expenses under section 36(1)(iii) or section 37. The mere fact that the expenses have been capitalised in the books of account is not conclusive.

Held that there seemed to be an expansion in the existing unit of business. The expenses incurred in relation with it were deductible. (AY. 1996-97, 1997-98)
CIT v. Kayal Syntex Ltd. (2016) 389 ITR 84 (Guj.)(HC)

S. 37(1) : Business expenditure – Commission to third parties – Disallowance was held to be justified – Proceedings before settlement commission was held to be independent proceedings [S. 28(i), 245D] 625
Dismissing the appeal of the assessee the Court held that disallowance of commission was held to be justified and proceedings before settlement commission was independent proceedings. (AY. 2000-01, to 2003-04)
D. Srinivas Vyas v. ITO (2016) 73 taxmann.com 4 (Mad.)(HC)
Editorial : SLP of the assessee is dismissed as withdrawn, permission to file review petition before the Settlement Commission was granted. D. Srinivas Vyas v. ITO (2016) 242 Taxman 171 (SC)

S. 37(1) : Business expenditure – Expenditure incurred by – Corporation on maintenance of Thiruvalluvar statue at Kanyakumari was allowable as deduction 626
Dismissing the appeal of the revenue, the Court held that; the expenditure incurred by assessee-corporation on maintenance of Thiruvalluvar statue at Kanyakumari was allowable as deduction. (AY. 2005-06, 2006-07)
CIT v. Tamil Nadu Tourism Development Corporation Ltd. (2016) 241 Taxman 441 / 288 CTR 444 (Mad.)(HC)

S. 37(1) : Business expenditure – Job work charges – Contribution for effluent treatment plant was held to be deductible. Amount paid to farmers on account of penalty was held to be deductible if compensatory and not penal 627
Dismissing the appeal of revenue the Court held that job work charges was held to be deductible. Contribution for effluent treatment plant was held to be deductible. Whenever any statutory impost paid by an assessee by way of damage or penalty or interest, is claimed as an allowable expenditure under section 37(1) the assessing authority is required to examine the scheme of the provisions of the relevant statute providing for payment of such impost notwithstanding the nomenclature of the impost as given by the statute, to find whether it is compensatory or penal in nature. The authority has to allow deduction under section 37(1) wherever such examination reveals the concerned impost to be purely compensatory in nature. (AY. 1994-95, 1996-97, 1997-98)
CIT v. Metrochem Industries Ltd. (2016) 389 ITR 181 (Guj.)(HC)

S. 37(1) : Business expenditure – Capital or revenue – Professional fees for enhancing efficiency of assessee's organization was held to be revenue expenditure 628
Dismissing the appeals of revenue, the Court held that Professional fees paid for implementation of SAP software programme for enhancing efficiency of assessee's organisation which did not have any enduring benefits, was not an amount for purchase of technology; hence, same was not in nature of capital expenditure but revenue expenditure. (AY. 2006-07, 2007-08)
CIT v. KSB Pumps Ltd. (2016) 243 Taxman 240 (Bom.)(HC)

629 **S. 37(1) : Business expenditure – Travelling expenses of Director's wife was held to be not allowable as deduction.**
Assessee-company claimed travelling expenses in respect of its Director's wives who travelled with Directors while they were on business tours. Assessing Officer rejected expenditure as being unsatisfactory. Tribunal allowed the claim of assessee. On appeal by revenue, allowing the appeal the Court held that whether Director's spouse travelled with him for business purpose or not was essentially a question of fact not only in respect of each year but in respect of each tour, burden of proving same was on assessee; since, assessee did not prove issue, case would be in favour of revenue. (AY. 1991-92)
CIT v. Hero Cycles Ltd. (No 2) (2016) 243 Taxman 28 / (2017) 393 ITR 164 / 293 CTR 23 / 147 DTR 265 (P&H)(HC)

630 **S. 37(1) : Business expenditure – Capital or revenue – Corporate brand building – Expenditure incurred by assessee – company on corporate advertisement to maintain its corporate image which resulted in increased sale of products, was to be allowed as revenue expenditure**
Dismissing the appeal of revenue, the Court held that Expenditure incurred by assessee-company on corporate advertisement to maintain its corporate image which resulted in increased sale of products, was to be allowed as revenue expenditure. (AY. 2006-07)
CIT v. Asian Paints (India) Ltd. (2016) 243 Taxman 348 (Bom.)(HC)

631 **S. 37(1) : Business expenditure – Capital or revenue – Techno Commercial Agreement' and 'Brand Licensing Agreement' – Held to be revenue in nature**
Dismissing the appeal of revenue, the Court held that amount paid under head 'Techno Commercial Agreement' and 'Brand Licensing Agreement' was held to be revenue in nature. (AY. 2005-06 to 2009-10)
PCIT v. Nitrex Chemicals India Ltd. (2016) 243 Taxman 371 (Delhi)(HC)

632 **S. 37(1) : Business expenditure – Bogus purchases – Paid by account payee cheques – Sales was accepted – GP was normal – Deletion of addition by the Tribunal was held to be justified. [S. 69C, 260A]**
The Assessing Officer made additions on account of certain purchases made by the assessee holding them as bogus and that the assessee failed to prove the genuineness of such purchases in spite of opportunities being granted. The Commissioner (Appeals) found that the books of account of the assessee were duly audited and that they were not considered by the Assessing Officer. The Tribunal found that for all the disallowed purchases, payments were made through account payee cheques and that the assessee had fully co-operated in the proceedings and furnished the necessary particulars. On appeal : Held, dismissing the appeal, that the Commissioner (Appeals) and the Tribunal had concurrently upheld the assessee's contentions after appreciating the rival contentions. Their decisions essentially determined the questions of fact. No question of law arose. (AY. 2007-08)
CIT v. Anju Jindal (Smt.) (2016) 387 ITR 418 (P&H)(HC)

S. 37(1) : Business expenditure – Entertainment expenditure – Disallowance of 25% of expenses was held to be reasonable [S. 37(2)] 633

Dismissing the appeal of the assessee the Court held that Staff welfare expenses and expenses incurred on outsiders not shown separately in accounts of assessee, hence estimation of entertainment expenditure for disallowance at 25 per cent of total expenditure by Assessing Officer reasonable. (AY. 1995-96)

Cebon India Ltd. v. CIT (2016) 387 ITR 502 (P&H)(HC)

S. 37(1) : Business expenditure – Guarantee commission paid to State Government for guarantee issued at assessee's request to Housing Urban Development Corporation – Held allowable as revenue expenditure 634

Allowing the appeal of assessee the Court held that deduction on the expense incurred on account of payment of guarantee commission was allowable. C*IT v. Sivakami Mills Ltd. (1997) 227 ITR 465 (SC)* followed. (AY. 2010-11)

Haryana State Road and Bridges Development Corporation Ltd. v. CIT (2016) 388 ITR 253 / 243 Taxman 187 (P&H)(HC)

S. 37(1) : Business expenditure – Amount transferred out of profit and loss account to storage fund for molasses and alcohol account – Admissible deduction. [Ethyl Alcohol (Price Control) Amendment Order, 1971 635

On reference the Court held that the amount of ₹ 28,983 transferred out of the profit and loss account to storage fund for molasses and alcohol account to meet the statutory requirements of Ethyl Alcohol (Price Control) Amendment Order, 1971, was an admissible deduction in working out the business income. (AY. 1980-81)

Somaiya Organo Chemicals Ltd. v. CIT (2016) 388 ITR 423 / 290 CTR 30 / 142 DTR 361 (Bom.)(HC)

S. 37(1) : Business expenditure – Sub-contractors – Trough banking channel – Held to be allowable 636

Dismissing the appeal of revenue the Court held that The assessee producing necessary material relating to sub-contracting a part of his work before the Commissioner (Appeals). There was nothing to doubt the genuineness of payments effected through banking channels in favour of the two sub-contracting agencies. The conclusions drawn by the Commissioner (Appeals) and the Appellate Tribunal were sustainable. (AY. 2010-11)

CIT v. SVE Engineers P. Ltd. (2016) 388 ITR 11 / 243 Taxman 193 (Mad.)(HC)

Editorial : Refer AIT v. SVE Engineers P. Ltd. (2015) 63 taxmann.com 86 (Chennai)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Expenditure incurred in setting up new line of same business is held to be deductible 637

Dismissing the appeal of revenue the Court held that the Commissioner (Appeals) after appreciating the evidence produced on record had observed that various businesses carried on by the assessee including health care constituted the same business of the assessee. The Appellate Tribunal was right in law in allowing the expenses for setting up new business and fee paid treating them as revenue in nature. (AY. 1999-2000)

CIT v. Max India Ltd. (No. 1) (2016) 388 ITR 74 / 243 Taxman 40 (P&H)(HC)

638 **S. 37(1) : Business expenditure – Legal and professional fees – Transfer pricing – Held to be deductible [S. 92C]**

Dismissing the appeal of revenue the Court held that The Tribunal found that the nature of the services rendered by M was supported by an invoice. It was further found that the nature of the services provided by M were such that it was difficult to provide evidence of the services having actually been rendered. Further, the Tribunal accepted as relevant the assessee's contention that it was in fact able to achieve an export turnover of ₹ 29 crores and that this demonstrated *prima facie* that the services were rendered by M. It was not possible to say that the conclusion arrived at by the Tribunal was absurd or perverse. It was a possible view. On the facts of the case the Appellate Tribunal was right in holding that the legal and professional expenses were allowable. (AY. 2002-03)

CIT v. Max India Ltd. (No. 2) (2016) 388 ITR 81 / 75 taxmann.com 268 (P&H)(HC)

Editorial: SLP is granted to the revenue, CIT v. Max India Ltd. (2017) 246 Taxman 308 (SC)

639 **S. 37(1) : Business expenditure – Capital or revenue – Current repairs – Amount paid to extend life of machinery after expiry of its life span, was held to be allowable as revenue expenditure [S. 31]**

Dismissing the appeal, the Court held that Amount paid to extend life of machinery after expiry of its life span, was held to be allowable as revenue expenditure. (AY. 1993-94 to 1999-2000)

CIT v. Neyveli Lignite Corporation Ltd. (2016) 388 ITR 172 (Mad.)(HC)

640 **S. 37(1) : Business expenditure – Contribution to recognized provident fund – Gratuity actually paid was held to be deductible [S. 36(1)(iv)]**

Dismissing the appeal of revenue the Court held that the mere fact that the contribution would not come within the ambit of the provisions of section 36(1)(iv) would not disentitle the assessee to claim the benefit under section 37(1) if the requirements thereunder were satisfied. The assessee had not merely made a provision but payment was actually made and therefore, was entitled to deduction. (AY. 2009-10)

CIT v. Shri Siddeshwar Co-Operative Bank Ltd. (2016) 388 ITR 588 / 240 Taxman 588 (Karn.)(HC)

CIT v. Sindagi Urban Co-operative Bank Ltd. (2016) 388 ITR 588 / 240 Taxman 588 (Karn.)(HC)

641 **S. 37(1) : Business expenditure – Capital or revenue – Expenses on dry docking of rigs and vessels on maintenance of assets allowable as revenue expenditure**

Dismissing the appeal of revenue, the Court held that the expenditure on dry docking was revenue expenditure and hence deductible. (AY. 2005-06)

CIT v. Oil and Natural Gas Corporation Ltd. (2016) 387 ITR 710 (Uttarakhand)(HC)

642 **S. 37(1) : Business expenditure – Provision in respect of concluded transaction is provision hence deductible**

Court held that the assessee had made provision in respect of a percentage of sales to account for various expenses transferred to a separate account. This had been claimed. The claim of expenditure being consistent with the method of accounting followed and the provision having been made on concluded transactions, it was allowable. (AY. 2002-03)

CIT v. Wipro GE Medical System Ltd. (2016) 387 ITR 77 (Karn.)(HC)

S. 37(1) : Business expenditure – Difference between direct sales and sales through franchisee hence difference must be taken into account 643

Court held that what the Assessing Officer had done was to delete the value of franchise sales from the total expenses. No method of accountancy adopted by the assessee was disturbed. This was justified. (AY. 2002-03)

CIT v. Wipro GE Medical System Ltd. (2016) 387 ITR 77 (Karn.)(HC)

S. 37(1) : Business expenditure – Entries allowed in earlier and subsequent years hence deduction cannot be denied 644

That the assessee had cured the defects pointed out by the Assessing Officer, by filing the necessary auditor's report before the Commissioner which was properly considered and it was held that it was a genuine error in the book entry and this was confirmed by the Tribunal. The error occurred in the book entries for the assessment years 2002-03 and 2003-04, and the Revenue had not raised this question in appeal for the assessment year 2003-04. In such circumstances, the Revenue challenging this issue only in this appeal relating to Assessment Year 2002-03, without just cause was not sustainable. (AY. 2002-03)

CIT v. Wipro GE Medical System Ltd. (2016) 387 ITR 77 (Karn.)(HC)

S. 37(1) : Business expenditure – Secret commission "mehta sukhadi" paid to employees of client – Failure by assessee to establish payment of secret commission – Disallowance was held to be proper-Inflation of labour charges and wrong billing – Disallowance based on facts and statement made during search, disallowance was held to be justified [S. 132(4)] 645

Dismissing the appeal the Court held that; the Appellate Tribunal was right in sustaining the addition of ₹ 1,37,375 being payment made on account of secret commission "mehta sukhadi".

That during the course of search the senior partner had made a statement under section 132 of the Act that labour expenses were inflated. The Commissioner (Appeals) who partly deleted the additions made on account of labour charges and restricted them to 10 per cent of ₹ 10.97 lakhs, had himself rendered a finding that there was a shortcoming in the accounts of the labour charges till the date of search. The Appellate Tribunal found that the Assessing Officer had rendered a finding that the assessee had not entered bills for hiring charges in its books of account in the day-to-day running of the business and hence the contention that in the absence of any error or discrepancy being noted in the accounts, no amount could be added on account of non-billing was not acceptable. Therefore, reliance by the Tribunal upon the statement made under section 132(4) of the Act after considering the retracted statement, could not be faulted. The view taken by the Tribunal was a possible view. (AY. 1990-91)

T. Lakhamshi Ladha & Co. v. CIT (No. 2) (2016) 386 ITR 245 / 242 Taxman 325 / 288 CTR 330 (Bom.)(HC)

S. 37(1) : Business expenditure – Trial run expenditure incurred for expansion of existing manufacturing facilities was to be allowed as revenue expenditure 646

Allowing the appeal of the assessee, the Court held that there was only one company which managed the business of both the units and supplied the required staff to both

the units. Therefore, the Bangalore unit could not be treated as a new business but was only an establishment of the existing business and therefore, the expenditure incurred was allowable as a revenue expenditure.
Bell Ceramics Ltd. v. Dy. CIT (2016) 242 Taxman 134 (Guj.)(HC)

647 **S. 37(1) : Business expenditure – Travelling expenses of head office personnel on business to its branches incurred in India was held to be allowable [S. 44C]**
Travelling expenses incurred in India by the head office personnel of a foreign bank on behalf of the Indian branch is deductible in its hands and section 44C would not be applicable. (AY. 1998-99, 1999-2000)
DIT (IT) v. Oman International Bank S.A.O.G. (2016) 386 ITR 151 (Bom.)(HC)
Editorial: SLP was granted, CIT v. Oman International Bank S.A.O.G. (2016) 382 ITR (St.) 35]

648 **S. 37(1) : Business expenditure – Mercantile system of accounting – Customs duty – Assessee challenging increase in payment of customs duty before Supreme Court – Mere challenge to demand would not by itself lead to cessation of liability – Assessee cannot be denied deduction of amounts paid for purchase of goods [S. 43B, 145]**
Dismissing the appeal of revenue, the Court held that the agreements between the parties provided that the consideration payable for the purchase of goods included within it, the duty of customs payable on the imported goods as a part of the cost incurred by the seller. Therefore, the cost of purchase of goods was not only the expenses incurred by the seller from the opening of the letter of credit but continued to run till the execution of the contract. The mere fact that the seller of the goods had obtained a stay, would not by itself result in an unascertained and unqualified liability. Moreover, since the assessee was following the mercantile system of accounting, mere challenge to the demand by the seller might not by itself lead to the liability ceasing. Although, the seller of the goods might not be able to claim deduction since it was paid in terms of section 43B of the Act, this would not deprive the assessee of the deduction of the amounts paid by it for purchase of goods. Thus, the assessee would be entitled to deduct the amount of ₹ 1.78 crores as consideration paid for the goods in the AY. (AY. 1985-86)
CIT v. Monica India (No.1) (2016) 386 ITR 608 / 240 Taxman 60 / 286 CTR 426 / 135 DTR 281 (Bom.)(HC)

649 **S. 37(1) : Business expenditure – Capital or revenue – Current repairs – Replacing of parts was held to be revenue expenditure [S. 31]**
Dismissing the appeal of revenue, the Court held that expenditure on replacement of various components in boilers and BWE was only to preserve and maintain existing assets without any enduring advantage hence expenditure was revenue in nature (AY. 1993-94 to 1999-2000)
CIT v. Neyveli Lignite Corporation Ltd. (2016) 388 ITR 172 / 240 Taxman 473 (Mad.)(HC)

S. 37(1) : Business expenditure – Contribution to State Renewal Fund, for safety and welfare benefit of employees – Held to be allowable as business expediency 650

Any expenditure for the welfare and benefit of the employees was allowable expenditure under section 37(1). It had been found that it was a legal obligation of the assessee to contribute to the State welfare fund. It was for the assessee to decide whether any expenditure had to be incurred in the course of business and the contribution to the State welfare fund expenditure being in the nature of business expediency was allowable expenditure. (AY. 2009-10)

PCIT v. Rajasthan State Seed Corporation Ltd. (2016) 386 ITR 267 (Raj.)(HC)

S. 37(1) : Business expenditure – Accrual – Liability crystallising during relevant assessment year on approval, held to be allowable as deduction [S. 145] 651

Since a finding of fact had been recorded by the appellate authorities that the approval for payment of the expenses had been given during the year under appeal and therefore, the liability crystallised during the year and not prior to that, amount was allowable as deduction. (AY. 2009-10)

PCIT v. Rajasthan State Seed Corporation Ltd. (2016) 386 ITR 267 (Raj.)(HC)

S. 37(1) : Business expenditure – Fines and penalties – Penalty charges paid to Pollution control Board was held to be allowable 652

The payment made by the assessee to Pollution Control Board was for the purpose of compensating the damage to the environment and this compensation was recovered on the "polluter pays" principle. It was not the case that the business pursued by the assessee was illegal. Hence, the amount was allowed as deduction. (AY. 2003-04)

Shyam Sel Ltd. v. Dy. CIT (2016) 386 ITR 492 / 72 taxmann.com 105 / (2017) 148 DTR 167 / 293 CTR 316 (Cal.)(HC)

S. 37(1) : Business expenditure – Exporting herbal products – Expenditure incurred in cultivating rare herb – Deductible 653

Coleus was a rare herbal plant. The assessee had been in the business of manufacture and export of herbal extracts including cultivation of coleus. To maximize the production and sale of herbal extract, the assessee incurred expenditure on cultivation activities for the development of coleus. The expenditure incurred on cultivation of the herb was deductible. (AY. 2006-07)

PCIT v. Sami Labs Ltd. (2016) 386 ITR 81 / 241 Taxman 102 (Karn.)(HC)

S. 37(1) : Business expenditure – Current repairs – Onus is on the assessee – Disallowance of expenses was held to be justified 654

On appeal, the HC dismissing the appeal, held that the remaining expense cannot be allowed as the assessee failed to establish that the expenses are not unreasonable and excessive. For allowability of an expense, the onus is on the assessee to prove the genuineness of the expenditure as to not being excessive. (AY. 1989-90)

Famous Sand Dredging Co. v. CIT (2016) 386 ITR 450/ 239 Taxman 551 / 139 DTR 50 (Bom.)(HC)

655 **S. 37(1) : Business expenditure – Deduction of entire expense in the year of making fixed deposit receipt itself [S. 145]**

Where the assessee company launched a scheme in terms of which any person who bought a plot of land from assessee was assured a return of entire land cost upon expiry of 5 years from date of completion of sale and for the said purpose, created a fixed deposit with bank. Since liability arose on date of contract and what was postponed was only payment. Assessee can claim the deduction of entire expense in the year of making fixed deposit receipt itself. (AY. 1994-95)

Macro Marvel Projects Ltd. v. ACIT (2016) 239 Taxman 189 (Mad.)(HC)

656 **S. 37(1) : Business expenditure – Club membership fee was held to be allowable as revenue expenditure**

In view of *Otis Elevator Co (India) Ltd. v. CIT (1992) 195 ITR 682 (Bom.)(HC),* the Court held that, club membership fee was held to be allowable as revenue expenditure. (AY. 1997-98)

CIT v. Infrastructure Leasing & Financial Services Ltd. (2016) 239 Taxman 464 (Bom.)(HC)

657 **S. 37(1) : Business expenditure – Where the assessee had to close down one of its unit on account of statutory compulsion, expenditure incurred on shifting of manufacturing activity of the said unit to other units was to be allowed as a deduction**

Where the assessee had to close down one of its unit on account of statutory compulsion, expenditure incurred on shifting of manufacturing activity of the said unit to other units was to be allowed as a deduction. High Court held that, the findings were not shown to be perverse and therefore, revenue's appeal was held to be dismissed. (AY. 1998-99)

CIT v. Nicholas Piramal (India) Ltd. (2016) 239 Taxman 470 (Bom.)(HC)

658 **S. 37(1) : Business expenditure – Capital or revenue – Expenditure incurred on renovation of rented premises is capital in nature and therefore, depreciation is to be allowed [S. 30, 32]**

The assessee made a claim of expenses incurred on repairs and maintenance of the premises which also included rented premises. The Assessing Officer found that under the garb of repairs and maintenance, the assessee had carried out major renovation and after perusal of the nature of expenses incurred, held that 25% of the expenses is to be treated as revenue in nature and the balance is to be treated as capital in nature and thereby, allowing depreciation on the same, which action was upheld both by CIT(A) and by Tribunal. On appeal, the High Court held that the expenses incurred provided long term enduring benefit to the assessee and therefore, is to be treated as capital expenditure. It was also held that the claim is not under section 30 as well as it excludes expenses in the nature of capital expenditure. (AY. 1996-97)

RPG Enterprises Ltd v. DCIT (2016) 386 ITR 401 / 240 Taxman 614 / 138 taxman 49 (Bom.)(HC)

S. 37(1) : Business expenditure – Bogus purchases – Disallowance of 25% of expenses was held to be not justified [S. 40(A)(3)] 659

The Assessing Officer disallowed 25% of the payments for purchases incurred by the assessee on the ground that the payments were actually not made by the assessee for the purchases made. Tribunal has upheld the order of Assessing Officer. On appeal allowing the appeal of assessee the Court held that; the purchases were genuine and are allowable as the Assessing Officer has accepted the corresponding sales and that it is not established by the Assessing Officer that the payments made by the assessee for purchases by crossed cheque was ultimately encashed either by or on behalf of the assessee. Order of Tribunal was set side. (AY. 2003-04)

Yunus Haji Ibrahim Fazalwala v. ITO (2016) 240 Taxman 198 (Guj.)(HC)

S. 37(1) : Business expenditure – Stamp duty expenses incurred in relation to contract executed with Maharashtra State Road Transport Corporation is to be allowed as revenue expenditure entirely in the year it was incurred [S. 145] 660

The assessee incurred stamp duty expenses in relation to contract executed with Maharashtra State Road Transport Corporation. The Assessing Officer disallowed the same and amortised the same which was reversed by the CIT(A). the Tribunal held that the same has to be amortised. Reversing the order of the Tribunal, it is held by the High Court that the stamp duty is in the nature of compulsory levy under a statute and not an expenditure arising out of business expediency and therefore, has to be allowed in the year in which it is incurred following the decision of the Honourable Apex Court in the case of *Taparia Tools Ltd v. JCIT [2015] 372 ITR 605 (SC)* and that the accounting practices cannot override the provisions of the Act. (AY. 2003-04)

Prithvi Associates v. ACIT (2016) 240 Taxman 621 (Guj)(HC)

S. 37(1) : Business expenditure – Secret commission – Tribunal was justified in restricting deduction to the extent of one per cent of total sales 661

Dismissing the appeal of assessee the Court held that where assessee claimed deduction of secret commission paid to employees of different companies, who had given business to assessee, since assessee had not kept any accounts as to where and to whom such commission was paid, Tribunal was justified in restricting deduction to the extent of one per cent of total sales. (AY. 1997-98)

Patel Brothers v. DCIT (2016) 240 Taxman 487 (Guj.)(HC)

S. 37(1) : Business expenditure – Secret commission paid to employees of customers are to be disallowed as it cannot be proved that such payments are common in the business of the assessee 662

Secret commission paid by the assessee to the employees of the customers to secure contracts, expedite payments etc. are to be disallowed as the assessee did not disclose the names of the recipients of such commission and that the assessee cannot prove that such commission was common in the assessee's line of business. (AY. 1991-92, 1992-93, 1993-94)

T. Lakamshi Ladha and Co. v. CIT (2016) 386 ITR 233 / 240 Taxman 49 / 286 CTR 494 (Bom.)(HC)

663 **S. 37(1) : Business expenditure – Search and seizure – Inflation of labour charges and wrong billing – Statement of senior partner and retraction by another partner – Disallowance was held to be justified [S. 132(4)]**

Statement made by senior partner of assessee firm at the time of search could not be retracted by other partner in absence of any allegation of any pressure and coercion by revenue and there being no evidence to establish that original statement was incorrect. Disallowance based on facts and statement made during search was held to be justified. (AY. 1990-91)

T. Lakhamshi Ladha & Co. v. CIT (No. 2) (2016) 386 ITR 245 / 242 Taxman 325 / 288 CTR 330 (Bom.)(HC)

664 **S. 37(1) : Business expenditure – Gold coins – Natural justice – Disallowance of expenses was held to be justified – Assessee cannot urge a question on section 69C of the Act if it did not arise from the order of the Tribunal for the first time before the High Court [S. 69C, 260A]**

Dismissing the appeal of assessee the Court held that the assessee cannot urge a question on section 69C of the Act if it did not arise from the order of the Tribunal for the first time before the High Court. The assessee had not sought cross-examination of the proprietor of O from whom he claimed to purchase gold coins before the Commissioner (Appeals), but before the Tribunal, a fresh affidavit of the proprietor of O was filed on which it rested its case. This affidavit did not seek to explain or point out circumstances under which the statement made earlier on oath by the deponent of the affidavit was incorrect. The Tribunal independently applied its mind to the affidavit filed by the assessee and on examination, found it to be unbelievable. So there was no violation of the principles of natural justice. With regard to the reimbursement, the authorities came to a finding of fact that no expenditure as claimed in respect of purchase of gold coins was incurred. Consequently, there could be no question of reimbursement of an expenditure not incurred. On findings of the facts by the authorities that no expenditure on purchase of gold coins was incurred, the expenditure could not be allowed under section 37(1) of the Act. (AY. 2006-07)

Cenzer Industries Ltd v. ITO (2016) 385 ITR 582 / 239 Taxman 543 / 287 CTR 219 / 138 DTR 37 (Bom.)(HC)

Editorial: SLP of assesse was dismissed Cenzer Industries Ltd v. ITO (2016) 242 Taxman 175(SC)

665 **S. 37(1) : Business expenditure – Club subscriptions paid by assessee for its executives – Allowable deductions**

Club subscriptions paid by the assessee for its executives in terms of contracts for employment were allowable deductions. (AY. 1998-99)

CIT v. Duncan Industries Ltd. (2016) 385 ITR 150 /138 DTR 241 / 288 CTR 107 (Cal.)(HC)

666 **S. 37(1) : Business expenditure – Capital or revenue – Set up of business-Bank charges relating to new project of hotel under construction – Capital expenditure – Not deductible**

Dismissing the appeal of assessee the Court held that the The fact that the assessee had already been in the business or that it had gone in for expansion of the business by diversifying, did not alter the situation that the hotel business was a new business

undertaken by it. During the construction of the hotel it could not have been said that the acquisition of the hotel had been completed. Any expenditure incurred on account of the new business had to be allowed only when the business had actually been set up. The order of the Tribunal upholding the disallowance need not be interfered with. No question of law arose. (AY. 2006-07, 2016)
Video Plaza v. ITO (2016) 385 ITR 404 (Cal.)(HC)

S. 37(1) : Business expenditure – Capital or revenue – Guarantee commission to acquire the asset on installment terms is revenue expenditure 667
Expenditure incurred for the purchase of the machinery was undoutedly capital expenditure; for it brought in an asset of enduring advantage. But the guarantee commission stands on a different footing. By itself, it does not bring into existence any asset of an enduring nature; nor did it bring in any other advantage of an enduring benefit. The acquisition of the machinery on installment terms was only a business exigency. If interest paid on a credit purchase of machinery could be held to be revenue expenditure, we fail to see how guarantee commission paid to a bank for obtaining easy terms for acquisition of the machinery could be regarded as capital payments (ITA No. 85/2016, dt. 29.09.2016) (AY. 2010-11)
Haryana State Road & Bridge Development Corporation Ltd. v. CIT (P&H)(HC); www.itatonline.org

S. 37(1) : Business expenditure – Ad-hoc disallowance of 50% of miscellaneous expenditure – Held, no finding by the AO that either the expenditure was not genuine or that books have been rejected – Held, disallowance is not justified 668
The assessee claimed deduction of a certain amount as miscellaneous expenditure. The AO disallowed 50 per cent of the expenditure on the basis that the assessee was not doing any business activity but acting as a real estate developer and that the expenditure claimed was not related to day to day business activities. The CIT(A) held that the assessee reasonably established that the expenditure was necessary for running any business establishment and that AO had not held the expenditure to be non-genuine or disallowance was not based on any scientific method or any specific defects were pointed out in the books of account. High Court held that CIT(A) had examined the record and the accounts produced by the assessee and after scrutiny of the same returned findings of fact that the expenditure was justified. Further it was held that no rationale was given by the AO for disallowing 50 per cent of the expenditure incurred. Neither was there a finding that the expenditure was not genuine nor were the books of account been rejected by the AO. (AY. 2008-09)
CIT v. DLF Hilton Hotels (2016) 240 Taxman 495 (Delhi)(HC)

S. 37(1) : Business expenditure – Expenses incurred on telephone, tea, tiffin and general expenses-Expenses supported by debit vouchers – *Ad hoc* disallowance of 20% of expenditure was held to be not justified 669
Assessing Officer disallowing 20 percent of expenses on ground that sums not verifiable. Allowing the appeal the Court held that the Assessing Officer has no power to disallow expenditure when appropriate evidence was adduced. (AY. 2001-02)
Ashok Surana v. CIT (2016) 384 ITR 267 (Cal.)(HC)

670 **S. 37(1) : Business expenditure – Premium on Keyman insurance – Held to be allowable**

Held, dismissing the appeal, that the premium paid on the Keyman insurance policy taken by the assessee on the life of the partners of the firm was wholly and exclusively for the purposes of business and was allowable as business expenditure under section 37(1) of the Income-tax Act, 1961. (AY. 2008-09)

PCIT v. Ramesh Steel (2016) 384 ITR 437/ 290 CTR 93 (P&H)(HC)

671 **S. 37(1) : Business expenditure – Foreign exchange loss is not a "notional" or "speculation" loss and is allowable as a deduction [S. 28(i)]**

Dismissing the appeal of revenue, the Court held that derivative transactions (forward contracts) is not applicable to cases of losses in dealings with foreign exchange. Foreign exchange loss is not a "notional" or "speculation" loss and is allowable as a deduction. CBDT's Instruction No. 3 of 2010 which deals with foreign exchange derivative transactions (forward contracts) is not applicable to cases of losses in dealings with foreign exchange. (ITA No. 376 of 2014, dt. 11.08.2016) (AY. 2009-10)

CIT v. Vinergy International Pvt. Ltd. (Bom.)(HC); www.itatonline.org

672 **S. 37(1) : Business expenditure – Capital or revenue – renovation of leased office premises – Revenue neutral – Bifurcation of renovation expenses by 70 percent as revenue and 30 percent as capital justified [S. 32(1), Expln. 1]**

On appeal by revenue; dismissing the appeals the Court held that; the Department failed to show that the findings recorded by the Tribunal were erroneous or perverse in any manner. The view adopted by the Tribunal in the given facts and circumstances was a plausible view. Moreover, the case related to the assessment years 2000-01 and 2001-02, where the allowability of the expenditure was not in dispute but the issue was whether it had to be allowed in one year as revenue expenditure or by way of depreciation under Explanation 1 to section 32 of the Act by spreading it over the years. More than thirteen years from the initial year had passed and the Department was not able to demonstrate that there was any change in the rate of taxation during these years. Thus, even if a substantial portion of the expenditure had been capitalised and depreciation allowed under Explanation 1 to section 32 of the Act, at the prevalent rate admissible under the Act and the Income-tax Rules, 1962, the entire amount would have been allowed as deduction on account of depreciation by now and the case would be revenue neutral. (AY. 2000-01, 2001-02)

CIT v. GlaxoSmithkline Consumer Health Care Ltd. (2016) 383 ITR 290 (P&H)(HC)

673 **S. 37(1) : Business expenditure – Capital or revenue – Depreciation – After the introduction of Expln. 1 to S. 32(1), by a legal fiction, the assessee is treated as the owner of the building for the period of his occupation – Accordingly, by refurbishing/ decorating or doing interior work, the assessee derives an enduring benefit for the period of occupation therefore, the expenditure is capital in nature [S. 32]**

The assessee incurred certain expenditure on repairs, refurbishing and improvements of buildings taken on lease and claimed it as revenue expenditure.

The AO treated the said expenditure to be capital in nature and accordingly, rejected the claim of assessee. However, the CIT(A) reversed the action of AO. Aggrieved by the

said order, the Revenue preferred appeals before the Tribunal and these appeals were allowed holding that the expenditure incurred by the assessee can only be treated as capital expenditure.
On further appeal, the HC held that by virtue of legal fiction created under Explanation 1 to S. 32(1) the assessee is treated as owner of leasehold building. Thus, 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, such expenditure incurred by the Assessee was capital expenditure. (AY. 2009-10)
Indus Motor Company (P) Ltd. v. Dy. CIT (2016) 282 CTR 540 (Ker.)(HC)

S. 37(1) : Business expenditure – Revenue expenditure incurred in particular year had to be allowed in the year of expenditure – Irrespective of whether the same is amortised in the books of account – Revenue could not deny claim of the entire expenditure as deduction. 674
Assessee had amortised the amount of 14.87 crores incurred for payment to sub-arrangers in the books of account for 5 years and thereby debiting only 99.16 lakhs to its profit and loss account. The AO held that the assessee had amortised the amount over five years and hence a deduction only to the extent of 99.16 lakhs was allowable in the subject year of assessment. The CIT(A) upheld the findings of the AO. On appeal the Tribunal relied on decision of Apex Court in case of *Madras Industrial Investment Corp. Ltd v. CIT (1997) 255 ITR 802 (SC)* and *India Cements Ltd v. CIT (1966) 60 ITR 52 (SC)* and held that the expenditure incurred was deductible in the year of expenditure. Aggrieved Revenue filed an appeal before the High Court.
The High Court after relying on the decision of the Apex Court in case of *Taparia Tools Ltd v. JCIT (2015) 372 ITR 605 (SC)* wherein it has been held that once the assessee had filed the return making a particular claim the AO was bound to carry out assessment by applying provisions of the Act and could not go beyond the return. Since the assessee had claimed the entire expenditure of ₹ 14.87 crores in the subject assessment year, the High Court ruled in favour of the Assessee. Accordingly appeal of the Revenue was dismissed. (AY. 2009-10)
DIT(IT) v. Credit Lyonnais (2016) 238 Taxman 157 (Bom.)(HC)

S. 37(1) : Business expenditure – Commission – Natural justice – Assessee refusing to cross examine witness despite being granted opportunity – No violation of principles of natural justice – Disallowance of commission was held to be justified [S. 69C] 675
Every effort was made by the Department to locate M. The failure to produce M for cross-examination was deliberate. The witness made incriminating statements against the assessee and the assessee chose not to counter them. Despite opportunities, the assessee declined to cross-examine him. There was no violation of principles of natural justice and the uncontroverted statements of the witness were sufficient to substantiate the case of the revenue against the assessee. The Tribunal was right in upholding the concurrent findings of the Assessing Officer and the Commissioner (Appeals) regarding disallowance of the commission payments claimed by the assessee. (AY. 1981-82 to 1983-84)
Roger Enterprises P. Ltd. v. CIT (2016) 382 ITR 639 / 238 Taxman 434 (Delhi)(HC)

676 **S. 37(1) : Business expenditure – Capital or revenue – Superstructure – Matter required reconsideration [S. 37(1)]**

Question of law involved in this case was whether for construction of superstructure and refurbishing of leasehold building, the expenses involved is capital or revenue expenditure. The Hon'ble HC referred the matter to the larger Bench to decide this issue as they viewed that after the introduction of Expl. 1 to 32(1), by a legal fiction, the assesee is treated as the owner of the building an enduring benefit was derived by the assessee for the period of occupation and therefore the expenditure was capital expenditure and not revenue expenditure. Law laid down by the Division Bench in *Joy Alukkas India (P) Ltd v. ACIT (2016) 282 CTR (Ker) 551* required reconsideration. (AY. 2007-08 to 2009-10)

Indus Motor Co. (P) Ltd. v. Dy. CIT (2016) 134 DTR 94 (Ker.)(HC)

677 **S. 37(1) : Business expenditure – Capital or revenue – Leasehold premises – Expenditure incurred for construction of superstructures and setting up of workshop facilities on leasehold premises – Whether expenditure capital or revenue to be decided on facts of each case by applying relevant tests – Explanation 1 to section 32(1)(i) [S. 32]**

A Division Bench entertained doubt regarding the correctness of an earlier Division Bench judgment in *Joy Alukkas India P. Ltd. v. Asst. CIT (2015) 5 ITR-OL 340 (Ker)*. On a reference to the Full Bench of the question whether the judgment in Joy Alukkas case required reconsideration:

Held, that the Division Bench in its reference order was not correct in its assumption that by Explanation 1 to section 32(1), Parliament manifested its legislative intention to treat expenditure incurred by the assessee on leasehold building as capital expenditure. Had the Legislature intended to provide that all such expenditure incurred by the assessee as referred to in Explanation 1 shall be treated as capital expenditure, the Explanation would have used different phraseology. It was a settled principle of statutory interpretation that the language of the statute was to be read as it is. Explanation 1 was to be read as it is. Thus whether a particular expenditure was capital expenditure or revenue expenditure was to be found out from the facts of each case and by applying the relevant tests in each case and when it was found that the nature of such expenditure was capital expenditure, Explanation 1 would automatically come into operation. It could not be said that the ratio laid down in Joy Alukkas' case was not in accordance with the ambit and scope of Explanation 1 to section 32. The ratio expressed therein at paragraph 28 laid down the correct law and needed no reconsideration. The observations and opinion expressed in paragraphs 29 and 30 of Joy Alukkas' case for holding that the expenditure incurred by the assessee was not a capital expenditure but revenue expenditure were observations based on the facts of that case and relevant test applied by the Division Bench. The observations made by the Division Bench in paragraphs 29 and 30 were to be confined to the facts of that case. Whether an expenditure incurred by the assessee was a capital expenditure or revenue expenditure was to be decided on the facts of each case applying the relevant tests. (AY. 2007-08, 2008-09, 2009-10)

Indus Motors Co. P. Ltd. v. Dy. CIT (2016) 382 ITR 503 / 134 DTR 73 / 285 CTR 209 (FB) (Ker.)(HC)

S. 37(1) : Business expenditure – Failure to produce bills and not maintaining of stock register – Disallowance of 5% of expenses was held to be proper 678

Allowing the appeal of revenue the Court held that failure by assessee to produce bills, vouchers and other supporting documents in relation to various expenses and as no stock register was maintained, disallowance of 5% of expenses was held to be proper. (AY. 2004-05)

CIT v. Rimjhim Ispat Ltd. (2016) 382 ITR 152 (All.)(HC)

S. 37(1) : Business expenditure – Company – Expenses incurred on conveyance and telephone charges of directors – Expenditure incurred in providing benefit free of charge under Companies Act cannot be disallowed [Companies Act, 1856] 679

Dismissing the appeal of revenue the Court held that the expenditure incurred in providing benefit free of charge under the Companies Act, 1956 could not be disallowed. Therefore, expenses incurred on maintenance of vehicle or conveyance and telephone of directors of the assessee was allowable. *Sayaji Iron and Engg. Co. v. CIT (2002) 253 ITR 749 (Guj.)* applied. (AY. 2004-05)

CIT v. Rimjhim Ispat Ltd. (2016) 382 ITR 152 (All.)(HC)

S. 37(1) : Business expenditure – Provision for warranty – Held to be allowable – Commission paid to directors allocated among units – Allocation was held to be justified [S. 15, 17] 680

Dismissing the appeal of revenue the Court held that Provision for warranty claims is allowable. Court held that just as the payment of salary is not dependent on the profit earned by any unit, the basis of commission payable by the assessee to its directors also could not be made subject to the profit making ability of a unit. Therefore Commission payable at the end of the year when the company makes profit is nothing but a part of the salary. Therefore, it also has to be allocated to the unit which he is heading as a full time director. (AY. 2001-02 to 2004-05)

Dy. CIT v. Wipro Ltd. (2016) 382 ITR 179 / 236 Taxman 209 / 282 CTR 346 (Karn.)(HC)

S. 37(1) : Business expenditure – Accrued or contingent liability – Provision for warranty claims – Deduction permissible if requirements fulfilled – Matter remanded 681

The High Court held that the provision for warranty could be made permissible if the requirements were fulfilled and remanded the matter to the Tribunal. The Tribunal after reconsidering the matter, remanded it to the Assessing Officer for a limited purpose of verification whether the assessee's provision for warranty was based on past history or actual expenditure incurred by the assessee on account of such warranty. On appeal by the assessee. (AY. 2002-03, 2003-04)

Dell International Services India P. Ltd. v. ACIT (2016) 382 ITR 37 (Karn.)(HC)

S. 37(1) : Business expenditure – Capital or revenue – Expenditure in respect of a project which did not materialize has to be treated as revenue expenditure as no capital asset comes into existence 682

On the question was to whether if the project does not materialize and an asset is not created, expenditure on steps in that direction must be treated as capital expenditure or

revenue expenditure, the Supreme Court in *Commissioner of Income Tax v. Madras Auto Service (P) Ltd., reported at (1998) 233 ITR 468* clinches the controversy. There while considering the issue, the Court finds that the assessee could not have claimed it as capital expenditure, as there was no capital asset generated by spending said amount. The expenditure has been held rightly classified as revenue expenditure.
CIT v. Manganese Ore India Ltd. (2016) 384 ITR 413 / 238 Taxman 315 / 138 DTR 364 (Bom.)(HC)

683 **S. 37(1) : Business expenditure – Capital or revenue – Expenditure on "application software" is revenue expenditure**
Allowing the appeal of assessee the Court held that;Expenditure on "application software" is revenue as it allows efficient carrying on of business and requires to be constantly updated due to rapid advancements in technology and increasing complexity of the features. (AY. 1997-98)
Indian Aluminum Co. v. CIT (2016) 384 ITR 386 / 135 DTR 305 / 239 Taxman 51 / (2017) 291 CTR 196 (Cal.)(HC)

684 **S. 37(1) : Business expenditure – Capital or revenue – Royalty – Cannot be treated as job worker or contractor – Held to be allowable**
The Assessing Officer disallowed 25 percent of the expenses on account of royalty as being capital in nature. CIT(A) has allowed the claim which was upheld by the Tribunal. On appeal dismissing the appeal of revenue, the High Court held that since the assessee had acted like any other original equipment manufacturer, it could not be treated as a job worker or a contractor. (AY. 2004-05, 2005-06)
CIT v. Kethin Panalfa Ltd. (2016) 381 ITR 407 / 286 CTR 107 / 133 DTR 261 (Delhi)(HC)

685 **S. 37(1) : Business expenditure – Interest on borrowed capital – Interest free advances – Sufficient interest free advance – No disallowance can be made**
Assessee having sufficient interest-free advances from its directors, shareholders and members of their families to cover interest-free advances made by company .Interest on borrowings not to be disallowed. (AY. 2008-09)
CIT v. Kapsons Associates (2016) 381 ITR 204 (P&H)(HC)

686 **S. 37(1) : Business expenditure – Investments in shops and penthouses – Merely because some properties were rented it cannot be inferred that investments in other properties not for business purpose**
That the assessee was in the business, *inter alia*, of making investments in shares and property. Merely because the assessee had rented out some of its properties, it could not be inferred that investments in other properties were not for business purposes. The assessee could always give out its properties on rent and acquire further properties towards investment. (AY. 2008-09)
CIT v. Kapsons Associates (2016) 381 ITR 204 (P&H)(HC)

S. 37(1) : Business Expenditure – Commission – PAN to be used by Income Tax Authorities – To track the transactions of commission agents – Matter remitted to Assessing Officer to conduct further inquiry 687

Assessee is a business concern dealing in chemicals. It had claimed deduction for the commission paid to three companies. Assessing Officer held that in absence of details of services rendered, identification of persons who rendered such services and justification of the expenditure it was difficult to come to a conclusion that the expenditure was wholly and exclusively for the business purpose and hence disallowed the same. The CIT(A) also upheld the views of the Assessing Officer and dismissed the assessee's appeal. In appeal to the Tribunal, the Tribunal held the commission paid to the corporate entities, through banking channel whose PAN have been furnished to the Assessing Officer cannot be doubted and disallowed without proper enquires. Hence the Tribunal ruled in favour of the assessee. Aggrieved Revenue filed an appeal before the High Court. The Revenue contended that the Department had taken all the possible steps to find about the whereabouts of the concern and it was a duty of the assessee to prove the claim of deduction. The Revenue stated that the Commission agents were not traceable and therefore it was for the assessee to produce those commission agents. Relying on the various judicial precedents High Court held that the onus of proof was on assessee in cases where there was a proof of payment of commission, and to show that the payment was exclusively for the business. The High Court observed the powers of the Income Tax Authorities and laid down the importance and utility of the PAN. The High Court held that the Income Tax Authorities had power to track the transactions of the Commission Agents using the PAN. In this result the High Court had set aside and remitted the matter back to the Assessing Officer with a direction to conduct further enquiry with regard to the claim of deduction on commission payments. (AY. 2003-04)

CIT v. Textile Dye Chem Corporation (2015) 237 Taxman 354 (Mad.)(HC)

S. 37(1) : Business expenditure – Allowability of travel expenditure – Where foreign buyer of assessee was situated in Singapore, expenditure incurred for travel to meet buyer in Singapore could only be allowed; and expenses incurred on travel to countries other than Singapore were to be disallowed 688

The assessee, an export oriented unit, claimed deduction of foreign travel expenditure of its president and directors for purpose of marketing and selling its goods. Assessing Officer found that president and directors of company had not only travelled to Singapore where associated enterprise was situated but also to other countries and therefore, disallowed expenses incurred by assessee on travel to countries other than Singapore. The CIT(A) and Tribunal confirmed order of Assessing Officer. In appeal, the High Court held that the view taken by Tribunal to restrict the expenses of travel only to Singapore visit where the foreign buyer of the appellant was situated, could not be said to be perverse. (AY. 2003-04)

Advance Power Display Systems Ltd. v. CIT (2016) 382 ITR 607 / 237 Taxman 16 / 138 DTR 282 / 290 CTR 330 (Bom.)(HC)

689 **S. 37(1) : Business expenditure – Deferred revenue expenditure – Decision to abandon project, balance deferred revenue expenditure relating to said project would be deemed to arise in relevant year.**

The assessee was running a project which was not making profits. Therefore, it was abandoned and entire expenses, including balance deferred revenue expenditure were written off during the year. The Assessing Officer disallowed the balance deferred revenue expenditure as it was not related to current year's income. The CIT(A) allowed the claim of assessee, which was affirmed by the Tribunal. On appeal, the High Court held that since the project was abandoned in the assessment year 1995-96 and the entire expenses was written off during the said assessment year. It can be safely concluded that the expenditure arose in the relevant year. (AY. 1995-96, 1996-97)

CIT v. Alcove Industries Ltd. (2016) 237 Taxman 226 (Cal.)(HC)

690 **S. 37(1) : Business expenditure – Royalty paid to director for use IPR of the director – Held, assessee company is a separate juristic entity – Payment made as royalty is an allowable expenditure.**

Director of the assessee company, had invented the technology through which ringtones could be created. He carried on the business in the name and style of 'phoneytunes.com' as a sole proprietor. Assessee company entered into an agreement with the director for using the brand name in lieu of payment of royalty. The AO and CIT(A) held that the director cannot enter into an agreement with the company as they are the same person. High Court held that, assessee company is a separate juristic entity and therefore, can enter into the said agreement. Further, it was held that the director had obtained copyright in the artistic work comprised in the name 'phoneytunes.com' and registration thereof was not compulsory. Further, it constituted the trademark of the director. Held, therefore, the assessee was entitled to use the trademark as a licensee and the payment of royalty made was allowable as a deduction. (AY. 2006-07 to 2008-09)

CIT v. Mobisoft Tele Solutions (P.) Ltd. (2016) 237 Taxman 221 (P&H)(HC)

691 **S. 37(1) : Business expenditure – Rule 9B – Cost of preparing positive prints of the film cannot be treated as a part of the cost of acquisition of distribution rights of films and the same cannot be carried forward for amortization in terms of Rule 9B [R. 9B]**

Assessee, a partnership firm, was engaged in the business of distribution of Hindi motion picture/films. During the year, assessee claimed set off of expenses pertaining to the earlier year which related to feature films released during that earlier year but did not complete a commercial run of 180 days as on 31st March of that year. According to the assessee, business expenses were to be reduced from the gross realizations and thereafter the cost of acquisition was to be reduced from the surplus and if the surplus was not enough to absorb the entire cost, the balance cost was to be carried forward to the subsequent year. AO held that the cost of feature films (without taking into account expenses such as cost of prints) was to be reduced from the gross realizations and the balance was to be carried forward. High Court held that in view of the clear language of Rule 9B, the cost of preparing positive prints cannot be treated as a part of the cost of acquisition of distribution rights of films and the same cannot be carried forward for amortization in terms of Rule 9B. High Court further observed that the assessee was

entitled to a deduction to the extent the cost of acquisition of the films did not exceed the amount realized by the assessee from exhibiting the film and the balance cost was to be carried forward. High Court held that in view of the plain language of Rule 9B(3), "amount realized" must be given its plain meaning and would mean the amount realized without accounting for any expenditure incurred by the assessee in its business. (AY. 1992-93, 1993-94)

Honey Enterprises v. CIT (2016) 381 ITR 258 / 236 Taxman 519 / 132 DTR 36 / 289 CTR 262 (Delhi)(HC)

S. 37(1) : Business expenditure – Interest on borrowed capital – Effect of Explanation 8 to section 43(1) – Borrowed capital used for construction of hotels as part of expansion of business – Interest deductible [S. 43(1)] 692

The construction of three hotels had been undertaken by the assessee in Srinagar, Goa and Mumbai. The assessee had borrowed loans for the projects. The Assessing Officer noted that 75% of the total interest of ₹ 1.54 crores paid on the term loan obtained from the Jammu and Kashmir Bank amounting to ₹ 1,15,77,137/- was capitalised. The balance of ₹ 38,59,046 was charged to the profit and loss account as revenue expenditure. According to the Assessing Officer, the assessee did not provide any justification how 25% of the total interest paid could be claimed as revenue expenditure. This was accordingly added back. The Commissioner (Appeals) deleted the addition and this was upheld by the Tribunal. On appeal by the Department: Held, that the assessee was entitled to claim the payment of interest on the borrowings made in relation to the hotel projects at Srinagar, Goa and Mumbai, which were in the nature of expansion of the business of the assessee, as revenue expenditure. (AY. 2000-01)

CIT v. Bharat Hotels Ltd. (2015) 64 taxmann.com 14 / (2016) 381 ITR 222 (Delhi) (HC)

S. 37(1) : Business expenditure – Where an assessee follows the mercantile system of accounting, it is not necessary that the liability must have actually been incurred during the relevant year. If the amount is ascertainable with a reasonable certainty the assessee can claim it as an expense or deduction. [S. 145] 693

Assessee is engaged in the business of running cinema hall. It entered into a Licence Agreement with New Delhi Municipal Council (NDMC) for running the cinema hall for a period of ten years. The agreement also gave an option to the assessee to get its licence renewed for a further period of ten years. On completion of term, assessee applied for renewal of the licence and a fresh licence agreement was entered into between the assessee and the NDMC wherein the annual license fee was increased by the NDMC. The assessee paid the increased licence fee for certain period under protest and filed a suit challenging the enhancement of the said licence fee. This was followed by various rounds of further litigation and the legal proceedings between the assessee and the NDMC which are still pending adjudication.

The assessee followed the mercantile system of accounting and in the returns filed for the assessment years 1982-83 to 2008-09, it claimed deduction towards enhanced licence fee payable and interest on arrears of licence fee payable to NDMC.

The AO disallowed the claim of licence fees to the extent not paid to NDMC and interest amount claimed in relation to certain the assessment years. On appeal, CIT(A)

deleted the addition made by AO. However, the Tribunal upheld the observation of the AO.

On appeal, the HC held that where an assessee follows the mercantile system of accounting, it is not necessary that the liability must have actually been incurred during the assessment year in question to enable the assessee to claim it as an expense or deduction. If the liability can be ascertained with reasonable certainty, it had to be allowed as a deduction. (AY. 1987-88 to 2003-04)

Aggarwal and Modi Enterprises (Cinema Project) Co. (P.) Ltd. v. CIT (2016) 381 ITR 469 / 238 Taxman 17 / 131 DTR 289 / 284 CTR 211 (Delhi)(HC)

694 **S. 37(1) : Business expenditure – Payment of damages to compensate the loss suffered by other, is compensatory in nature and hence, allowable.**

The assessee had taken on lease a plot of land from the Calcutta Port Trust. It had encroached some land belonging to the trust, for which the trust asked the assessee to pay damages before proposal of the assessee for grant of a long-term lease in respect of the encroached land. The assessee made the said payment and claimed it as revenue expenditure u/s. 37(1).

The AO treated the impugned payment as capital in nature on the ground that it was expended to obtain a long-term lease. He also held that the encroachment amounted to an infraction of law. The CIT(A) and Tribunal concurred with the view of the AO.

On appeal, the HC held that the impugned payment was made to compensate the loss suffered by the Trust and for benefit already received by the assessee as a user of land. Therefore, payment is not in the nature of penalty. Further, the impugned payment was also held to be not a capital expenditure as prayer for lease of encroached land could not have been examined before payment of the compensation. (AY. 2001-02)

Mundial Export Import Finance (P) Ltd. v. CIT (2016) 131 DTR 195 / 284 CTR 87 / 238 Taxman 34 (Cal.)(HC)

695 **S. 37(1) : Business expenditure – Repayment of sales-tax deferral loan – Finance charges – Held to be allowable as business expenditure. [S. 145]**

The assessee-company was engaged in business of financial intermediary agents and earned income by way of commission and professional fees.

The Assessing Officer was of view that amount debited was not a revenue expenditure as liability did not exist in praesenti but was a contingent liability. He thus, disallowed the claim of finance charges, which was up held by the CIT(A). On appeal the Tribunal held that; finanace charges was to be allowed as business expenditure. (AY. 2007-08)

Knox Investments (P.) Ltd. v. ITO (2016) 161 ITD 527 (Pune)(Trib.)

696 **S. 37(1) : Business expenditure – Expenses incurred by pharmaceutical company on overseas tours of doctors to increase their sales and profitability is held to be not an allowable expenditure. [Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002].**

Assessee a pharmaceutical company incurred expenditure for sponsoring Doctors overseas tour and claimed it as business expenditure u/s. 37(1). The AO while completing the assessment held that assessee had not been able to prove that these sponsorships of doctors of overseas tours was incurred wholly and exclusively for

purposes of business. Further observed that spouses of doctors also accompanied to overseas trips and arrangements which included cruise travel to island, gala dinners, cocktails, entertainment etc. rather than seminar for product information dissemination as no details of seminar and its course content were brought on record. Tribunal upheld the order of the AO stating that these overseas trips were merely to entertain doctors abroad and lure doctors to solicit business for assessee by illegal means. Expenses incurred by assessee could not be allowed as business expenditure u/s. 37(1) as they were clearly hit by Explanation to s. 37 being against public policy as unethical, prohibited by law and by Regulation 6.4.1 of IMC regulations, 2002 which created bar on physicians on receiving gifts, gratuities, commissions or bonus in consideration of or return for referring, recommending or procuring of any patients for medical, surgical or other treatment. Therefore deduction u/s. 37(1) for expenses incurred towards doctors' foreign tours was not allowable as per the law. (AY. 2009-10)
ACIT v. Liva Healthcare Ltd. (2016) 161 ITD 63 / 181 TTJ 433 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Expenses incurred towards free samples distributed to physicians allowable only if free samples distributed to physicians/doctors at initial stage of introduction to test efficacy of products. Matter was set aside *de novo* determination. [Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002] 697

The assessee company engaged in the manufacturing of drugs and pharmaceuticals claimed expenses towards free samples distributed to the physicians under the pretext that it was necessity of business requirement of the assessee. It was contended that the twin purpose of distributing free samples was to test the efficacy of the products as well as advertisement, publicity or sales promotion. The AO held that the genuineness of these expenses as well that these expenses were incurred wholly and exclusively for the purposes of its business was not proved by the assessee therefore he disallowed 25 per cent of the total expenditure.
The ITAT held that Explanation to s. 37 and Regulation 6.4.1 of IMC Regulations, 2002 made it clear that if free samples were granted post-introduction of pharmaceutical products in market when its end-use stood established, it would be hit by Explanation to s. 37 and shall not be allowable as deduction. Further assessee could not provide details as to date of introduction of products to established whether same were provided to test efficacy of pharmaceutical products, therefore matter was remanded back for if free samples of pharmaceutical products are distributed to physicians/doctors at initial stage of introduction to test efficacy of products. Matter was set a side denovo determination. (AY. 2009-10)
ACIT v. Liva Healthcare Ltd. (2016) 161 ITD 63 / 181 TTJ 433 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Payment to tenants – Payment made to tenants to vacate hotel premises to convert it in a shopping complex – expenditure incurred was in respect of making asset fit for utilization for new business – expenditure would be capital expenditure. 698

As a part of disinvestment of ITDC, assessee bought hotel run by ITDC. For getting vacant possession of hotel building the assessee has paid to tenants occupying premises.

After that Hotel was demolished for conversion of said premises into shopping complex. Since no business was in existence during the same period. Therefore, the expenditure claimed by the Assessee as revenue expenditure is not allowable. The Tribunal held that since expenditure incurred by assessee was not in respect of continuing business but in respect of making asset in a condition to be fit to be utilized for new business, such expenditure would be as capital expenditure. (AY. 2003-04)
Hotel Steelwell (P.) Ltd. v. DCIT (2016) 161 ITD 767 (Delhi)(Trib.)

699 **S. 37(1) : Business expenditure – Sales promotion expenses – pharmaceutical company – Sale promotion expenses by applying Circular No. 5/2012 dated 1-8-2012, since said circular was not in existence during assessment years, disallowance was deleted**
Assessee engaged in business of manufacturing and dealing in pharmaceutical products, incurred expenditure on sale promotion such as payments made for promotional items, freebies given to medical practitioners etc. The AO applying CBDT Circular No. 5/2012 dated 1-8-2012 disallowed a part of said expenditure. Tribunal held that from records that expenditure incurred was wholly and exclusively for purpose of business. Further the said AY in question, circular relied upon by AO was not even in existence. Disallowance was deleted. (AY. 2010-11, 2011-12)
Macleods Pharmaceuticals Ltd. v. ACIT (2016) 161 ITD 291 (Mum.)(Trib.)

700 **S. 37(1) : Business expenditure – Travelling expenses – Foreign agent not being an employee, deduction is not allowable.**
Comprehensive payment made to a foreign agent as a commission, which also included travelling expenditure. As the foreign agent not being an employee of assessee, deduction towards travelling expenditure of foreign agent not to be allowed as deductions. (AY. 2008-09, 2009-10)
Servall Engineering Works (P.) Ltd. v. DCIT (2016) 161 ITD 457 / 52 ITR 252 (Chennai) (Trib.)

701 **S. 37(1) : Business expenditure – Capital or revenue – Interest capitalised in the books – There is no estoppel against a statute – An expenditure allowable as revenue cannot be denied deduction on the basis of the assessee's accounting treatment. [S. 143(1)]**
Allowing the appeal the Tribunal held that; It is established principle that entries in the books of account are not decisive of the nature and character of expenses. It is not material and relevant how the assessee treated these expenses in its books of account but what is material and relevant is the allowability of these expenses as revenue expenses as per provisions of the Act. The Hon'ble Bombay High Court in *Nirmala L. Mehta v. CIT (2004) 269 ITR 1 (Bom.)* held that there cannot be any estoppel against the statute. Article 265 of the Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law. Referring the Circular No. 14(XL-35) of 1955, dated 11.4.1955, issued by the Central Board of Direct Taxes reads as under the Tribunal held that, reading of the circular shows that a duty is cast upon the assessing officer to assist and aid the assessee in the matter of taxation. They are obliged to advise the assessee

and guide them and not to take advantage of any error or mistake committed by the assessee or of their ignorance. The function of the Assessing Officer is to administer the statute with solicitude for public exchequer with an inbuilt idea of fairness to taxpayers. *ACIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd's. (2007) 291 ITR 500 (SC)*. Once the expenditure is found to be allowable as revenue expenditure as per provisions of the Act, the same are to be allowed as revenue expenditure under the Act while computing income chargeable to tax even if the taxpayer has given different treatment in its books of account by capitalizing the same in its books of account instead of debiting it to the Profit and Loss Account. This is the mandate of the Act which has to be followed as the taxes can only be collected by the authority of law. (ITA 8622 & 7738/Mum/2010, ITA 1140 & 694/Mum/2012, ITA 5627/Mum/2013 & ITA 1/Mum/2014, dt. 31.10.2016) (AY. 2007-08 to 2010-11)
DCIT v. The Saraswat Co-operative Bank Ltd. (Mum.)(Trib.); www.itatonline.org

S. 37(1) : Business expenditure – Capital or revenue – Maintenance of highway on BOT basis – Expenditure incurred on repairs on both sides of highway and on fencing was held to be revenue expenditure [S. 31(1)] 702
The normal repair expenditure on earthen shoulder road on both sides of highway with normal tear wear on fencing claimed by the assessee is allowable under S. 31(i) of the Act. This expenditure is also allowable under S. 37 of the Act as it is not a capital expenditure, not personal expenditure and is wholly and exclusively incurred for the purpose of business. These expenditures were not capital expenditure as no new assets has been created. (AY. 2008-09)
GVK Jaipur-Kishangarh Expressway (P.) Ltd. v. Addl. CIT (2014) 166 TTJ 11 (UO) / (2015) 68 SOT 205 (Jaipur)(Trib.)

S. 37(1) : Business expenditure – Assessee made comprehensive payment of commission to a foreign agent which included travelling expenditure also – Travelling expenditure of that agent could not be claimed as deduction. 703
Assessee made comprehensive payment of commission to an agent which included travelling expenditure. AO disallowed the claim of assessee on the ground that the agreement between the parties did not permit the payment of travelling expenditure. Commissioner (Appeals) found that the foreign agent was not an employee of the assessee but he worked for Commission and when assessee paid Commission to him, his travelling expenditure could not be claimed as deduction. On appeal, Tribunal held the assessee has made comprehensive payment of commission, which included travelling expenditure and hence travelling expenditure was not allowable. Further, agent was not an employee of assessee but works for commission. (AY. 2008-09, 2009-10)
Servall Engineering Works (P.) Ltd. v. DCIT (2016) 52 ITR 252 / 161 ITD 457 (Chennai) (Trib.)

S. 37(1) : Business expenditure – Radio License fee allowable as business expenditure, if the corresponding income pertaining to the pre-demerger period is also offered to tax 704
The assessee had written off F.M. Radio licence fee amortized in the earlier year. The amount pertained to a period of 9 months, during which the assessee had exploited

the radio licence. The AO alleged that the radio business was demerged into another company, and hence that company ought to have claimed the same. The ITAT held that the licence was exploited for a period of 9 months, and the income was accounted for, and hence there the corresponding expense, being the amortized licence fee, was allowable to the assessee. (AY. 2010-11)
Muthoot Finance Ltd. v. Addl. CIT (2016) 52 ITR 241 (Cochin)(Trib.)

705 **S. 37(1) : Business expenditure – Purchase of software, not used by assessee but sold to customers is in nature of business expenditure – Expenditure is allowable.**
Assessee sold software after customization and installed it on customer's system. Assessing Officer observed that for expenses arising from purchase of software there was no co-relation between the purchase and sale of software because the software purchased did not tally with the software sold out. He held that it was not a trading transaction and disallowed the said expenses treating them as capital in nature. CIT(A) considered the fact that assessee sold software after customization according to requirements of customer and once installed on the customer's system, it was no longer available for use by assessee, and deleted disallowance. ITAT upheld deletion of disallowance made by CIT(A). (AY. 2006-07)
Dy.CIT v. E-enable Technologies P. Ltd. (2016) 46 ITR 546 (Delhi)(Trib.)

706 **S. 37(1) : Business expenditure – Provision for sale & maintenance of software in accordance with annual maintenance contract – Assessee following Accounting Standard consistently, expenditure is held to be allowable. [S. 145]**
The assessee entered into annual maintenance contract (AMC) for one year and debited an amount as provision for sale and maintenance of software. The AMC which was bifurcated on time basis, into amount for the financial year and amount received for services to be provided in the next year. The assessee followed the mercantile system of accounting as prescribed by the accounting standard AS-9 and made provision for sale and maintenance representing the unexecuted portion of the AMC income received in advance. The AO disallowed the same as an unascertained liability. ITAT confirmed the order of the CIT(A) allowing the assessee's claim as the assessee consistently followed the mercantile system of accounting and provision made by assessee in current financial year is reversal of income for unexecuted portion of the contract which is charged as income in the next financial year. (AY. 2006-07)
Dy.CIT v. E-enable Technologies P. Ltd. (2016) 46 ITR 546 (Delhi)(Trib.)

707 **S. 37(1) : Business expenditure Penalty – Amount paid to Electricity Board for excess usage of electricity is an expenditure not in nature of penalty hence allowable as deduction.**
Allowing the appeal of the assessee, the Tribunal held that payment was for electricity consumed for manufacturing activities of assessee and not for any infraction of law. It had direct nexus with manufacturing activities of assessee. Therefore, the expenditure so incurred was allowed. (AY. 2007-08)
Moonlight Tools (P) Ltd. v. DCIT (2016) 49 ITR 39 (Chd.)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Expenditure incurred for expanding capital base is capital expenditure, disallowance was affirmed. 708
The CIT(A) confirmed order of disallowance of expenditure incurred in order to increase share capital by way of fee for merchant bankers, legal fees, stamp duty and registration charges as expenditure incurred on capital account. The Tribunal noted that funds raised by issuing capital increases capital base of the assessee, the ultimate aim of raising more funds was to increase the volume of business and its profit, thus, expenses incurred in increasing capital base were capital expenditure. (AY. 2007-08, 2008-09)
Bank of India v. ACIT (2016) 49 ITR 62 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Penalty – Compounding fee paid by assessee as per direction of RBI for some technical violations without committing any offence is an allowable business expenditure. [Foreign Exchange Management Act, 1999, S. 131] 709
Allowing the appeal of the assessee, the Tribunal held that since compounding fee was not in nature of penalty but compensatory in nature, assessee was eligible for deduction u/s. 37(1). Since said fee had not been paid for contravention of provisions of law, Explanation to s. 37(1) was not attracted. (AY. 2009-10)
EON Hadapsar Infrastructure (P.) Ltd. v. ACIT (2016) 159 ITD 532 (Pune)(Trib.)

S. 37(1) : Business expenditure – Foreign exchange fluctuation loss being on revenue account was an allowable expenditure. [S. 43A] 710
Allowing the appeal of the assessee, the Tribunal held that; Loss recognized on account of foreign exchange fluctuation as per notified accounting standard AS 11 is an accrued and subsisting liability and not merely a contingent or a hypothetical liability. S. 43A would not be applicable to the case inasmuch as treatment of unrealised exchange gain/ loss is not covered under scope of S. 43A. Since conversion in foreign currency loans which led to impugned loss, was dictated by revenue considerations towards saving interest costs, etc., loss being on revenue account was an allowable expenditure. (AY. 2008-09)
Cooper Corporation (P.) Ltd. v. Dy. CIT (2016) 159 ITD 165 / 180 TTJ 727 (Pune)(Trib.)

S. 37(1) : Business expenditure – Club membership fees for employees was admissible business expenditure. 711
Tribunal held that the expenditure incurred by assessee on club membership fees for employees was admissible business expenditure. (AY. 2010-11)
Foods and Inns Ltd. v. ACIT (2016) 159 ITD 1007 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Expenses incurred on development of commercial space was held to be capital in nature 712
The Tribunal held that cost incurred on development of commercial space being expenditure incurred for acquiring interest in the land i.e. a capital asset, same cannot be allowed even as revenue expenditure. (AY. 2008-09)
Cyber Park Development & Construction Ltd. v. Dy. CIT (2016) 159 ITD 648 / 181 TTJ 556 (Bang.)(Trib.)

713 **S. 37(1) : Business expenditure – Capital or revenue – Royalty, airfare of technicians,entry tax and software expenses was held to be revenue in nature.**
The Department filed appeal before the Tribunal against the order of CIT(A) on following additions: Royalty and lumpsum fee, Airfare of technicians, Entry tax and Software expenses. The Tribunal held that ground nos. 1 to 4 of the revenue's appeal are covered by the order of the Tribunal for the assessment year 2008-09 in the assessee's own case are held in favour of assessee by the Hon'ble High Court in its order dated 18th April, 2015. (AY. 2009-10)
Dy.CIT v. Honda Cars India India Ltd. (2016) 181 TTJ 36 / 161 ITD 655 (Delhi)(Trib.)

714 **S. 37(1) : Business expenditure – Expenses incurred on physicians samples – Matter was set aside to the Assessing Officer.**
The Tribunal sent the matter back to the file of AO *de novo* determination of the issue on merits and held that proper and adequate opportunity of being heard shall be provided to the assessee by the AO in accordance with principles of natural justice in accordance with law. (AY. 2009-10)
ACIT v. Liva Healthcare Ltd. (2016) 181 TTJ 433 / 161 ITD 63 (Mum.)(Trib.)

715 **S. 37(1) : Business expenditure – accrued or contingent liability – contractual obligation of assessee to provide for facilities within a reasonable time – liability accrued but discharged in future – allowable.**
Where the registered sale deed created acontractual obligation on the assessee, requiring it to provide for the facilities mentioned therein, it cannot be said that the agreement would be an open-ended agreement. The contractual obligation of the assessee, would, without doubt, be to provide for the facilities within a reasonable time. Hence, the liability accruing on the assessee is an ascertained liability allowable under section 37 of the Act. (AY. 2010-11)
Spytech Buildcon v. ACIT (2016) 51 ITR 40 (Jaipur)(Trib.)

716 **S. 37(1) : Business expenditure – Premium expenses in purchase of government securities – *Ex gratia* payment to staff – payments to members from members welfare fund – allowable.**
The Appellate Tribunal held that the assessee had to maintain good relations with the member and, thus, the assessee had incurred the expenditure towards the welfare of the members. Such expenditure was incurred for the purpose of business allowable under section 37 of the Act. (AY. 2010-11)
ACIT v. Surat National Co-operative Bank Ltd. (2016) 51 ITR 136 (Ahd.)(Trib.)

717 **S. 37(1) : Business expenditure – Capital or revenue – Expenditure – Software expenses was held to be revenue in nature.**
Tribunal held that the expenditure of ₹ 1,82,300/- incurred on software expenditure was having enduring benefit of not more than year and expenditure hence allowable as revenue expenditure. (AY. 2008-09)
Aiswarya Prints Dyeing & Printings Mills Pvt. Ltd. v. Addl. CIT (2016) 48 ITR 810 (Ahd.) (Trib.)

S. 37(1) : Business expenditure – Premium paid on 'Keyman Insurance Policy' taken for benefit of directors and senior staff is allowable expenditure. 718
Dismissing the appeal of the revenue, the Tribunal held that; payment towards insurance premium under keyman policy was for protection of assessee's company from any risk that it may sustain by losing valuable services of their directors and its senior staff from any eventuality by any accident or death, it was an expenditure which was incurred wholly and exclusively for purposes of business, hence allowable. (AY. 2009-10)
ITO v. Marcopolo Products (P.) Ltd. (2016) 159 ITD 266 (Kol.)(Trib.)

S. 37(1) : Business expenditure – Club expense was held to be allowable as revenue expenditure 719
Dismissing the appeal of the Revenue, the Tribunal held that expenditure incurred towards club-memberships, facilitated smooth and efficient running of business and did not add to profit earning apparatus, said expenditure would be business expenditure. (AY. 2009-10)
ITO v. Marcopolo Products (P.) Ltd. (2016) 159 ITD 266 (Kol.)(Trib.)

S. 37(1) : Business expenditure – Corporate entity – Certain bare minimum expenses were liable to be incurred by assessee in order to maintain its status of a corporate body, matter required to be decided afresh 720
Assessee claimed deduction of certain expenditure as business expenditure. The AO disallowed expenditure on ground that there was no business achieved during year. Tribunal held that since certain bare minimum expenses were liable to be incurred by assessee in order to maintain its status of a corporate body, matter was set side to decide afresh. (AY. 2009-10)
Kavita Marketing (P.) Ltd. v. ITO (2016) 159 ITD 547 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Prior period expenses was held to be not allowable as the assessee failed to substantiate its claim of corresponding liability being crystallized during said year – Invoices received subsequent to close of accounting year can be allowed as deduction though not claimed in the books of account. [S. 5, 145] 721
Dismissing the appeal of the assessee the Tribunal held that prior period expenses was held to be not allowable as the assessee failed to substantiate its claim of corresponding liability being crystallized during said year. As regard invoices received subsequent to close of accounting year can be allowed as deduction though not claimed in the books of account. (AY. 2007-08)
Lupin Ltd. v. ACIT (2016) 159 ITD 10 (Mum)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Setting up a project – Expenditure incurred by it on setting up project for production of medium and heavy commercial vehicles would be capital expenditure, however depreciation is allowable. [S. 32] 722
Tribunal held that; expenditure incurred by it on setting up project for production of medium and heavy commercial vehicles would be capital expenditure, however depreciation is allowable (AY. 2007-08, 2008-09)
Mahindra Navistar Automotives Ltd. v. Dy. CIT (2016) 159 ITD 123 / 181 TTJ 271 (Mum.) (Trib.)

723 **S. 37(1) : Business expenditure – Capital or revenue – Interest incurred on loan taken for advancing security deposit for taking a shop on leave and licence basis for expanding existing business of assessee is allowable as revenue expenditure. [S. 36(1)(iii)]**

Allowing the appeal of the assessee the Tribunal held that Interest incurred on loan taken for advancing security deposit for taking a shop on leave and licence basis for expanding existing business of assessee is allowable as revenue expenditure. (AY. 2005-06)

Ramesh D. Murpana v. ACIT (2016) 159 ITD 1019 (Mum.)(Trib.)

724 **S. 37(1) : Business expenditure – Interest paid on share application money pending allotment of shares is allowable as revenue expenditure. [S. 36(1)(iii)]**

Allowing the appeal of the assessee the Tribunal held that Interest on share application money Share application money cannot be equated with share capital as obligation to return money is always implicit in event of non-allotment of shares; hence, interest paid on share application money pending allotment of shares would be allowable as revenue expenditure. (AY. 2004-05 to 2009-10)

S. R. Thorat Milk Products (P.) Ltd. v. ACIT (2016) 159 ITD 255 (Pune)(Trib.)

725 **S. 37(1) : Business expenditure – *Ad hoc* disallowance – Matter was sent back for *de novo* determination of issues on merits after considering details and evidences.**

Allowing the appeal of the assessee, the Tribunal held that it was incumbent on part of AO to have scrutinized claim of assessee to identify and disallow specific expenses which are found to have not been proved and substantiated by assessee to have been incurred wholly and exclusively for purposes of business in accordance with mandate of section 37(1) instead of resorting to *ad hoc* disallowances, matter sent back to AO for *de novo* determination of issues on merits after considering details and evidences submitted by assessee. (AY. 2007-08)

Shivender Singh v. ACIT (2016) 159 ITD 977 (Mum.)(Trib.)

726 **S. 37 (1) : Business expenditure – Lease of lands – Expenses – Deduction towards land reclamation expenses is allowable on accrual basis, whether or not, said expenditure was paid during financial year. [S. 145]**

Allowing the appeal of the assessee the Tribunal held that when an assessee following mercantile system of accounting, had taken on lease land for mining and as per agreement she required to refill land after using assessee was eligible for deduction towards land reclamation expenses on accrual basis, whether or not, said expenditure was paid during financial year. (AY. 2010-11)

K. Suryakumari Venu (Smt.) v. ACIT (2016) 159 ITD 1034 (Visakh)(Trib.)

727 **S. 37(1) : Business expenditure – Capital or revenue – Legal expenses incurred certain legal expenditure in relation to buy back of share, said expenditure was a capital expenditure.**

Dismissing the appeal of the assessee, the Tribunal held that Legal expenses incurred certain legal expenditure in relation to buy back of share, said expenditure was a capital expenditure. (AY. 2005-06)

Cornell Overseas (P.) Ltd. v. Dy. CIT (2016) 160 ITD 373 (Delhi)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Renovation for a rented premises – Expenses incurred for renovation of a rented premises, said expenditure was a capital expenditure, however, assessee was entitled to depreciation [S. 32] 728

Tribunal held that expenditure incurred by assessee in respect of rented premises was a capital and not revenue expenditure. Provisions of Explanation 1 to section 32, assessee was entitled to depreciation on such expenditure. (AY. 2005-06)

Cornell Overseas (P.) Ltd. v. Dy. CIT (2016) 160 ITD 373 (Delhi)(Trib.)

S. 37(1) : Business expenditure – Setting up of business, for NBFC, date of set up of business shall be date on which it receives registration certificate from RBI. [S. 2(13), 28(i)] 729

Tribunal held that business may be commenced subsequently, but for purpose of allowing expenses, it has to be seen when business can be said to be 'set-up'. Where assessee incorporated with an object to make investment in other companies had received funds in form of share capital or other sources before 11-10-2006 when it got NBFC registration certificate and thereafter it had started making due diligence for potential investee companies, it could be said that assessee was ready to commence its business and, thus, its business was set-up on 11-10-2006. (AY. 2007-08)

Pinebridge Investments Capital India (P.) Ltd. v. ITO (2016) 160 ITD 566 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Telephone and car – Personal use by partners and their family members could not be ruled out, one-tenth of total expenses were liable to be disallowed. 730

Assessee claimed deduction of telephone expenses and car expenses. The Tribunal held that on the facts and circumstances of case, disallowance equal to one-tenth of total telephone expenses and car expenses for personal use by partners and family members was a reasonable disallowance. (AY. 2008-09)

Rattan Brothers v. ACIT (2016) 160 ITD 365 (Amritsar)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Mercantile system of accounting – Treatment of emergency spares in accordance with revised AS 2 and AS 10 consonance with mercantile system was held to be expenditure incurred on replacement of tools was revenue expenditure [S. 145] 731

Tribunal held that the Accounting Standards are mandatory in nature and applied to accounts prepared after 1-4-1999 hence entire cost of spares in consonance with mandatory provisions of (AS) 2 and (AS) 10 is accepted. Maintaining mercantile system of accounting and treatment of emergency spares is in consonance with mercantile system of accounting which under Act. Therefore, expenditure incurred on replacement of tools is revenue expenditure. (AY. 2008-09, 2009-10)

Ucal Machine Tools (P.) Ltd. v. ITO (2016) 159 ITD 1061 (Chennai)(Trib.)

S. 37(1) : Business expenditure – License fee – Payment made for use of goodwill was held to be allowable as business expenditure 732

The assessee, a partnership firm, was providing legal services specializing in intellectual property and corporate laws. The AO disallowed licence fee paid by the assessee to

RSCPL for the use of goodwill on the ground that the entire transaction was colourable device adopted to transfer profits of the assessee-firm to the family members who held majority shares in RSCPL and to evade tax. Allowing the appeal the Tribunal held that licence fee paid by a law firm to, a partnership firm (RSCPL) for use of goodwill of RSCPL in law firm, being incurred wholly or exclusively for business of assessee and same was allowable. (AY. 2003-04 to 2010-11)
Remfry & Sagar v. JCIT (2016) 182 TTJ 744 / (2017) 162 ITD 324 (Delhi)(Trib.)

733 **S. 37(1) : Business expenditure – Pharmaceutical company – Expenses on overseas trip of doctors with family was held to be not allowable as illegal and against public policy.**
Allowing the appeal of the revenue the Tribunal held that expenditure by a pharmaceutical company on overseas trip of doctors with family was held to be not allowable as no details of seminar and its course content were brought on record and also overseas trips were merely to entertain doctors abroad and lure doctors to solicit business for assessee which is illegal according to the Explanation to section 37 being against public policy as unethical. (AY. 2009-10)
ACIT v. Liva Healthcare Ltd. (2016) 161 ITD 63 (Mum.)(Trib.)

734 **S. 37(1) : Business expenditure – Capital or revenue – Store Relocation expenses are incurred in the normal course of carrying on business therefore cannot be considered as Capital in nature.**
The assessee was engaged in the business of manufacture and sale of pizzas. For the assessment year 2004-05, the Assessing Officer completed the assessment under section 147 read with section 143(3) making the additions of store relocation expenses ₹ 12,44,678. The Commissioner (Appeals) deleted the additions. On appeal by the Department it was held that that the store relocation expenses were in the nature of rent of godown, security guard expenses, transportation charges for shifting of materials from one place to another, loading and unloading charges, dismantling charges and routine repair and maintenance charges and other expenses of similar nature. From the very nature of these expenses, they were found to have been incurred by the assessee in the normal course of carrying on in its business activities and were revenue in nature. Further, the Assessing Officer in the assessee's case for the earlier assessment year 2003-04 allowed the store relocation expenses of ₹ 20,33,590 treating the expenses as revenue in nature. The Department consistently taken the view that the store location expense were in the nature of revenue expenditure. In view of the above, the store relocation expenses were allowable for the assessment year 2004-05. (AY. 2004-05)
DCIT v. Jubilant Foodworks Ltd. (Delhi) (2016) 48 ITR 302 (Delhi)(Trib.)

735 **S. 37(1) : Business expenditure – Free samples were granted post-introduction of pharmaceutical products in market when its end – Use stood established, it would be hit by Explanation to section 37 and shall not be allowable as deduction, matter was set aside.**
Allowing the appeal of the Revenue, the Tribunal held that; samples of pharmaceutical products are distributed to physicians/doctors at the initial stage of introduction to test the efficacy of the products, the same are incurred wholly and exclusively for the

purposes of the business of the assessee. But if the free samples of pharmaceutical products are distributed to doctors/physicians after the products are introduced in the market and its uses are established, giving of free samples will be a measure of sales promotion which will be hit as being in infringement to regulations of The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002. It is clear that such free samples granted post-introduction of pharmaceutical products in market when its end-use stood established will be hit by Explanation to section 37 and shall not be allowable as deduction. Matter was set aside. (AY. 2009-10)
ACIT v. Liva Healthcare Ltd. (2016) 161 ITD 63 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Failed to produce the evidence disallowance was held to be justified 736

Dismissing the appeal of the assessee, the Tribunal held that assessee failed to produce necessary evidence in support of expenditure claimed to have been incurred, such expenditure was to be disallowed.(AY. 2009-10)
PBS Developers v. ITO (2016) 161 ITD 27 (Hyd.)(Trib.)

S. 37(1) : Business expenditure – Lease rent paid was held to be allowable deduction though capitalised in the books of account of assessee. [S. 145] 737

The Tribunal held that assessee has secured certain assets on lease from IBM under an agreement whereby for all practical purposes IBM was exercising all the ownership rights and was liable for their maintenance, insurance, etc., the beneficial ownership remained with IBM and therefore, assessee is entitled to deduction of entire lease rent paid to IBM, notwithstanding that the assessee has capitalized such assets and charged depreciation thereon in its books of account in order to comply the mandate of AS 19. (AY. 2006-07, 2008-09)
Bharti Hexacom Ltd. v. ACT (2016) 179 TTJ 25 (Delhi)(Trib.)

S. 37(1) : Business expenditure – Mine development expenses – Removal of overburden expenses in case of mining of coal by open cast mines, had to be allowed as revenue expenditure. 738

The assessee-company engaged in the business of generation of thermal power and it had also taken the coal mines on lease from the State Government. The assessee extracted coal from the mines, and the process used in the extraction of coal mines was open cast coal mines. The A.O. noticed that the assessee had claimed deduction on account of mine development expenses. The said expenses represented expenditure incurred on removal of overburden to mine the coal from mines. Aforesaid expenditure was in nature of capital expenditure, rejected assessee's claim. CIT(A) allowed the claim of the assessee. The ITAT by following the *Northern Coalfield Ltd. v. ACIT (2015) 69 SOT 637 (Jabalpur) (Trib)* held that Removal of overburden expenses in case of mining of coal by open cast mines had to be allowed as revenue expenditure. (AY. 2008-09)
ACIT v. Jindal Power Ltd. (2016) 179 TTJ 736 / 70 taxmann.com 389 / 138 DTR 313 (Raipur)(Trib.)

739 **S. 37(1) : Business expenditure – Corporate social responsibility – School building – Allowable as business expenditure. [Companies Act, 2013, S. 135]**
The AO noticed that the assessee had claimed deduction on account of expenses incurred on discharging corporate social responsibility. The assessee explained that this expenditure mainly related to expenses incurred on construction of school building, drainage, etc. voluntarily. The AO. taking a view that expenditure was not mandatory for business purpose, rejected assessee's claim. The CIT(A) allowed assessee's claim.
ITAT held that expenditure incurred by assessee on corporate social responsibility on voluntary basis such as construction of school building, drainage, barbed wire fencing etc., was to be allowed as deduction. (AY. 2008-09)
ACIT v. Jindal Power Ltd. (2016) 179 TTJ 736 / 70 taxmann.com 389 / 138 DTR 313 (Raipur)(Trib.)

740 **S. 37(1) : Business expenditure – Car expenses – *Ad hoc* disallowance of 20 per cent expenditure was justified.**
Assessee claimed car expenditure against commission income. A.O. observed that assessee was not maintaining any log book, disallowed claim made by assessee. CIT(A) concurred with view of A.O., but scaled down expenditure to 20 per cent as against 33 per cent made by A.O. Assessee had failed to establish that expenditure was exclusively incurred for purpose of business or profession, Possibility of user of car for personal purpose could not be ruled out, therefore, *ad hoc* disallowance made by CIT(A) was justified.
Madanlal F. Jain v. DCIT (2016) 160 ITD 1 / 143 DTR 150 / 181 TTJ 948 (Ahd.)(Trib.)

741 **S. 37(1) : Business expenditure – Capital or revenue – Setting up of new units on similar business was held to be allowable as revenue expenditure.**
The assessee was manufacturing iron castings new units established by the assessee are also admittedly manufacturing iron castings. Therefore, expenditure incurred by the assessee in connection with setting up of new units is allowable as revenue expenditure. (AY. 2006-07, 2007-08, 2009-10, 2010-11)
Hinduja Foundries Ltd. ACIT (2016) 178 TTJ 88 / (2017) 148 DTR 158 (Chennai)(Trib.)

742 **S. 37(1) : Business expenditure – Staff welfare expenses – Disallowance was held to be not justified.**
The assessee had provided uniforms and shoes as per the terms of the agreement with the workers. Assessee has produced all the bills and vouchers. The impugned disallowance was not justified. (AY. 2009-10)
JLC Electromet P. Ltd. v. Addl. CIT (2016) 178 TTJ 28 (UO) (Jaipur)(Trib.)

743 **S. 37(1) : Business expenditure – Expenditure incurred by a director in engaging lawyers to defend himself against cases filed for violation of the law by the Company of which he is a director is not personal expenditure but is allowable as business expenditure.**
Expenditure incurred by a director in engaging lawyers to defend himself against cases filed for violation of the law by the Company of which he is a director is not personal

expenditure but is allowable as business expenditure. (ITA No. 3316/Mum/2013, dt. 16.06.2016) (AY. 2009-10)
Nimesh N. Kampani v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 37(1) : Business expenditure – Foreign exchange fluctuation loss arising consequent to restatement of current liabilities as per the year end rates in accordance with Accounting Standard-11 (AS-11) is allowable as a deduction. 744
Allowing the appeal of assessee the Tribunal held that Foreign exchange fluctuation loss arising consequent to restatement of current liabilities as per the year end rates in accordance with Accounting Standard-11 (AS-11) is allowable as a deduction. (ITA No. 2976/Del./2013, dt. 24.08.2016) (AY. 2009-10)
Silicon Graphics Systems (India) Pvt. Ltd. v. DCIT (Delhi)(Trib.); www.itatonline.org

S. 37(1) : Business expenditure – Fine and penalties – Stock broker – Expenditure for purpose prohibited by law – Compensatory in nature – No disallowance can be made. 745
The assessee was a closely held company engaged in the business of share and stock broking. The Assessing Officer, for the assessment year 2006-07, made disallowance of ₹ 9,08,193/- being the amount of fine paid by the assessee to the Securities and Exchange Board of India and Stock Exchange, *inter alia*, for non-maintenance of "know your customer" forms and short collection of margin money, on the ground that such payments were incurred in relation to an offence which is prohibited by the law. This was confirmed by the Commissioner (Appeals). The Tribunal held that the payments were made on account of routine fines for minor procedural irregularities, in the day to day working of the assessee. The assessee was engaged in stock broking activities and also in financial services which involved substantial compliance requirements with various regulatory authorities. In the regular course of the business of the assessee, certain procedural non compliances were not unusual, for which the assessee was required to pay some fines or penalties. These routine fines or penalties are compensatory in nature — these are not punitive. These fines are generally levied to ensure procedural compliances by the concerned persons. Therefore, the disallowance under section 37(1), to be deleted. (AY. 2006-07)
Mangal Keshav Securities Ltd. v. ACIT (2016) 46 ITR 458 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Expenditure on interiors and maintenance on lease premises – Matter was remitted to Assessing Officer. 746
The assessee incurred expenditure for showroom maintenance and interior furnishing on leased premises. It included wood panelling of the interiors including temporary sheds for workers, new showcases and false ceilings since a new branch was started. The Assessing Officer treated the expenditure as capital in nature. This was confirmed by the Commissioner (Appeals). The Tribunal held that expenditure incurred for civil work by a lessee in respect of the leased premises without any further proof cannot be said to be capital expenditure or revenue expenditure. In order to find out the nature of expenditure, it is necessary to find out the nature of construction put up, the purpose of construction/renovation and the use to which the construction put up and also if it is a case of repair, replacement, addition or improvement has to be gone into. It is only

on the material, one has to determine whether the expenditure is revenue expenditure or capital expenditure. For the expenditure to be considered as capital, it is essential that the expenditure incurred on the construction of any structure on leased premises should result in enduring benefit. What would apply to civil work equally applies to electrical work or interior decoration. The assessee had not stated the nature of civil works constructed, the nature of interior decoration of the leasehold premises and the nature of electrical work undertaken. In the absence of that material and without proper application of mind, the assessing authority proceeded on the footing that the expenditure constituted capital expenditure. Therefore, the matter was remitted to the Assessing Officer to consider whether the expenditure was revenue or capital in nature and decide afresh. (AY. 2009-10)

K. R. Bakes Pvt. Ltd. v. ACIT (2016) 46 ITR 73 (Chennai)(Trib.)

747 **S. 37(1) : Business expenditure – Prior period expenses – Disallowance of prior period expenses while separately taxing prior period income not justified – netting to be allowed.**

The Tribunal held that the income relating to one year cannot be assessed in any other year. Likewise, the expenditure relating to one year cannot be claimed in any other year. Both principles shall have exception, if it is expressly provided in the Act. Hence, the entire amount of the prior period expenses, while assessing the entire amount of the prior period income, could not be disallowed for the assessment years 2004-05 and 2007-08 without bringing support of any of the provisions of the Act. Therefore, the assessee was justified in computing the disallowance by netting off the prior period income against the prior period expenditure. The assessee had offered the net income in the assessment year 2007-08, i.e., the prior period income was more than the period expenditure. (AY. 2004-05, 2007-08)

Mazgaon Dock Ltd. v. ITO (2016) 46 ITR 162 (Mum.)(Trib.)

748 **S. 37(1) : Business expenditure – Employees stock option plan – excess public price over price charged from employees treated as discount – Deduction is allowed.**

The assessee's claim to amortisation of expenses on its employee stock options plan was disallowed on the ground of the expenditure being a notional and, in any case, capital expenditure. The Commissioner (Appeals) confirmed the disallowance. The Tribunal held that the discounted sum, which could be realised by the company on shares issued under the employee stock options plan, was forgone by it only with a view to retain the employees, allowed by way of compensating them for their services. However, since the assessee bank had issued shares to the public at large as well, the employee stock options plan shares being in fact a mere fraction of the total shares issued during the year, the difference between the issue price of the shares to the two segments, i.e., to the public and its employees, would mark or signify the extent of the value forgone or the discount allowed by the assessee on the latter issue. The assessee was to be allowed the discount on the shares issued to the employees subject to its being reckoned with reference to issue price of the shares issued to the public during the relevant year. (AY. 2008-09)

HDFC Bank Ltd. v. DCIT (2015) 155 ITD 765 / 173 TTJ 810 / (2016) 45 ITR 529 / 130 DTR 219 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Staff welfare expenses and repair and maintenance expenses – No expense incurred for personal benefit – Authorities to consider claim in reasonable and practical manner 749

The assessee was engaged in the business of execution of loading and transportation contract works. The AO disallowed the staff welfare expenses and repair and maintenance expenses on the ground that the assessee had failed to produce original bills and vouchers. On appeal to Tribunal, it was held that none of the expenses were incurred for personal benefit of the assessee and there was no direct evidence to show that the expenses were incurred for the personal benefit of the assessee. There was no adverse inference drawn by the auditor. The tax authorities must consider the claims in reasonable and practical manner. The additions were to be deleted. (AY. 2009-10)

Mahendra Kumar Saha v. ACIT (2016) 47 ITR 590 (Cuttack)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Lease rentals – Right to use assets for which lease rentals paid – Treatment of lease rentals in books of account is of no relevance – Deductible 750

The assessee obtained vehicles on lease and paid lease rental. Out of the total amount of lease rentals, lease rentals amounting to ₹ 46,28,067/- were already charged to the profit and loss account as they pertained to the period prior to the introduction of Accounting Standard 19. However, lease rentals amounting to ₹ 3,27,25,577/- were separately claimed as deduction in the computation of income as the fair value of vehicles for such lease were capitalized in the books in terms of Accounting Standard 19. For income tax purposes, the assessee had not capitalized the fair value of the leased vehicles in the additions to the block of assets and, thus, no depreciation was claimed thereon. Instead, the entire lease rentals were claimed as a revenue deduction in view of the Central Board of Direct Taxes Circular No. 2, dated February 9, 2001 ([2001] 247 ITR (St.) 53). The Assessing Officer held that the principal component of lease was capital in nature and could not be allowed as deduction. He also observed that the vehicles were registered in the name of the assessee through which ownership rights were bestowed on the assessee. According to him, the assessee remained both the legal and the beneficial owner of the leased vehicles regardless of whatever clauses to the contrary were contained in the lease agreement. This was confirmed by the Commissioner (Appeals). The Tribunal held that the assessee got only a right to use the assets for which lease rentals were paid. The fact of registration of vehicles in the name of the assessee under the Motor Vehicles Act was only relevant for the purpose of that Act and not otherwise. Under the general law, the ownership of the vehicles vests only with the lessor. How the assessee treated the cost of vehicles in its books of account was not material. The assessee had been treating the lease rentals as revenue expenditure for tax purposes. The Central Board of Direct Taxes Circular No. 2 of 2001, dated February 9, 2001, had clarified that the Accounting Standard 19 would have no implication on the allowance of depreciation on assets under the provisions of the Act. Hence, the same analogy could be applied for lease rentals also. Hence, the treatment given in the books to comply with Accounting Standard 19 was of no relevance. Circular No. 2 of 2001, dated February 9, 2001, stipulates that in a lease transaction, the owner of the assets is entitled to depreciation. The lessor being the owner had the right to claim depreciation

and the assessee had not claimed any depreciation on the same for tax purposes. The assessee had claimed the entire lease rent as deductible expenditure. Therefore, the assessee was entitled to deduction towards lease rentals. (AY. 2005-06, 2008-09)
Royal Bank of Scotland N.V v. DDIT (2016) 47 ITR 513 (Kol.)(Trib.)

751 **S. 37(1) : Business expenditure – Commission paid, on behalf of clients, and billed as reimbursements is not an expenditure of the assessee.**
The assessee, a clearing and forwarding agent, claimed commission expenses, being in the nature of payments made to dock workers for speedy loading and unloading. The expense was disallowed by the AO on the basis that it was in the nature of bribes. The ITAT allowed by the expense since it was paid on behalf of the assessee's clients and was not its own expenditure. Merely because the assessee had routed its reimbursements through the P&L A/c it could not be said that the item was its expenditure and hence, books of account cannot be the sole determinative factor. The payment was made to workers as an incentive which was not prohibited by any law. (AY. 2009-10)
D. H. Patkar and Co. v. ITO (2016) 47 ITR 82 (Mum.)(Trib.)

752 **S. 37(1) : Business expenditure – Rent allowed based on the order of earlier year, though it was paid to shareholder based on an unregistered agreement.**
The assessee claimed rent expense during the year, which was disallowed by the AO, who claimed that the transaction was a sham. The AO was of the belief that the rent agreement with the shareholder (alleged owner of the premises) was unregistered and the assessee was actually the owner of the premises. The Assessee claimed that the premises was given earlier with only a right use by way of a refundable deposit for a period of 9 years. Subsequently, rent was paid based on an annual agreement. The ITAT, followed its earlier years' orders and allowed the expense. (AY. 2009-10)
Kaiser Industries Ltd. v. JCIT (2016) 47 ITR 656 (Amritsar)(Trib.)

753 **S. 37(1) : Business expenditure – No disallowance of salary and consultancy fees in case the same was allowed by the AO in earlier as well as subsequent assessment years.**
The Assessee salary and consultancy fees to persons who were also its shareholders. The AO disallowed the same alleging that no evidence was submitted to prove that the said persons rendered any services to the assessee. The Assessee claimed that the said expenses were allowed by the AO in the earlier as well as subsequent years. The ITAT remanded the matter and directed the AO to consider the history of disallowances. (AY. 2009-10)
Kaiser Industries Ltd. v. JCIT (2016) 47 ITR 656 (Amritsar)(Trib.)

754 **S. 37(1) : Business expenditure – Mobilization expenses incurred for installation of rigs at client's place is revenue in nature.**
The assessee, being in the business of giving rigs on hire for drilling oil, imported four new rigs. The rigs were taken to the site of the client, installed, commissioned and made operational. The assessee earned charter hiring charges for the same. The mobilization expenses incurred by the assessee to make the rigs operational were claimed as revenue

expenditure. The AO treated same as capital expenditure and allowed depreciation on the same. The ITAT deleted the addition and since the Assessee had merely expanded its capacity by importing the new rigs and there was no new source of income. The rigs were ready to use upon purchase and the mobilization expense was incurred to merely install the same at the client's place. (AY. 2009-10)
Dewanchand Ramsaran Industries (P.) Ltd. v. ACIT (2016) 158 ITD 645 / 47 ITR 687 / 179 TTJ 557 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Interest expense on debentures issued for acquisition of rigs to be given on hire is revenue in nature. 755
The assessee was in the business of giving rigs on hire for drilling oil. It issued debentures in the earlier year to acquire new rigs. Interest expense pertaining to the period prior to the acquisition of the rigs was capitalized by the assessee. However, the AO held that the entire interest expenses was to be capitalized. The ITAT allowed the interest expense pertaining to both before and after the acquisition of rigs, since the same was incurred for the business of the assessee, which was giving rigs on hire. The rigs were ready to use upon acquisition and hence the interest cost after the acquisition of the rigs was revenue in nature. (AY. 2009-10)
Dewanchand Ramsaran Industries (P.) Ltd. v. ACIT (2016) 158 ITD 645 / 47 ITR 687 / 179 TTJ 557 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Labour charges – Self made voucher – Disallowance was held to be not justified. 756
Assessee builder made payment to labourers for construction activity on basis of self-made vouchers obtaining proper voucher from such kind of unorganized labourers was beyond control of assessee, action of AO to disallow said payment without showing that assessee had inflated expenditure was not justified. (AY. 2010-11)
Vijayashanthi Builders Ltd. v. JCIT (2016) 158 ITD 635 / 48 ITR 310 (Chennai) (Trib.)

S. 37(1) : Business expenditure – Professional fees – Service rendered was not proved, hence expenditure was held to be not allowable. 757
Company paid certain amount to a Switzerland based company as professional fees and claimed deduction of same, since there were no independent services rendered by and *de facto* services had been rendered by one, who was a director in assessee company as well as in Switzerland based company wearing hat of Company, impugned payment was not allowable expenditure. (AY. 1995-96 to 1997-98)
Stock Traders (P.) Ltd. v. ACIT (2016) 158 ITD 620 / 178 TTJ 265 / 135 DTR 41 (Mum.) (Trib.)

S. 37(1) : Business expenditure – Travelling expenses of wife of Director – Held to be not allowable. 758
Company incurred travelling expenses in respect of wife of director, as there was no evidence that travel by director's wife was wholly and exclusively for purposes of business, travelling expenses was not allowable. (AY. 1995-96 to 1997-98)
Stock Traders (P.) Ltd. v. ACIT (2016) 158 ITD 620 / 178 TTJ 265 / 135 DTR 41 (Mum) (Trib.)

759 **S. 37(1) : Business expenditure – Interest on debentures – New rigs were ready to be to used, hence interest was held to be allowable as deduction.**
Assessee incurred interest on debentures which were raised to acquire new rigs to be given on hire for oil drilling, said interest was allowable as revenue expense as rigs were ready to be put to use from time these were acquired by assessee. (AY. 2009-10)
Dewanchand Ramsaran Industries (P.) Ltd. v. ACIT (2016) 158 ITD 645 / 47 ITR 687 / 179 TTJ 557 (Mum.)(Trib.)

760 **S. 37(1) : Business expenditure – Licence fee paid was held to be allowable as business expenditure.**
Tribunal held that the licence fee paid to NDMC as per licence deed was a confirmed liability. Therefore, assessee is entitled to deduction of amount paid to NDMC as licence fee under the licence deed. (AY. 2003-04, 2008-09, 2009-10)
CJ. International Hotels Ltd. v. Dy. CIT (2016) 177 TTJ 124 (Delhi)(Trib.)

761 **S. 37(1) : Business expenditure – Payment made to holding company towards ESOP – Held to be allowable as revenue expenditure.**
Dismissing the appeal of revenue, the Tribunal held that discount on ESOP is nothing but a part of remuneration packages and it is neither a short receipt of capital nor a capital expenditure. The discount on ESOP is not contingent expenditure hence the same is allowable as business expenditure. (AY. 2010-11) (ITA No. 2096/Mum/2014 dt. 11-3-2016)
DCIT v. Kotak Securities Ltd. (2016) Chamber's Journal-2016 - April-P. 86 (Mum.)(Trib.)

762 **S. 37(1) : Business expenditure – On same facts the AO had accepted payment of royalty as genuine and not sham transaction in previous assessment year, disallowance of such payment on ground of non-genuineness was held to be not justified.**
The AO. disallowed royalty payment made by assessee Company to its associated enterprise abroad on ground that assessee had not proved necessity of payment of royalty and also benefits accrued to it by using brand name of AE. In view of facts that payment was made through banking channel which was supported by bills and agreements and TPO as well as A.O. on same facts had accepted payment of royalty as genuine and not sham transaction in previous assessment year, AO was unjustified in disallowing royalty payment. (AY. 2007-08, 2008-09)
ACIT v. L. G. Polymers India (P.) Ltd. (2016)157 ITD 1113 (Visakha)(Trib.)

763 **S. 37(1) : Business expenditure – Encashment of bank guarantee – Held to be allowable as deduction. [S. 28(i)]**
Where in respect of contract for providing coverage of Commonwealth Games, assessee had to pay certain amount to Prasar Bharati as performance bank guarantee on account of inadequate performance of said contract, it was to be allowed as deduction. (AY. 2011-12)
SIS Live v. ACIT (2016) 175 TTJ 643 / 131 DTR 221 (Delhi)(Trib.)

S. 37(1) : Business expenditure – Expenditure on Corporate Social Responsibility (CSR), though voluntary, is allowable as business expenditure. 764

Expenditure on Corporate Social Responsibility (CSR), though voluntary, is allowable as business expenditure. Explanation 2 to s. 37(1) inserted w.e.f. 01.04.2015 is not retrospective. It applies only to CSR expenditure referred to in s. 135 of the Companies Act and not to voluntary CSR expenditure. (AY. 2008-09)

ACIT v. Jindal Power Limited (2016) 179 TTJ 736 / 70 taxmann.com 389 / 138 DTR 313 (Raipur)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Repair of rented premises – Held to be allowable. [S. 30, 31] 765

Expenditure on repairs of rented premises, even if huge and accumulated, are allowable as revenue expenditure. Fact that CIT(A) admitted additional evidence is no justification for seeking a set aside to the AO if the CIT(A) called for a remand report from the AO: Ratio in *CIT v. Savarana Spinning Mills Limited (2007) 293 ITR 201 (SC)* is held to be not applicable. (ITA No. 5393/Del/2010, dt. 02.06.2016) (AY. 2005-06)

DCIT v. Ikea Trading (India) P. Ltd. (Delhi)(Trib.); www.itatonline.org

S. 37(1) : Business expenditure – Capital or revenue – Leased premises – Set-up cost – Held to be capital in nature. [S. 32] 766

Assessee company engaged in business of development of software products. Assessee acquired leased premises in a semi-finished state which could not be used for its purposes, i.e., development of software, expenditure incurred by assessee for first time for installing work stations, electric cables, proper flooring, furniture and fixture, computers, etc. in said premises to achieve its functional utility would be regarded as part of set-up cost and as capital expenditure. (AY. 2011-12)

Alpha Plus Technologies (P.) Ltd. v. ITO (2016) 158 ITD 136 (SMC) (Mum.)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Repairs – Expenditure incurred on repairs and painting of hoarding structures is held to be revenue expenditure. 767

The assessee firm has incurred expenditure for the purpose of its business of outdoor advertising business. The repairs to the permanent structure have been undertaken and it was not extensive repair of permanent structure. The A.O. treated the expenses as capital expenditure while the CIT(A) granted relief to the tune of 50%. The Hon'ble ITAT held that repairs of the hoarding structures with respect to the existing structure, therefore assessee is entitled for deduction on account of hoarding expenditure is revenue expenditure. (AY. 2007-08)

Asian Advertising v. ITO (2016) 158 ITD 145 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Product Trial expenses of a new product is revenue in nature as it does not provide the assessee with any enduring benefit – Compensation paid to supplier to ensure goodwill and continued relationship is revenue expenditure. 768

Product Trial expenses of a new product is revenue in nature, does not provide Assessee any enduring benefit. Compensation to paid to supplier to ensure goodwill and

continued relationship is revenue expenditure. (ITA No. 7978/Mum/2010, dt. 25.05.2016) (AY. 2006-07)
Bayer Crop Science Limited v. ACIT (Mum.)(Trib.), www.itatonline.org

769 **S. 37(1) : Business expenditure – Audit fee – Prior period expenses – Method of accounting – Matter remanded. [S. 145]**
Assessee made certain provision in its profit and loss account in respect of accounting and auditing charges. On appeal Tribunal held that matter was to be remanded back to Assessing Officer with direction to verify whether assessee was following practice of recognizing expenditure of audit fee pertaining to each year irrespective of actual payment and, if yes, then, it should not be disallowed for year under consideration. As regards prior period expenses also matter was remanded to the AO. (AY. 2009-10)
New Mangalore Port Trust v. ACIT (2016) 157 ITD 399 (Bang.)(Trib.)

770 **S. 37(1) : Business expenditure – Disallowance of expenses on account of personal element was made on estimation and revenue had not challenged issue before Tribunal for earlier assessment years, disallowance had to be restricted in line with previous assessment years.**
Assessing Officer disallowed certain percentage of expenditures ranging from 10-15 per cent on account of personal usage. Commissioner (Appeals) restricted disallowance to 10 per cent. Since revenue had not challenged issue before Tribunal against orders of Commissioner (Appeals) for earlier assessment years and it was only an estimated disallowance, Assessing Officer was directed to restrict disallowance at 5 per cent as restricted in earlier years. (AY. 2005-06, 2007-08)
ACIT v. Pawan Kumar Jhunjhunwala (2016) 157 ITD 667 (Kol.)(Trib.)

771 **S. 37(1) : Business expenditure – Genuineness of commission payments – *ad hoc* disallowance**
It was held that AO having not controverted the assessee's claim and not brought any material on record to show that the commission expenditure was either bogus or was not allowable deduction, disallowance made by him solely on *ad hoc* basis cannot be sustained. (AY. 2008-09)
Dy. CIT v. Vodafone Mobile Services Ltd. (2016) 130 DTR 195 / 176 TTJ 430 (Delhi)(Trib.)

772 **S. 37(1) : Business expenditure – Commission payments – No disallowance can be made only on the ground that copy of assessee's account did not indicate in the account of payee, when tax was deducted**
It was held that commission by cheques after deducting TDS could not be disallowed on the basis that the copy of the assessee's account in the payees books of account did not indicate any payment received by him from the assessee. (AY. 2009-10)
ITO v. LGW Ltd. (2016) 130 DTR 201 (Kol.)(Trib.)

773 **S. 37(1) : Business expenditure – Penal interest paid to bank – Compensatory in nature – Not an offence prohibited by any law – Allowable.**
The assessee had paid penal interest for not fulfilling a stipulated condition in the loan agreement which was compensatory in nature. The banks were entitled to charge

extra rate of interest which was reimbursed to the assessee on fulfillment of condition. On appeal to Tribunal, it was held that the assessee has not committed any offence prohibited under any law and hence doesn't come under the ambit of Explanation to Section 37. The expenditure was allowable. (AY. 2008-09)
ACIT v. Bharat Hi-Tech (Cement) P. Ltd. (2016) 176 TTJ 166 (Kol.)(Trib.)

S. 37(1) : Business Expenditure – Capital or Revenue – Expenditure incurred for undertaking expansion of existing business – To be treated as revenue expenditure. 774
The assessee was engaged in the business of manufacturing intermediaries and bulk drugs, which was undertaken at the manufacturing facility of the assessee. During the year under consideration, the assessee had undertaken expansion of its existing business for which it had incurred both direct and indirect expenses. The direct expenses were capitalized to the fixed assets whereas the indirect ones, other than the ones which increased the value of assets, were claimed as revenue expenditure. The AO disallowed the indirect expenses since the bifurcation of expenses incurred on new project were not provided. On appeal to the Tribunal, it held that any expenditure incurred for the purpose of running the business or working it with a view to produce the profits were revenue expenditure and would not become capital expenditure merely for the reason that such expansion was termed as new project. (AY. 2010-11)
DSM Sinochem Pharmaceuticals India P.Ltd v. DCIT (2016) 176 TTJ 322 (Chd.)(Trib.)

S. 37(1) : Business expenditure – Repairs and maintenance expenses to be disallowed if original vouchers were not produced and genuineness of expense has been doubted by lower authorities. 775
The assessee claimed repairs and maintenance expense being in the nature of revenue expenditure. Since it was related to the installation of new cooler and duct, the AO treated the same as capital in nature and allowed depreciation on it. The assessee repeatedly changed stands on whether it was incurred towards air cooler or purchase of CCTV and did not submit vouchers in support of the claim. Thus, the CIT(A) upheld the disallowance made by the AO. The ITAT upheld the disallowance since the genuineness of the expense has been doubted by the AO and original vouchers were not submitted by the assessee. (AY. 2008-09)
Brothers Pharma P. Ltd. v. ITO (2016) 45 ITR 154 (Jaipur)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Expenditure incurred for use of technical know-how for improving the manufacturing process would be revenue in nature. 776
The assessee entered into a technical assistance agreement by virtue of which it was granted a licence to use technical know-how in its manufacturing operations. The expenditure was claimed to be revenue in nature by the assessee, while the AO held that that it was capital in nature. The CIT(A) ruled in favour of the assessee. On appeal, the ITAT held that expense was incurred only for improvement of technology used in its manufacturing process and would be revenue in nature. Further, no new asset with enduring benefit was acquired by the Assessee as it was only given a right to use the technical information. (AY. 2005-06)
DCIT v. I.F.G.L. Refractories Ltd. (2016) 45 ITR 1 (Kol.)(Trib.)

777 **S. 37(1) : Business Expenditure – Capital or revenue – Advertisement expenditure – Display of granty signs and product launching expenses – No asset of permanent nature comes into existence – Expenditure allowed as revenue.**
Assessee Company was engaged in the business of providing cellular mobile telephony network. During the year under consideration, the AO made disallowance of Advertisement expenses. The Tribunal held that the expenditure incurred on display of granty signs and on product launches were allowable as revenue since no asset of permanent nature comes into existence. (AY. 2008-09)
DDIT v. Vodafone Mobile Services Ltd. (2016) 130 DTR 195 / 176 TTJ 430 (Delhi)(Trib.)

778 **S. 37(1) : Business expenditure – Capital or revenue – Royalty paid to DOT – Necessary to run the business – Amount allowed as Revenue expenditure**
Assessee Company was engaged in the business of providing cellular mobile telephony network. During the year under consideration, the AO made disallowances of Royalty paid to DOT. On appeal to Tribunal, it was held that the royalty pertaining to spectrum charges was paid to DOT on a quarterly basis as a percentage of revenue. The assessee could not run the business without making such payments and hence the same were allowable as revenue expenditure. (AY. 2008-09)
DDIT v. Vodafone Mobile Services Ltd. (2016) 130 DTR 195 / 176 TTJ 430 (Delhi)(Trib.)

779 **S. 37(1) : Business expenditure – Advertisement expenses incurred after the issuance certificate by the Censor Board is allowable.**
The assessee incurred advertisement expenses after the obtaining the certificate from the Censor Board, which was disallowed by the AO based on the provisions of rules 9A and 9B. The ITAT held that advertisement and publicity expenses incurred after obtaining the certificate from the Censor Board would be allowable to the assessee u/s. 37 based on the earlier decisions of the Tribunal. (AY. 2009-10)
Dharma Productions P. Ltd. v. ACIT (2016) 45 ITR 102 (Mum.)(Trib.)

780 **S. 37(1) : Business expenditure – *Ad hoc* disallowance not allowed in case primary documents have not been doubted and has it not been alleged that bogus expenses or inflated expenses have been booked.**
The AO disallowed *ad hoc* 25% of certain expenses claimed by the assessee due to want of evidence. The ITAT followed earlier year and deleted the disallowance and held that the AO had not doubted the primary documents, but had made bald observations. (AY. 2009-10)
Dharma Productions P. Ltd. v. ACIT (2016) 45 ITR 102 (Mum.)(Trib.)

781 **S. 37(1) : Business expenditure – Marker research expenses – Order of CIT(A) was accepted in earlier year – Appeal of revenue was dismissed.**
The Tribunal allowed the expenditure on the ground that for earlier years. The department has not filed the appeal before Tribunal and accepted the order of CIT(A). the facts and circumstances being same the Tribunal held that department cannot agitate the issue in this year. (AY. 2003-04)
Dy. CIT v. Pfizer Ltd. (2015) 64 taxmann.com 465 (2016) 175 TTJ 92 / 139 DTR 81 / (Mum.)(Trib.)

S. 37(1) : Business expenditure – Provision for liability under long-term incentive plan for employees – Held to be allowable. 782

The Tribunal held that provision on account of incentive plan made by the assessee during the year is an ascertained liability. The AO has nowhere objected to the method of quantifying the said provision by the assessee. Therefore, the same is allowable as deduction. (AY. 2009-10)

GlaxoSmithKline Consumer Healthcare Ltd. v. Jt. CIT (2016) 175 TTJ 552 / 143 DTR 57 (Chd.)(Trib.)

S. 37(1) : Business expenditure – Interest for late deposit of service tax – Cannot be termed as penalty – Allowable as deduction. 783

The Tribunal held that interest paid on delayed payment of service tax cannot be termed as penalty for infringement of any law and, therefore the same cannot be disallowed. (AY. 2012-13)

Gillco Developers & Builders (P) Ltd. v. Dy. CIT (2016) 175 TTJ 81 (UO)(Chd.)(Trib.)

S. 37(1) : Business expenditure – Provision for liability on account of leave encashment – Allowable as deduction. 784

The Tribunal held that provision for liability on account of leave encashment is allowable as deduction. (AY. 1996-97 to 1998-99)

ICI India Ltd. v. Dy. CIT (2016) 175 TTJ 217 (Kol.)(Trib.)

S. 37(1) : Business expenditure – Liability under VRS is allowable as deduction. 785

The Tribunal held that provision for liability under VRS is allowable as deduction. (AY. 1996-97 to 1998-99)

ICI India Ltd. v. Dy. CIT (2016) 175 TTJ 217 (Kol.)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Expenditure to make computer system Y2K compliant was held to be revenue expenditure. 786

The Tribunal held that the expenses incurred to make computer system Y2K compliant is revenue expenditure. (AY. 1996-97 to 1998-99)

ICI India Ltd. v. Dy. CIT (2016) 175 TTJ 217 (Kol.)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Expenditure in shifting corporate office was held to be revenue expenditure. 787

The Tribunal held that the expenditure in shifting corporate office constituted revenue expenditure. (AY. 2007-08)

Gillette India Ltd. v. ACIT (2015) 70 SOT 289 / (2016) 175 TTJ 35 (UO)(Jaipur)(Trib.)

S. 37(1) : Business expenditure – Real estate development – Commission and Brokerage paid to brokers or agents – Quantum of expenses cannot be examined by AO. 788

On appeal, the Tribunal held that merely because any income had not been earned during the year directly from any activity, it could not be said that the related expenses was not expense for the business of the assessee. Whether the income has been earned or not and whether the ultimate benefit had accrued immediately or not, the expenses

incurred shall be allowable if these have been incurred for business or for commercial expediency. Further, once the expenses had been found to be genuine and to have been incurred for the purpose of the business, the quantum of the expenses could not be examined by the AO to adjudicate how much of the expenses were justifiable and whether the expenses claimed were proportionate or disproportionate vis-a-vis the requirement of the business. (AY. 2006-07)
Today Homes and Infrastructure Pvt. Ltd. v. Dy. CIT (2016) 46 ITR 586 (Delhi)(Trib.)

789 **S. 37(1) : Business expenditure – Bribe for awarding of contract – Sum deleted in case of recipient and deletion affirmed by High Court – No disallowance can be made.**
The AO added ₹ 21.62 crores on the ground that the assessee paid a sum in the form of bribe for awarding of contract. The Commissioner (Appeals) deleted the addition.
On appeal the Tribunal held that, the entire addition made by the AO was solely based on suspicion and surmises. The addition was deleted by the CIT(A) in the hands of the alleged recipient of the bribe which was upheld by the Tribunal and ultimately approved by the jurisdictional High Court. Therefore, the addition was rightly deleted by the CIT(A) in the assessee's case. (AY. 2006-07)
Today Homes and Infrastructure Pvt. Ltd. v. Dy. CIT (2016) 46 ITR 586 (Delhi)(Trib.)

790 **S. 37(1) : Business expenditure – Commercial expediency – Safeguard interest – Allowable as business expenditure.**
On appeal, the Tribunal held that the purpose of taking over the loan was to improve the financial viability of the subsidiary company to facilitate a one-time settlement of certain loans in the subsidiary company and to complete subscription of non-convertible debentures in the subsidiary company. Therefore, it was an expenditure to safeguard its interest or investment in subsidiary company. Therefore, it was for the business purpose of the assessee and hence revenue in nature. (AY. 2006-07, 2007-08)
Rain Commodities Ltd. v. Dy. CIT (2016) 46 ITR 1 (Hyd.)(Trib.)
Rain Cements Ltd. v. Dy. CIT (2016) 46 ITR 1 (Hyd.)(Trib.)

791 **S. 37(1) : Business expenditure – Co-operative Bank – Expenditure on various welfare funds – Statutory obligation, hence allowable expenditure.**
The funds contributed neither remained with the apex co-operative bank nor came back to the assessee in another form and the amounts were spent only out of statutory obligation. Further, one of the objects of the assessee was to develop or assist and co-operate the members of district central co-operative banks and other co-operative societies and hence the contribution was only made in further pursuance of the objects of the bank for which it was established and there was no business interest in incurring the expenditure. The amount spent could not be disallowed. (AY. 2007-08)
Karnataka State Co-operative Apex Bank Ltd. v. Dy. CIT (2016) 46 ITR 728 (Bang.)(Trib.)

792 **S. 37(1) : Business expenditure – Disallowance by netting off prior period income against prior period expenditure was held to be Justified. [S. 4]**
The entire amount of the prior period expenses, while assessing the entire amount of prior period income, could not be disallowed for the AY 2004-05 and 2007-08, without

bringing support of any of the provisions of the Act. Therefore, held that the assessee was justified in computing the disallowance netting the prior period income against the prior period expenditure. The assessee had offered the net income in the AY 2007-08. Netting was held to be justified. (AY. 2004-05, 2007-08 to 2010-11)
Mazgaon Dock Ltd. v. ITO (2016)46 ITR 162 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Advertisement expenses – No discrepancy was pointed on ledgers and bills produced before authorities disallowance was held to be not justified. 793
On appeal, the Tribunal held that the AO had not pointed out any discrepancy or any reason explained inadmissible in the nature in terms of section 37 of the Act. Just because the assessee had not offered the sum for tax in the previous years, it could not be a ground for disallowing the expenses. The addition was to be deleted. (AY. 2007-08)
Sahil Study Circle Pvt. Ltd. v. Dy. CIT (2016) 46 ITR 182 (Delhi)(Trib.)

S. 37(1) : Business expenditure – Capital or revenue – Stamp duty or fees paid for increase in authorised capital is capital in nature. 794
Tribunal held that; Stamp duty or fees paid to Ministry of Corporate Affairs towards increase in authorised capital of company would be considered as capital expenditure. (AY. 2009-10)
Inventurus Knowledge Services (P.) Ltd v. ITO (2016) 156 ITD 727 / 45 ITR 57 / 177 TTJ 269 / 143 DTR 113 (Mum.)(Trib.)

S. 37(1) : Business expenditure – Licence fee – Limited right to use software – Allowable as business expenditure. 795
Amount paid as licence fee in order to get limited right to use software programme belonging to other company, held to be allowable as business expenditure. (ITA No 2806/Del/dt. 16-10-2015) (AY. 2007-08)
GE Capital Business Process Management Services (P) Ltd. (2016) Chamber's Journal-January–P. 95 (Delhi)(Trib.)

S. 37(1) : Business expenditure – Sales promotion expenses – Gift to doctors bearing logo of company – Allowable expenditure – CBDT Circular dated 01.08.2012 is prospective. 796
Receiving of gifts by doctors was prohibited by MCI guidelines, giving of the same by manufacturer is not prohibited under any law for the time being in force. Giving small gifts bearing company logo to doctors does not tantamount to giving gifts to doctors but it is regarded as advertising expenses. As regards sponsoring doctors for conferences and extending hospitality, pharmaceutical companies have been sponsoring practicing doctors to attend prestigious conferences so that they gather contemporary knowledge about management of certain illness/disease and learn about newer therapies. We found that the disallowance was made by the AO by relying on the CBDT Circular dated 01.08.2012 onwards. However, the Circular was not applicable because it was introduced w.e.f. 01.08.2012. i.e. assessment year 2013-2014, whereas the relevant assessment year under consideration is 2010-2011 and 2011-2012. Accordingly, we do not find

any merit in the disallowance so made by the AO in both the assessment years under consideration. (ITA No. 6429 & 6428/Mum/2013 & ITA No.11/Mum/2014, dt. 23.12.2015) (AY. 2010-11, 2011-12)
DCIT v. Syncom Formulation (I) Ltd. (Mum.)(Trib.); www.itatonline.org

797 **S. 37(1) : Business expenditure – Payment of speed money to dock workers are not bribes or prohibited under the law hence cannot be disallowed.**
Allowing the appeal of assessee the Tribunal held that Payment of speed money to dock workers are not bribes or prohibited under the law hence cannot be disallowed. (AY. 2009-10) (ITA No. 4524/Mum/2013 dt 18-03-2016, Bench 'D')
D. H. Patkar & Co. v. ITO (2016) BCAJ-April-P. 32 (Mum.)(Trib.)

798 **S. 37(1) : Business expenditure – There is a distinction between "setting up" and "commencement" of a business. A business is "set up" and expenditure is deductible even if assessee has no customers and no income. [S. 3, 71]**
The assessee has already purchased residential flat for the purpose of resale/lease, and therefore assessee was apparently ready to do its business. Under these circumstances, it can be said that the business is set up by the assessee during the year under consideration. For the deductibility of expenses incurred after this stage, earning of the business income is not a mandatory condition under the law. The assessee may not have been successful in getting customers or earning the business income, but if the assessee has done requisite preparations and if the assessee can be said to be in a position to cater to its customers, then it can be said that business is set up and it would amount to carrying on the business and accordingly the expenses would stand allowable to the assessee, irrespective of the fact whether actually assessee got any customer and earned any business income during the year or not. (AY 2008-09)
Multi Act Realty Enterprises Pvt. Ltd. v. ACIT (Mum.)(Trib.); www.itatonline.org

799 **S. 37(1) : Business expenditure – Fees for technical services – Payment to group company – Administrative support – Held to be allowable – Obligation to price reduction is not penalty allowable as deduction – Non-resident – India – United Kingdom. [S. 9(1)(vii), Art. 13(4)**
AAR has held that Contract for construction support and supervision, procurement and engineering design in Paradip refinery. Payments to group company for time charge of staff working on bid, travel expenses and printing cost pertaining to applicant's contract charged to applicant under agreement. Incurred for business purposes and to be allowed in year in which incurred. Services rendered by third parties and group companies in connection with expatriate movement to India in relation to project office. Payments not technical services but administrative support services. – Allowable in year in which incurred. Provision made in books year to year for obligation for price reduction for not meeting project schedule. Price reduction incurred in terms of agreement is not a penalty, to be allowed in year in which such invoices actually raised.
Foster Wheeler G. B. Ltd., In re (2016) 389 ITR 509 / 290 CTR 1 (2017) 77 taxmann.com 205 / 142 DTR 345 (AAR)

S. 37(3A) : Business expenditure – Previous year – Expenditure on advertising and sales promotion – Ceiling of expenditure – Change in previous year – Period of seventeen months treated as previous year – Ceiling to be increased proportionately. [S. 3] 800

On reference the Court held that the limit laid down in section 37(3A) could be proportionately increased because the previous year relevant for the assessment year was seventeen months instead of twelve months. Reference was answered in favour of assessee. (AY. 1980-81)

Somaiya Organo Chemicals Ltd v. CIT (2016) 388 ITR 423 / 290 CTR 30 / 142 DTR 361 (Bom.)(HC)

S. 37(4) : Business expenditure – Guesthouse – Expenditure incurred on rent, maintenance and depreciation on guest house is to be disallowed. 801

The assessee made a claim of expenses incurred on rent, maintenance and depreciation on guest house which was disallowed by the Assessing Officer and upheld by CIT(A) and Tribunal. On appeal, it was held that there is no need to interfere with the findings of the Tribunal as it decided the issue following the decision of the Supreme Court in the case of *Britannia Industries Ltd. v. CIT (2005) 278 ITR 546 / 148 Taxman 468*. (AY. 1997-98)

Tube Investments of India Ltd. v. JCIT (2016) 240 Taxman 543 (Mad.)(HC)

S. 40. Amounts not deductible.

S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Commission to non-resident agent in respect of sales made outside India was held not liable to deduct tax at source. [S. 5(2), 9(i), 195] 802

Dismissing the appeal of the Revenue, the Court held that payment to non-resident agent being commission for selling Indian goods outside India could not be said to have deemed to accrue or arise in income. It relied upon the judgment in *CIT v. Toshoku Ltd. (1980) 125 ITR 525 (SC)* and CBDT Circular No. 23 of 1969. The Court also held that the said circular was in force in the relevant assessment year and that it was withdrawn only on 22nd October, 2009 and that the said withdrawal did not have any retrospective effect. (AY. 2007-08, 2008-09).

CIT v. Gujarat Reclaim & Rubber Products Ltd. (2016) 383 ITR 236 / 136 DTR 138 / 287 CTR 83 (Bom.)(HC)

S. 40(a)(i) : Amounts not deductible – Deduction at source – Fees for technical services – Failure to deduct TDS on payment to a non-resident will result in a disallowance. Violates the non-discrimination clause in Article 26 of the India-USA DTAA because a similar disallowance is not made on payments to residents – DTAA-India-USA [S. 9(1)(vii), 195 Art. 12, 26] 803

Dismissing the appeal of revenue the Court held that Section 40(a)(i) of the Act is discriminatory and therefore, not applicable as per provisions of Article 26(3) of the Indo-US DTAA. Affirmed the view of Tribunal in in *Herbalife International India (P.)*

Ltd. v. ACIT (2006) 101 ITD 450 (Delhi)(Trib), wherein Tribunal held that the AO cannot invoke provision of section 40(a)(i) to disallow the claim even on assumption that um in question was chargeable to tax in India. (AY. 2001-02)
CIT v. Herbalife International India Pvt. Ltd. (2016) 384 ITR 276 / 136 DTR 33 / 286 DTR 372 / 240 Taxman 21 (Delhi)(HC)

804 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Commission – Rendering of services abroad – Not liable to deduct tax at source – OECD Model Conventions. [S. 9(1)(i), 9(1)(vii), 195, Art. 5, 11, 12]**
Dismissing the appeal of the revenue, the Tribunal held that Export commission payments to foreign brokers for rendering services abroad was not liable to deduct tax at source. (AY. 2010-11)
ACIT v. Pahilajrai Jaikishin (2016) 157 ITD 1187 / 179 TTJ 148 (Mum.)(Trib.)

805 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Remittance to French resident on payment made much earlier in period relevant to year 1-4-2008 to 31-3-2009, was not liable to deduct tax at source – DTAA-India-French [S. 195, Art. 15]**
Allowing the appeal of the assessee the Tribunal held that retrospective amendment made by Finance Act, 2010 with effect from 1-6-1976 in Explanation 2 to section 9(2), effective from 8-5-2010, does not create any liability upon assessee, an Indian company, for deduction of tax under section 195 on remittance to French resident on payment made much earlier in period relevant to year 1-4-2008 to 31-3-2009 (AY. 2009-10)
Ashok Piramal Management Corpn. Ltd. v. ACIT (2016) 161 ITD 234 (Mum.)(Trib.)

806 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Service rendered outside India – Not liable to deduct tax at source – OECD Model convention. [S. 9(1)(vii), 195, Art. 7, 12]**
Assessee made payment of communication charges, commission charges, legal and professional charges, marketing and selling charges and business development charges to non residents. Non-residents had no business connection with India, no services were rendered in India and there was no finding that services rendered were in nature of technical services hence the assessee was not liable to deduct tax source. (AY. 2009-10)
IDS Infotech Ltd. v. DY. CIT (2016) 181 TTJ 217 (Chd.)(Trib.)

807 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Professional services rendered to Indian company by overseas companies outside India was held to be not liable to deduct tax at source – DTAA-India-UK-USA [S. 9(1)(i), 195, Art. 14]**
Dismissing the appeal of the revenue, the Tribunal held that Professional services rendered to Indian company by overseas companies outside India in relation to audit and taxation would be independent professional services; and in absence of any PE in India of these companies, payment made to them would not be chargeable to tax in India, hence not liable to deduct tax at source. (AY. 2008-09)
ACIT v. BSR & Company (2016) 159 ITD 1068 / 182 TTJ 544 (Mum.)(Trib.)

S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Interest – Royalty – Fees for technical services – UK company not only made available of design and drawings to assessee-company but also erected project in India under its own supervision – Since said services were rendered in India, payment made by assessee to UK company would be taxable in India, hence liable to deduct tax at source – DTAA-India-UK [S. 9(1)(vii), 195, Art. 13] 808

Assessee engaged services of a UK company for design, manufacturing and start up of paper machines. Designs and drawing were made in UK, therefore payment made without deduction of tax at source. AO held that the agreement between the parties was a composite one. Accordingly, the company in UK had to implement by way of erection in India and unless drawings and designs were prepared in India, the agreement could not be concluded. Since UK Company rendered taxable services in India therefore, the assessee had to deduct tax under section 195. The Commissioner (Appeals) observed that engineering services by the UK Company were rendered in India and the amount paid for said services fell within the definition of fee for technical services under Article 13 of DTAA with UK thus, said fees was liable to be taxed in India. On appeal the Tribunal held that erection of the machine was done by the engineers of UK Company in India wherein the engineers came down to India to the site to supervise the erection personally. Even though the design and drawings were said to be prepared in UK, mere preparing design and drawings would not complete the service rendered by UK Company. The UK Company has to necessarily execute the project and supervise the same in India. Therefore, the UK Company not only made available of design and drawings to the assessee-company but also erected the entire project in India under the personal supervision. Therefore, the services taxable in India. Disallowance was upheld. (AY. 2008-09, 2009-10)

Servall Engineering Works (P.) Ltd. v. DCIT (2016) 52 ITR 252 / 161 ITD 457 (Chennai) (Trib.)

S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Not liable to deduct tax at source on branding expenses paid to overseas entity. 809

The assessee had paid branding expenses to overseas entities to promote its money transfer business. A certain amount was created as a provision at the end of the year, which was paid subsequently. The AO disallowed the same on the ground that tax was not deducted by the assessee. Further, the AO disallowed the provision since the liability has not crystallized in the impugned year. Following the order in the case of another group company, the ITAT held that tax ought not be deducted on branding expenses incurred by the assessee and that provision of branding expense was also allowable since the assessee had been consistently following mercantile system of accounting. (AY. 2010-11)

Muthoot Finance Ltd. v. Addl. CIT (2016) 52 ITR 241 (Cochin)(Trib.)

S. 40(a)(i) : Amounts not deductible – Deduction at source – Fees for technical services – Subsequent retrospective amendment would not expose payer to an impossible situation of requiring deduction of tax at source on date of payment – Not liable to deduct tax at source – DTAA-India-UK-USA [S. 9(1)(vii), 40(a)(1), 195, Art. 14] 810

Dismissing the appeal of the revenue the Tribunal held that subsequent retrospective amendment would not expose payer to an impossible situation of requiring deduction of tax at source on date of payment, hence not liable to deduct tax at source. (AY. 2008-09)

ACIT v. BSR & Company (2016) 159 ITD 1068 / 182 TTJ 544 (Mum.)(Trib.)

811 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Permanent establishment – Logistic services from overseas Associated enterprises outside India on principal-to-principal basis, the assessee was not liable to deduct tax at source – DTAA-India-UAE [S. 9(1)(i), 195, 195A, 201, Art. 5]**

Dismissing the appeal of the revenue, the Tribunal held that, assessee company which is engaged in business of providing logistics services worldwide, which has availed logistics services from overseas associated enterprises exclusively outside India on principal to principal basis and there was no agency, merely because word 'agency' was used in relevant agreement, it did not mean that there existed relationship of agency therefore tax was not required to be deducted at source on payment (AY. 2012-13)

Balmer Lawrie & Co. Ltd. v. ITO (2016) 159 ITD 73 (Kol.)(Trib.)

812 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Royalties and fees for technical services – Marketing services was held to be not liable to deduct tax at source – DTAA-India-UK-Singapore. [S. 9(1)(vii), 195, Art. 12, 13]**

Allowing the appeal of the assessee, the Tribunal held that assessee which is in the business of stock broker to foreign subsidiaries rendered services which were in nature of simple marketing services of introducing foreign institutional investors to invest in capital markets in India and no technical service was being made available, payments made to subsidiaries for aforesaid services would not fall within definition of 'fees for technical services' hence not liable to deduct tax at source. (AY. 2008-09, 2009-10)

Batlivala & Karani Securities (India) (P.) Ltd. v. Dy. CIT (2016) 159 ITD 924 / 180 TTJ 558 (Kol.)(Trib.)

813 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Consideration paid for purchase of software and seller is not having any permanent establishment in India, the assessee was not liable to deduct tax at source – DTAA-India-USA. [S. 9(1)(vi), 195, Art. 12]**

Dismissing the appeal of the revenue, the Tribunal held that Assessee-company purchased different types of software from non-residents which were used in its business of oil and gas exploration. Software purchased by assessee was a standardized software for use in own business of assessee only. Assessee had not been given any commercial right to reproduce and sell copies of software and party from whom assessee acquired software was not having any permanent establishment in India and there was no time limit of expiry of said software. Consideration paid by assessee as per clauses of DTAA could not be said to be royalty and same would be outside scope of definition of 'royalty' as provided in DTAA and would be taxable as business income of recipient but in absence of permanent establishment could not be taxed in India. (AY. 2006-07 and 2007-08)

Dy. CIT v. Reliance Industries Ltd. (2016) 159 ITD 208) / 180 TTJ 22 (Mum.)(Trib.)

814 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident– Reimbursement of expenses – Agreements were not available before DRP, matter was seta side. [S. 9(1)(vii)]**

Tribunal held that since relevant agreement regarding reimbursement of expenses was not available on record, matter was to be re-adjudicated. (AY. 2007-08)

CISCO Systems Services v. JCIT (2016) 161 ITD 12 (Bang.)(Trib.)

S. 40(a)(i) : Amounts not deductible – Deduction at source – Payment to non-resident agent for rendering services outside India is not liable to deduct tax at source – Article 7 of OECD Model Tax Convention. [S. 9(1)(i), 195] 815

Payment to non-resident agent for rendering services outside India and said agent did not have any PE in India, said payment was not liable to tax in India hence not liable to deduct tax at source. (AY. 2011-12)

DCIT v. S.R.M. Agro Foods. (2016) 161 ITD 786 (Mum.)(Trib.)

S. 40(a)(i) : Amounts not deductible – Deduction at source – Payment to AE for raw material, spare parts and capital goods fall under section 24(3) of Article of India-Japan DTAA hence not liable to deduct tax at source. [S. 9(1)(i), 195, Art. 24(3)] 816

Payment to AE for raw material, spare parts and capital goods fall under section 24(3) of article of India-Japan DTAA hence not liable to deduct tax at source

Honda Cars India Ltd. v. DCIT (2016) 161 ITD 655 / 181 TTJ 36 (Delhi)(Trib.)

S. 40(a)(i) : Amounts not deductible – Deduction at source – Commission – Disallowance was confirmed since assessee except making a claim that it was director's salary, could not furnish any other evidence to substantiate same. [S. 9(1)(i), 195] 817

Disallowance was confirmed; since assessee except making a claim that it was director's salary, could not furnish any other evidence to substantiate same. (AY. 2008-09)

DCIT v. Neuland Laboratories Ltd. (2016) 161 ITD 422 (Hyd.) (Trib.)

S. 40(a)(i) : Amounts not deductible – Deduction at source – Fees for technical services – AO assessed consultancy services as technical services, matter was remanded – Article 5 and 12 of OECD Model tax convention. [S. 9(1)(i), 195] 818

Assessee had entered into an agreement with a company for availing certain consultancy services. The AO held same to be 'technical services'. CIT(A) without giving any reason as to why not accepting assessee's contentions, confirmed order. ITAT held that If consultancy charges are in nature of 'fees for technical services' or 'royalty', then it would be taxable in India irrespective of situs of services but if it is business income of recipient, then even if it is earned in India, it would be taxable only if recipient has a PE in India. Matter was remanded to AO for *de novo* consideration. (AY. 2008-09, 2009-10)

DCIT v. Neuland Laboratories Ltd. (2016) 161 ITD 422 (Hyd.)(Trib.)

S. 40(a)(i) : Amounts not deductible – Deduction at source – Royalties and fee for technical services – transponder fee to US based company for rendering services through satellite located outside India, payment was not for right to use any industrial, commercial or scientific equipment, did not fall within ambit of term 'royalty' – DTAA-India-USA. [S. 9(1)(vii), 195, Art. 12] 819

Assessee had made payments for transponder fee to PanAmSat, USA for rendering services through satellite located outside India in telecasting sports channel 'Ten sports' to various countries including India. The AO took a view payment was in nature of 'royalty' and fell under clause (iva) of Explanation 2 to s. 9(1)(vi). CIT(A) held that payment not for use of any equipment, did not amount to 'Royalty'. The payment was

for use of services. On appeal by the revenue dismissing the appeal, the Tribunal held that transponder fee paid to US based company for rendering services through satellite located outside India, payment was not for right to use any industrial, commercial or scientific equipment, did not fall within ambit of term 'royalty'. (AY. 2003-04 to 2005-06)
ADDIT v. Taj TV Ltd. (2016) 161 ITD 339 / (2017) 184 TTJ 202 / 147 DTR 30 (Mum.)(Trib.)

820 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Interest paid to banks in India for amount borrowed from foreign banks and payment not made in foreign currency payment – exempted from tax deduction at source – disallowance deleted. [S. 194A(3)]**
The assessee paid interest to banks located within India on amounts borrowed from foreign banks and the payment was not made in foreign currency. The Commissioner (Appeals) held that the interest paid to banks in India was exempt from tax deduction at source in terms of section 194A(3)(iii)(a) of the Act. The Tribunal held that the interest was paid to the banks located in India and not outside India and the payment was not made in foreign currency on amounts borrowed from foreign banks. Therefore, the disallowance under section 40(a)(i) was not warranted. (AY. 2005-06, 2008-09, 2009-10)
Brakes India Ltd. v. DCIT (2016) 46 ITR 212 (Chennai)(Trib.)

821 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Fees for technical services – Services in nature of recruitment or placement agency do not come under purview of 'fees for included services' – Not liable to deduct tax at source – DTAA – India-USA. [S. 9(1)(vii), 195, Art. 12(4)(b)]**
Services in nature of recruitment or placement agency do not come under purview of 'fees for included services' within meaning of Article 12(4)(b) of DTAA. Retrospective amendment to section 9 cannot change tax withholding liability with retrospective effect. Assessee company made certain payments to its overseas group companies as reimbursement of expenses incurred by them for recruitment of employees on behalf of assesse. The assessee had furnished all necessary details about said expenditure. However, the AO made disallowance u/s. 40(a)(i) by treating said expenditure as FTS as per provisions of s. 9(1)(vii). Since payments were pure and simple reimbursement of recruitment expenses, section 195 was not attracted and, consequently, disallowance u/s. 40(a)(i) was not called. (AY. 2007-08)
ACIT v. Lehman Brothers & Advisors (P.) Ltd. (2016) 157 ITD 1003 (Mum.)(Trib.)

822 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Late deposit of tax – Assessee deducted tax at source from royalty paid to its foreign associate in subsequent year and failed to deposit same within due date specified u/s. 200(1), disallowance was held to be justified. [S. 200(1)]**
Assessee Company deducted TDS from royalty paid to its foreign associated enterprise in subsequent year and also failed to deposit same within due date specified u/s. 200(1), it was rightly disallowed by revenue u/s. 40(a)(i). However in view of proviso to s. 40(a)(i) assessee would be eligible for deduction towards royalty payment, in year in which TDS was deducted and remitted into Government account, i.e., for assessment year 2008-09. (AY. 2007-08, 2008-09)
ACIT v. L.G. Polymers India (P.) Ltd. (2016) 157 ITD 1113 (Visakhapatnam)(Trib.)

S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – Retro amendments – Disallowance was not justified as assessee could not have visualized to deduct TDS in absence of any provision at time of making payment and since there was already a prevailing law laid down by Supreme Court that in such a case no TDS was to be deducted – DTAA-India-Swiss Confederation [S. 9(1), Art. 12] 823

Assessee made payment to a non-resident company for training programmes conducted by said company outside India in which assessee sent its delegates. Assessee did not deduct TDS on said payments in view of ratio laid down by supreme court in *Ishikawajma-Harima Heavy Industries Ltd. v. DIT (2007) 288 ITR 408 (SC)* wherein it was held that services rendered outside India would be taxable in India only if such services had been utilized in India. The A.O. disallowed payment for want of deduction of TDS holding that decision of Supreme Court would not be applicable in view of Explanation inserted with retrospective effect from 1-6-1976 which provided that fees for technical services received by a non-resident would be deemed to accrue in India whether or not it had rendered services in India. At time of making payment assessee could not have visualized to deduct TDS when there was no provision in this regard and there was already prevailing law laid down by Supreme Court that in such a case no TDS was to be deducted; therefore, disallowance for want of TDS was not justified. (AY. 2010-11)

Holcim Services South Asia Ltd. v. Dy. CIT (2016) 157 ITD 892 (Mum.)(Trib.)

S. 40(a)(i) : Amounts not deductible – Deduction at source – Fees for professional services outside India without deduction of tax at source – Payment made outside India was not sum chargeable to tax in India – Hence, provisions of S. 195 are not applicable [S. 195] 824

The Assessee is engaged in business of rendering taxation, business advisory, audit related services and other consultancy services. During course of assessment proceedings it was observed by AO that Assessee had paid fees for professional services outside India without deduction of tax at source. The assessee in reply to the AO's query explained that the payment made outside India is not sum chargeable to tax in India. Hence, provisions of section 195 were not applicable, consequently no disallowance could be made under S. 40(a)(i) of the Act. The AO however, made disallowance under Section 40(a)(i) by observing that services rendered by non-residents were in areas of application of high level of skills as well as technical and industrial know-how. Hence, assessee is required to deduct tax at source while making the payment. On appeal the First Appellate Authority deleted the disallowance made by A.O. on the ground that assessee did not have any liability under S. 195 r.w.s. 9(1)(vii) to deduct tax at source from those payments. The department being aggrieved by the order of the Ld. CIT(A) preferred an appeal before the Appellate Tribunal. The Tribunal dismissed the appeal of the department by observing that provision of S. 195(1) uses expression "chargeable" under the provisions of the Act. As the payment made by assessee is not chargeable to tax in India, TDS is not required to be deduction under S. 195 of the Act. (AY. 2008-09)

KPMG v. ACIT (2016) 177 TTJ 708 / 137 DTR 1 (Mum.)(Trib.)

825 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Non-resident – TDS is not required to be deducted on payment by foreign bank's Indian branch to its overseas head office and, therefore, disallowance of such payment is not valid – Model OECD convention. [S. 9(1)(i), Art. 11]**

TDS is not required to be deducted from payments made by a foreign bank's Indian branch to its overseas head office, since in such a situation, payment is made by non-resident to himself and, therefore, disallowance of said payment is not valid. (AY. 2009-10)

DBS Bank Ltd. v. Dy. IT(IT) (2016) 157 ITD 476 / 176 TTJ 293 / 131 DTR 121 (Mum.)(Trib.)

826 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Commission – Rendering market service abroad – Matter remanded [S. 9(1)(i), 195]**

Tribunal held that assessee did not bring material on record showing that non-resident agents had rendered marketing services abroad and there was no business connection in India, question as to whether commission paid to them was taxable in India, was to be remanded back for disposal afresh. (AY. 2010-11)

Chenitan Color Chem (P.) Ltd v. ACIT (2015) 43 ITR 181 / (2016) 156 ITD 509 (Chennai)(Trib.)

827 **S. 40(a)(i) : Amounts not deductible – Deduction at source – Sales commission – Non-resident – Matter remanded. [S. 9(1)(i), 195]**

Assessee had made payment of sales commission to non-resident agents. Since assessee did not deduct tax at source while making said payments, Assessing Officer disallowed same by invoking provisions of section 40(a)(i). Commissioner (Appeals) deleted said disallowance. On appeal Tribunal held that since assessee had not established that non-resident had rendered services abroad and there was no business connection in India by producing relevant records, nature of services rendered by non-resident agents could not be determined. Matter remanded. (AY. 2011-12)

ACIT v. Euro Leder Fashions Ltd. (2016) 156 ITD 208 (Chennai)(Trib.)

828 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Fees for technical services – Fee paid to Bombay Stock Exchange as Transaction charges is not fees for technical services – Not liable to deduct tax at source. [S. 9(1)(vii), 194J]**

The High Court of Bombay (*CIT v. Kotak Securities Ltd. (2012) 340 ITR 333*) held that the transaction charges paid by a member of the Bombay Stock Exchange to transact business of sale and purchase of shares amounts to payment of a fee for 'technical services' rendered by the Bombay Stock Exchange. Therefore under the provisions of Section 194J of the Income-tax Act, 1961 (for short "the Act"), on such payments TDS was deductible at source. The said deductions not having been made by the appellant – assessee, the entire amount paid to the Bombay Stock Exchange on account of transaction charges was not deducted in computing the income chargeable under the head "profits and gains of business or profession" of the appellant. On appeal reversing the judgment, the Court held that Fee paid to Bombay Stock Exchange as transaction charges is not fees for technical services hence not liable to deduct tax at source. (AY. 2005-06)

CIT v. Kotak Securities Ltd. (2016) 383 ITR 1 / 285 CTR 63 / 239 Taxman 139 / 133 DTR 151 (SC)

Editorial: Bombay High Court Judgment in CIT v. Kotak Securities Ltd. (2012) 340 ITR 333 (Bom.)(HC) is reversed.

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – Provision attracting disallowance introduced "with effect from 1-4-2005" – Refers to financial year not AY – No disallowance of payments made without deduction of tax in financial year ending 31-3-2005. [S. 194C] 829

Allowing the appeal of assessee the Court held that Section 11 of the Finance (No. 2) Act, 2004 by which sub-clause (ia) had been added to section 40 did not provide that it was to become effective from the AY. 2005-06. It had merely said that it was to become effective on April 1, 2005, which should have been meant to refer to the financial year. There was no scope for ambiguity or confusion. The Tribunal had erred in applying the provision of section 40(a)(ia) in disallowing the payment made to a contractor without deducting tax at source during the financial year 2004-05, corresponding to AY. 2005-06. (AY. 2005-06)

Piu Ghosh v. Dy. CIT (2016) 386 ITR 322 / 73 taxmann.com 226 (Cal.)(HC)

S. 40(a)(ia) : Amounts not deductible – Deduction at source disallowance was held to be justified even if no payment remained payable on last day of financial year [S. 194C] 830

Allowing the appeal of the revenue, the Court held that Payments made by assessee without deduction of TDS would be disallowed under section 40(a)(ia) even if no payment remained payable on last day of financial year. Matter remanded. (AY. 2006-07)

CIT v. T. Kurvilla (2016) 242 Taxman 139 (Ker.)(HC)

Editorial: T. Kurvilla v. Dy. CIT (2013) 33 taxmann.com 640 (Cochin)(Trib.) is set aside.

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Amendment by Finance Act, 2010 relaxing time limit for payment of tax deducted at source in first eleven months of year till due date for filing return, amendment is retrospective. 831

Dismissing the appeal of revenue the court held that; Amendment by Finance Act, 2010 relaxing time limit for payment of tax deducted at source in first eleven months of year till due date for filing return, amendment is retrospective. *CIT v. Santhosh Kumar Shetty (2014) 3 ITR-OL 306 (Karn)* followed.

CIT v. Sri Scorpio Engineering P. Ltd. (2016) 388 ITR 266 (Karn.)(HC)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Shortfall in deduction of tax due to *bona fide* mistake disallowance was held to be not justified. 832

The assessee had made deduction of tax at source at 1 per cent instead of 2 per cent on certain payments and failed to remit the tax deducted at source within the due date for filing the return of income for the assessment year 2010-11 under section 139(1) of the Act. On examination by the Assessing Officer, the assessee explained that subsequently, on realisation that the tax deducted at source on the said payments were to be made at 2 per cent thereon, instead of 1 per cent as had been done by the assessee, the balance tax deducted at source was paid on January 31, 2011 along with interest. The amount was disallowed by the Assessing Officer but the Tribunal set aside the disallowance. On appeal, dismissing the appeal of Revenue the Court held that in view of the contention of the assessee that in the middle of the year, there was a change of law about the deduction, the Tribunal was justified in deleting the disallowance. (AY. 2010-11)

CIT v. Kishore Rao (HUF) (2016) 387 ITR 196 (Karn.)(HC)

833 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Subscription to e-magazines is not rendering of professional services hence tax is not deductible at source as subscription.**

Dismissing the appeal of revenue the Court held that the Commissioner (Appeals) and the Tribunal had reached a concurrent finding of fact that payments made to B were for subscription to e-magazines and therefore, there was no occasion to deduct tax under the Act. Thus section 40(a)(ia) could not have been invoked. The submission on behalf of the Revenue that B's magazines/information was backed by solid research carried out by its employees and made available on the website would not by itself result in B rendering any consultative services. It was not the case of the revenue that specific queries raised by the assessee were answered by B as a part of the consideration of ₹ 4.34 lakhs. The information was made available to all subscribers to e-magazines/ journal of B. Therefore, in no way could the payments made to B be considered to be in the nature of any consultative/professional services rendered by B to the respondents. The Tribunal was justified in deleting the disallowance made by the Assessing Officer under section 40(a)(ia) of expenditure incurred by the assessee-company towards payment of data charges to B even though the assessee-company had not deducted tax at source on such payment made to avail of professional services. (AY. 2006-07)

CIT v. India Capital Markets P. Ltd. (2016) 387 ITR 510 (Bom.)(HC)

Editorial : The Supreme Court has granted special leave to the Department to appeal against this judgment, CIT v. India Capital Markets P. Ltd. (2016) 384 ITR 122 (St.)

834 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Sub-contractor – Failure by assessee to make deduction disallowance of payment was justified. [S. 194C, 260A]**

Dismissing the appeal the Court held that the Tribunal arrived at the finding of fact that the person to whom the payment was made was a sub-contractor. The finding of the Tribunal was not perverse to be interfered in an appeal under section 260A of the Act. Once the status of the person as a sub-contractor was accepted, the liability under section 194C was automatically attracted. Since, the assessee did not effect deduction under section 194C of the Act, the payment was to be disallowed under section 40(a) (ia) of the Act. (AY. 2009-10)

Prasanna Radha Krishnan (Smt.) v. ITO (2016) 387 ITR 162 / 73 taxmann.com 72 (Ker) (HC)

835 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payment of wages through agents – No work contracts – Persons to whom payments made neither contractors nor sub-contractors – No liability to deduct tax at source – Disallowance unsustainable. [S. 194C]**

Allowing the appeal of assessee the Court held that the persons to whom the payments had been made had been working on behalf of the assessee and not as sub-contractors and there was nothing on record to show that any work had been assigned to them by the assessee. The payment made to workers through the hands of the four persons was a payment made directly by the assessee to those persons. On the basis of the letters that had been received by the Assessing Officer from the four persons, it could neither be held that they were sub-contractors nor that the assessee had assigned to them the work that had been entrusted with him. Unless these factors were proved, the question of

applicability of section 194C(2) did not arise and that there was no liability of deduction of tax at source. The order of the Tribunal upholding the addition of labour charges was perverse. (AY. 2006-07)
Jiauddin Mollah v. CIT (2016) 385 ITR 394 (Cal.)(HC)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Freight charges – Assessee, buyer, reimbursing transportation expense – Liability to deduct tax at source on supplier under agreement – No liability on assessee to deduct tax. [S. 194C] 836
Allowing the appeal of assessee the Court held that under the contract of sale, the seller was bound to send the goods to the buyer and showed that the seller was bound to pay the transportation charges to the transport agency and was entitled to recover it from the buyer. The assessee had merely reimbursed the cost of transportation incurred by the seller. Section 40(a)(ia) might be applied to the seller but not to the case of the assessee who was the buyer. The agent being the supplier had admittedly paid to the transporters and had also deducted the tax at source. When the agent had complied with the provision, the principal could not have been visited with penal consequences. For one payment there could not have been two deductions. Moreover, when a person acted through another, in law, he acted himself. The Tribunal was wrong in holding that the assessee was liable to deduct tax at source in respect of the freight component. (AY. 2006-07)
Hightension Switchgears P. Ltd. v. CIT (2016) 385 ITR 575 / 240 Taxman 582 / 290 CTR 97 / 143 DTR 228 (Cal.)(HC)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Failure to deduct tax at source on payments made to contractors, towards rent and professional charges – Disallowance was held to be justified. [S. 194C, 194I, 194J] 837
Assessee running sugar factory. Agreements entered into with harvesters and transporters of sugarcane. Tax was not deducted at source on payments to contractors, towards rents and professional charges. On appeal by revenue, allowing the appeal the Court held that the disallowance of expenditures was held to be justified. (AY. 2005-06 to 2011-12)
ACIT v. Ryatar Sahakari Sakkare Karkhane Niyamit (2016) 383 ITR 561 / 67 taxmann.com 283 / 137 DTR 383 / 287 CTR 649 (Karn.)(HC)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Non-resident – Commission – Services rendered outside India – Order of Tribunal was set aside for reconsideration. [S. 195] 838
The Tribunal took the view (*Sesa Resources v. ACIT*) that in view of the 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). In appeal High Court, setaside the order of Tribunal. (AY. 2009-10)
Sesa Resoureces Ltd. v. DCIT (2016) 136 DTR 169 / 287 CTR 89 (Bom.)(HC)
Editorial : After setaside, Tribunal decided in favour of assessee. ITA No 267/Pan/2015 dated 27-04-2016 DCIT v. Sesa Resoureces Ltd. www.itatonline.org

839 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Commission – Services were rendered outside India – Not liable to deduct tax at source. [S. 9(1)(i), 9(1)(vii), 195]**

Commission paid to a non-resident for services rendered outside India is not chargeable to tax in India and is not liable for TDS. Insertion of Explanation 4 to s. 9(1)(i) and Explanation 2 to s. 195(1) by FA 2012 w.r.e.f. 01.04.1962 and insertion of Explanation below s. 9(2) by FA 2010, w.r.e.f. 01.06.1976 makes no difference to the law. (AY. 2010-11)

CIT v. Farida Leather Company (2016) 238 Taxman 473 / 135 DTR 268 / 287 CTR 565 (Mad.)(HC)

840 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payments made for purchase of software as product and for resale in Indian market – Not "royalty" – Assessee not liable to deduct tax at source. [S. 9(1)(vi), 195]**

Held, that the agreement indicated that the assessee was appointed for the purposes of reselling the software and payments made were on account of purchases made by the assessee. Payments made by a reseller for the purchase of software for sale in the Indian market could not be considered royalty. It was not disputed that in the preceding year, the Assessing Officer had accepted the transactions to be of purchase of software. The assessee was not liable to deduct tax at source. Deletion of addition was proper. (AY. 2008-09)

Pr.CIT v. M. Tech India P. Ltd. (2016) 381 ITR 31 / 238 Taxman 178 / 132 DTR 57 / 287 CTR 213 (Delhi)(HC)

841 **S. 40(a)(ia) : Amount not deductible – Deduction at source – When income is computed under section 11, no disallowance can be made for failure to deduct tax at source. [S. 10(23C), 11]**

Allowing the appeal of the assessee, the Tribunal held that when the income is computed u/s. 11, provisions of section 40(a)(ia) cannot be applied. (AY. 2008-09)

Sri Koundinya Educational Society v. ACIT (2016) 159 ITD 416 / 181 TTJ 677 (Visakha) (Trib.)

842 **S. 40(a)(ia) : Amount not deductible – Deduction at source – Non-resident – Ownership on drawings, specifications and documents not passed on to assessee and remaining property of payee, not liable to deduct tax at source – DTAA – India-USA [S. 195, 201, Art. 12]**

Non-resident Payee Company rendering architectural services from its office outside India. Payee not transferring any technology or technical knowhow or copyrighted scientific work designs, drawings and layouts project specific ownership on drawings, specifications and documents not passed on to assessee and remaining property of payee. Payments by assessee to non-resident not in nature of "royalty" or "fees for technical services". Hence the assessee is not liable to deduct tax at source. (AY. 2008-09, 2009-10)

Gera Developments P. Ltd. v. Dy. CIT (2016) 52 ITR 1 / 160 ITD 439 / 181 TTJ 510 (Pune) (Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – No liability of TDS on reimbursement of expenditure for common services. 843

Dismissing the appeal of the revenue, The Tribunal held that the expenditure is primarily incurred in the first instance by these companies. The assessee only borne its share of expenses by making the reimbursement to these two companies. The responsibility of TDS would be on those two companies when they actually incurred the expenditure. The assessee has only reimbursed the expenditure which belonged to the assessee share. On such reimbursement of expenditure, there is no liability of TDS. (AY. 2010-11)

ITO v. Escorts Asset Management Limited, (2016) 49 ITR 37 (Delhi)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Reimbursement of expenditure i.e., management fee of Asset Management Company in excess of SEBI prescribed limit – Pimary obligation to deduct TDS not on assessee. 844

Dismissing the appeal of the revenue, the Tribunal held that in this case also, the expenditure is primarily incurred and paid for by the mutual fund and thereafter to the extent it exceeds the limit prescribed by SEBI, it is recovered by mutual fund from the Asset Management Company. Thus, the primary obligation to deduct TDS is on the mutual fund at the time of payment for the expenditure. The assessee only reimbursed the expenditure to the mutual fund which is in excess of the limit prescribed by SEBI. On such reimbursement of expenditure, there is no liability of TDS. (AY. 2010-11)

ITO v. Escorts Asset Management Limited, (2016) 49 ITR 37 (Delhi)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Company provided designs, drawing and further erected project in India, payment to UK Company is liable to taxed in India – DTAA – India-UK. [S. 195, Art. 13] 845

UK-Company made available to the assessee company design and drawings and also erected project in India under its own supervision. Said services were rendered in India, payment made by assessee to UK-company taxable in India. (AY. 2008-09)

Servall Engineering Works (P.) Ltd. v. DCIT (2016) 161 ITD 457 / 52 ITR 252 (Chennai) (Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Provision cannot be invoked to disallow expenditure which has been actually paid within same year, without deduction of TDS. 846

The Assessee had paid to a resident without deducting TDS at the tme of deposit of tax. Provisions of s. 40(a)(ia) cannot be invoked to disallow expenditure which has been actually paid within same financial year, without deduction of TDS. (AY. 2011-12)

Efftronics Systems (P.) Ltd. v. (2016) 161 ITD 688 / 52 ITR 497 (Visakha(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Once Form No. 15G/ Form 15H were received by persons responsible, no liability to deduct TDS. [S. 194A] 847

Assessee paid interest to a resident without deduction TDS. Held that once Form No. 15G/Form 15H were received for deducting tax, there was no liability to deduct TDS in

view of S. 194A even said documents were not filed before proper authority S. 40(a)(ia) cannot be invoked in such case. (AY. 2007-08, 2010-11)
ACIT v. Chittoor Dist. Co-operative Central Bank Ltd. (2016) 161 ITD 282 / 50 ITR 303 (Hyd.)(Trib.)

848 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payment was made before due date of filing of return, Amendment to S. 40(a)(ia) by Finance Act, 2010 w.e.f. 1-4-2010 is retrospective, no disallowance can be made.**
Tribunal held that the Amendment to S. 40(a)(ia) by Finance Act, 2010 w.e.f. 1-4-2010 is retrospective and, therefore, TDS has to be paid on or before due date specified for filing return of income u/s. 139(1). In view of same Assessee made payments of TDS in next financial year but before due date for filing return of income u/s. 139(1), said payments could not be disallowed u/s. 40(a)(ia). (AY. 2010-11)
Foods and Inns Ltd. v. ACIT (2016) 159 ITD 1007 (Mum.)(Trib.)

849 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Once income is assessed by applying net profit rate disallowances cannot be made, and also income has been shown in hands of the recipient and has suffered tax.**
The Tribunal held that once the income is assessed by applying net profit rate, no disallowance under section 40(a)(ia) can be made and the section is not applicable as the impugned amount has been shown in the hands of recipient and has suffered tax. (AY. 2011-12)
ACIT v. J. S. Grover Constructions (2016) 181 TTJ 23 (UO) (Asr.)(Trib.)

850 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Amounts payable – No disallowance can be made if no amount was payable at the end of the accounting year.**
Dismissing the appeal of the revenue, the Tribunal held that no disallowance can be made if the amount was paid before the end of the financial year and no amount was payable at the . (AY. 2008-09)
ACIT v. Red Brick Realtors P. Ltd. (2015) 38 ITR 749 / 70 SOT 592 (Chennai)(Trib.)

851 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payment of product designing charges outside India for services rendered outside India – Not liable to deduct tax at source. [S. 195, 201(1), 201(1A)]**
Dismissing the appeal of the revenue the Tribunal held that; the commission amount which was earned by a non-resident for services rendered outside India would not be deemed to be income which is either accrued or arisen in India. As it was not disputed that payment in foreign currency was made to non-resident outside India for services rendered outside India, decision of the Apex Court in the case Toshoku Ltd., was found to be applicable to the facts of the case of the assessee. The tribunal concluded stating that payment made to non-resident for service rendered outside India is not liable for TDS under the provisions of the Act and therefore, disallowance of the same invoking the provisions of section 40(a)(ia) of the Act would not arise. (AY. 2008-09)
ACIT v. Amarvathy Textiles (2015) 125 DTR 321 / 70 SOT 648 / 173 TTJ 641 (Chennai) (Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Liaisoning charges and purchase of catalogue and brochure, payment was not required to be deducted. [S. 194C, 194J] 852

Allowing the appeal of the revenue, the Tribunal held that liaisoning charges and purchase of catalogue and brochure, payment was not required to be deducted under section 194C and 194J of the Income-tax Act. (AY. 2008-09)

Rattan Brothers v. ACIT (2016) 160 ITD 365 (Amritsar)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Interest – Co-operative bank – No outstanding balance as on year end hence TDS provision would not get attracted [S. 194A] 853

Dismissing the appeal of the revenue, the Tribunal held that where payment was already made to non-members and there was no outstanding balance as on year end, TDS provision of section 40(a)(ia) would not get attracted. (AY. 2012-13)

ACIT v. Warangal Urban Co-operative Bank Ltd. (2016) 161 ITD 56 (Hyd.)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Where income is computed under S. 11, provisions of S. 40(a)(ia) and 43B are not applicable. [S.11, 12A, 43B] 854

The legislature in its wisdom has kept separate provisions which are independent from any other provisions of the Act for computation of income of trusts claiming exemption under section 11. Therefore, when income is computed under section 11, the provisions of sections 40(a)(ia) and 43B are not applicable. Hence, the Assessing Officer was not correct in disallowing the amounts by invoking the provisions of sections 40(a)(ia) and 43B for failure to deduct TDS and failure to remit the unpaid liabilities. (AY 2009-10)

ITO v. Mother Theresa Educational Society (2016) 158 ITD 473 (Visakha)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Salaries reimbursed of the employees deputed by the AE of the assessee cannot be disallowed if the tax was deducted at source u/s. 192 while making the payment by the AE. [S. 192] 855

The assessee was engaged in the business of manufacture of medicines. The marketing activity of the products was carried out by its associate companies. It incurred a sum of ₹ 8.73 crores towards sales promotion expenses reimbursed to its group companies. Since the assessee did not deduct tax at source from these reimbursements, the Assessing Officer disallowed the expenses under section 40(a)(ia) of the Income-tax Act, 1961. The Commissioner (Appeals) held that the reimbursement of expenses did not contain any income element and, hence, there was no liability on the part of the assessee to deduct tax at source from those payments. On appeal, it was held that there was an agreement between the assessee and the marketing companies. The marketing companies were entitled to commission for the sales generated by them. Under the agreement, the marketing companies required sufficient number of employees for effectively marketing the products. The salary expenses, travelling and conveyance expenses, etc., incurred by the marketing companies were required to be reimbursed by the assessee. Thus, the reason why the expenses were reimbursed by the assessee to the marketing companies was sufficiently explained. The marketing companies had deducted tax at source from the salary payments. Thus, the expenses reimbursed by

the assessee had already suffered tax deduction at source at the end of the marketing companies. Accordingly, there was no requirement of invoking the provisions of section 40(a)(ia) in the hands of the assessee. It was not the case of the Assessing Officer that other expenses incurred by the marketing companies required tax deduction. (AY. 2008-09, 2009-10)
DCIT v. Martin & Harris Laboratories Ltd. (2016) 48 ITR 641 (Mum.)(Trib.)

856 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Income was not computed under head of business income, provision of section 40(a)(ia) could not be invoked. [S. 10(23C(iv)]**
Assessee was a Charitable Trust registered u/s. 10(23C)(iv). The AO noted that there were certain expenses incurred by assessee but it did not deduct TDS on these payments, He therefore disallowed these expenses invoking provisions of s..40(a)(ia). The ITAT held that since assessee was a trust which was claiming exemption u/s. 10 or 11 and assessee was not carrying on any business or profession, its income was not to be computed under head of business income, and since income was not computed under head of 'business income', provisions of section 40(a)(ia) could not be invoked. (AY. 2008-2009 to 2011-12)
ITO v. Haryana State Counseling Society (2016) 159 ITD 816 / 179 TTJ 660 (Chd.)(Trib.)

857 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Discount on prepaid charges, held the tax was not deductible at source. [S. 194H]**
The Tribunal while holding in favour of assessee concluded that in view of the findings of the Guwahati and Jaipur Benches of the Tribunal in assessee's own case that the provisions of S. 194H is not applicable to the discount allowed to the distributors in respect of prepaid cards, there was no amount on which TDS was deductible and, therefore S. 40(a)(ia) cannot come into play. (AY. 2006-07, 2008-09)
Bharti Hexacom Ltd. v. ACIT (2016) 179 TTJ 25 (Delhi)(Trib.)

858 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Royalty – Rent – Professional fees – No scope for assessee to deduct tax for payments made before amendment came into force – Only amounts payable as on 31, March disallowable. [S. 194I, 194J]**
Assessee incurred expenditure on payment to pay channels, royalties, commission, programme and new expenses, advertisement and rent without deducting tax at source. The Assessing officer disallowed the expenses u/s. 40(a)(ia) of the Act. On appeal the Tribunal held that

(i) With regard to pay channel charges the term 'royalty' appeared for the first time in Section 194J of the Act in the year 2007 and therefore there was no scope for the assessee to deduct tax at source in respect of payments made for obtaining the signals from the signal provider.

(ii) With regard to payment to cable operators, legal and professional charges, consumables and cable laying charges and advertisement was not disallowable u/s 40(a)(ia), if entire amount was paid before 31st March, 2007. The disallowance could only be restricted to the amount outstanding at the end of the year. Issue remanded to verify the amount outstanding at the end of the year.

(iii) With regard to expenditure towards hire charges for machinery and up-linking charges for live telecast of programmes in nature of royalty was to be allowable since the term 'machine hire charges' was also inserted in Section 194J by an amendment in the year 2006.
(iv) With regard to rent u/s. 194I, disallowance restricted to amount outstanding at the end of the year. Issue remanded for verification. (AY 2007-08)

Incable Net (Andhra) Ltd v. ITO (2016) 47 ITR 356 (Hyd.)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Advertising revenue – Commission paid to advertising agency – No disallowance in case tax has been paid by the payee. [S. 194H] 859

The assessee was engaged in the business of broadcasting and during the year under consideration, it has received the net revenue from the advertising agency towards advertising. The said revenue was accounted in the books of account after deducting tax at 15 per cent on the gross receipts. The Assessing Officer noted that the assessee had earned gross revenue and had not granted income and expenses of 15 per cent. This difference of 15 per cent has been treated as commission paid by the assessee to the advertising agency. Since no TDS has been deducted, which, according to him, should have deducted under section 194H, therefore, he disallowed the amount under section 40(a)(ia). The ITAT deleted the disallowance by the AO since it was proved that the payees have paid tax on the same. It was held that second proviso to s. 40(a)(ia) was directory and curative and had retrospective effect from 1-04-2015 and hence the Assessee was not in default of s. 201(1) as well as 40(a)(ia). (AY. 2009-10)

Nimbus Communications Ltd. v. ACIT (2016) 47 ITR 496 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Commission – Disallowance in case tax was not deducted on part of the amount. 860

The AO disallowed commission expenses claimed by the assessee on the basis that tax was not deduction on the same. Part relief was granted by the CIT(A) since tax was deducted by the Assessee on part of the amount. The ITAT upheld the order of the CIT(A) and the disallowance u/s 40(a)(ia) of the amount on which no tax was deducted. (AY. 2009-10)

Kaiser Industries Ltd. v. JCIT (2016) 47 ITR 656 (Amritsar)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Income computed under section 11 – No disallowance can be made. [S. 11] 861

Where income of the assessee has to be computed under section 11, no disallowance can be made under section 40(a)(ia) by applying commercial principles. (AY. 2009-10, 2010-11)

ITO v. Kalinga Cultural Trust (2015)155 ITD 291 / 41 ITR 147 / 177 TTJ 233 / 137 DTR 103 (Hyd.)(Trib.)

862 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Second proviso to S. 40(a)(ia) inserted by FA 2013 should be treated as retrospectively applicable from 1st April 2005 – When there are conflicting judgements of non-jurisdiction High Courts, it has to follow the view which is in favour of the assessee even if it believes that this view is not the correct law.**

When there are conflicting judgments of non-jurisdiction High Courts, the Tribunal is not permitted to choose based on its perception of what the correct law is because it will amount to sitting in judgment over the High Courts' views. Instead, it has to follow the view which is in favour of the assessee even if it believes that this view is not the correct law. Second proviso to S. 40(a)(ia) inserted by FA 2013 should be treated as retrospectively applicable from 1st April 2005. (ITA No. 106/RPR/2016, dt. 24.06.20166)(AY. 2010-11)

R K P Company v. ITO (Raipur)(Trib.); www.itatonline.org

863 **S. 40(a)(ia) : Amounts not deductible – Payments by a CA firm to foreign professional entities for services rendered abroad is not taxable. The retrospective amendment to S. 9(1)(vii) to tax services rendered outside India does not apply in the context of a disallowance u/s. 40(a)(ia) in the hands of the payer – DTAA – India-USA. [S. 9(1)(vii), 195, Art, 12, 15]**

(i) The issue revolves around the payments made by the assessee to certain non-resident entities for professional services rendered by them outside India. It has been consistently explained by the assessee that the services of such entities were availed during the course of the execution of engagements of assessee firm. The assessee firm did not deduct the tax at source and, therefore, the Assessing Officer invoked the provisions of section 40(a)(i) of the Act and disallowed such expenditure. The payments have been made to 12 different professional entities based in 10 different countries. In so far as the payments that are made to KPMG LLP, USA and KPMG LLP, Canada are concerned, the same has been made on account of professional services rendered in relation to taxation and transfer pricing. Undisputedly, the professional services have been rendered by the aforesaid entities outside India. The stand of the Revenue is that such services are in the nature of 'fee for technical services' and, therefore, tax was liable to be deducted at source in India. Factually speaking, the aforesaid stand of the Revenue is devoid of any support because there is no material to establish that any technical knowledge, skill, etc. has been made available to the assessee so as to consider it as falling within the purview of Article-12 of Indo-US Double Taxation Avoidance Agreement. It is also an established fact that such non-resident recipients do not have permanent establishment in India and, therefore, in the said background the same can, at best, be treated as independent personal services covered by Article 15 of the Indo-US Double Taxation Avoidance Agreement. As a consequence and in the absence of any fixed base in India, such income cannot be held chargeable to tax in India so as to require deduction of tax at source. Therefore, invoking of section 40(a)(i) of the Act to disallow such expenditure is not tenable.

(ii) Apart therefrom, even if we were to accept, for the sake of argument, that the services by the aforesaid entities are in the nature of technical services and are rendered and utilized in India so as to be taxable in terms of section 9(1)(vii) of

the Act, even then the disallowance is not warranted as the following discussion would show. Ostensibly, the requirement of rendering services in India in order to attract section 9(1)(vii) of the Act was removed by insertion of Explanation by the Finance Act, 2010 with retrospective effect from 1/4/1976. This has been understood by the Revenue to say that in spite of the services having been rendered by the recipients outside India, the same is taxable in India by applying the aforesaid amendment. In our view, such retrospective amendment would be determinative of the tax liability in the hands of the recipients of income. So however, in the present case, what is held against the assessee is the failure to deduct tax at source at the time of payment of such income. Ostensibly, *de hors* the aforesaid amendment, the impugned income was not subject to tax deduction at source in India as per the prevailing legal position. Taxability of a sum in the hands of recipient, on account of a subsequent retrospective amendment would not expose the assessee-payer to an impossible situation of requiring deduction of tax at source on the date of payment. Therefore, on this count also the assessee cannot be held to be in default in not deducting tax at source so as to trigger the disallowance under section 40(a)(i) of the Act (ITA No. 1917/Mum/2013, dated 06.05.2016) (AY. 2009-10)

ACIT v. BSR & Co. (Mum.)(Trib.), www.itatonline.org

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Form 15H was filed – No requirement of deduction at source – No disallowance can be made [S. 194A] 864

Tribunal held that where the assessee credited interest in recipient account without deducting TDS at time of payment, in view of filing of Form 15H by recipient there was no requirement for deduction of tax and, accordingly, disallowance was not justified. (AY. 2011-12)

Narasu's Spinning Mills v. ACIT (2016) 157 ITD 512 (Chennai)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payments towards deficit registration charges as directed by High Court, no tax needed to be deducted at source. [S. 194J] 865

As directed by Calcutta High Court, assessee paid a sum towards deficit registration charges by way of bank-draft in favour of Additional Registrar of Assurances being share of client's fee of assessee. No tax needed to be deducted at source on this sum, and hence, no disallowance could be made. (AY. 2005-06)

ACIT v. Pawan Kumar Jhunjhunwala (2016) 157 ITD 667 (Kol.)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Lawyer shared client's fee with other lawyers without deducting TDS, no disallowance could be made if there was no profit element in sum paid and was mere reimbursement of expenses. [S. 194J] 866

Assessee-lawyer paid remuneration to other lawyers. It was not clear from records whether assessee claimed any deduction on such payments. It was also not clear whether said payments were reimbursed to assessee by his clients – Whether if there was no profit element in sum paid and was mere reimbursement of expenses, then no disallowance could operate. Matter remanded. (AY. 2005-06)

ACIT v. Pawan Kumar Jhunjhunwala (2016) 157 ITD 667 (Kol.)(Trib.)

867 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Audit fee, bank charges, salary, depreciation – Additional evidence was filed – Matter remanded. [S. 194J]**
On appeal before Tribunal, assessee submitted documents by way of additional evidence to indicate that expenditure incurred towards audit fee and salary were genuine and contended that payment of professional fee would not attract provisions of section 194J in view of second proviso to sub-section (1) of section 194J. Considering submissions made by assessee on applicability of section 194J as well as additional evidence produced, issue relating to claim of salary and audit fee required examination afresh. Matter remanded. (AY. 2009-10)
Girish M. Kothari v. JCIT (2016) 157 ITD 451 (Mum.)(Trib.)

868 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Contractor – Even if no written contract the assessee is liable to deduct tax at source. [S. 194C]**
Allowing the appeal of revenue the Tribunal held that assessee would be liable to deduct tax at source under section 194C on payments made as transportation charges to intermediate parties who arranged actual transporters from open market for carriage of goods by transport for assessee, even if there was no written contract between assessee and intermediary party. (AY. 2007-08)
ITO v. Gopal S. Rajput (2016) 156 ITD 827 (Mum)(Trib.)

869 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Commission – Service rendered outside India – Not liable to deduct tax at source – Retrospective amendment does not make any difference to the legal position. [S. 195]**
Commission paid to non-resident agents for services rendered outside India is not liable for TDS u/s. 195. The 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 makes no difference to the legal position. (ITA No. 267/PAN/2015, dt. 27.04.2016) (AY. 2009-10)
DCIT v. Sesa Resources Ltd. (Panji)(Trib.); www.itatonline.org

870 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Interest other than interest on securities – Nodal agency – No liability to deduct tax at source. [S. 192A, 194A]**
AO disallowed the interest on the ground that the assessee has failed to deduct tax at source. On appeal CIT(A) has taken note of amendment to section 2101 and section 40(a)(ia) made by the Finance Act of 2012, with effect from 1-4-2013 to the effect that the said provision would not apply,if the payee had taken the amount in computing its income and paid tax thereon. CIT(A) held that proviso was inserted with effect from 1-4-2013 were to remedy consequences and therefore, the same were treated as clarificatory in nature and retrospective in operation and granted relief to the assessee. On appeal Tribunal held that where assessee infrastructure corporation acted as a Nodal agency for loan taken by Government organisations from other Government organisations, if payee had taken amount of interest received by it in computing its income and paid tax thereon, assessee would have no TDS obligation. (AY. 2009-10, 2010-11)
Dy. CIT v. A.P. Industrial Infrastructure Corporation Ltd. (2016) 156 ITD 410 (Hyd.)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Last month deduction was deposited before due date of filing of return – No disallowance can be made. [S. 139(1)] 871

Tribunal held that where assessee had deducted tax in last month of previous year and deposited same before due date of filing of return under section 139(1), Assessing Officer could not disallow said payment under section 40(a)(ia) (AY. 2007-08)

Furniture Concepts (I) Ltd. v. ACIT (2016) 156 ITD 233 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Payee has paid the tax – Amendment is retrospective – No disallowance can be made. 872

Tribunal held that the amendment inserted w.e.f. 01.04.2013, is retrospective in operation because it is curative and intended to remedy an unintended consequence. Accordingly, if the payee has paid the tax, the payer will not suffer a disallowance. (ITA No. 888/JP/2014, dated 4.11.2015) (AY. 2009-10)

Rakesh Tak v. ITO (Jai.)(Trib.); www.itatonline.org

S. 40(a)(ia) : Amounts not deductible – Deduction at source – Salary – Employees deputed pursuant to a secondment agreement are not "employees" of the assessee and so the amounts paid by way of reimbursement of their salary is not subject to TDS in the assessee's hands. [S. 192] 873

The employees are not the employees of assessee Mahanagar Gas Ltd. but employees of British Gas and they are working with assessee only in view of secondment agreement. As per joint venture agreement GAIL and British Gas have agreed to second, therefore, employees to the joint venture company i.e. Mahanagar Gas Ltd. on secondment basis and under secondment agreement certain employees have been seconded to the assessee. Since the employers were seconded for limited time of 2 to 3 years, the remuneration payable to these seconded employees were being paid by British Gas or GAIL recoverable from assessee on cost-to-cost basis. The nature of secondment agreement make clear the duties of second employees, their liabilities towards assessee and reimbursement of actual cost of remuneration, benefits and disbursement by assessee to the joint venture partners. These are reimbursements. Also the employee's remuneration was allowable to tax in India then there would be tax deduction obligation on the employer who was responsible for making payment to the employees. In the present case, there was subsisting employer-employee relation between British Gas and expatriate. British Gas was also person responsible for making payment to expatriate and application for deducting tax at source from salary was on British Gas. British Gas has deducted TDS on these remunerations paid to seconded employees and also deposited in the treasury of the Govt. of India. The TDS on salary payment to expatriate seconded employees to assessee have been given certificate to assessee stating the above fact which is available in the paper book of the assessee. All taxes have been paid by British Gas and second time TDS cannot be deducted on the same amount. CBDT Circular No. 720 dated 30.08.1995 clarifies that any sum payable shall be liable for deduction of tax only under one section. (AY. 2009-10)

DCIT v. Mahanagar Gas Ltd. (Mum.)(Trib.); www.itatonline.org

874 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Fees for technical services – Expense incurred by the Foreign Branch Office for conducting its business abroad, could not be treated as fees for technical services incurred by the Assessee – Disallowance was held to be not justified. [S. 9(1)(vii)]**
Assessee undertook business outside India through its branch office in Japan. The software development work was outsourced by the Japan Branch Office to another Japanese Company. The AO held that payments made by the Branch Office were fees for technical services paid by the Assessee and were to be disallowed u/s. 40(a)(i) since no tax was deducted at source. The ITAT deleted the disallowance and held that merely because the financial statements of the Branch Office was included in the assessee's financial statements, it could not be said that the expense was of the assessee. (AY. 2008-09)
NEC HCL System Technologies Ltd. v. ACIT (2016) 176 TTJ 436 (Delhi)(Trib.)

875 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Non-resident – Reimbursement of expenses is not income in hands of the recipient and deduction of tax at source is not required.**
The AO disallowed the reimbursement of expenses made by the Assessee to its foreign associate company on the basis that tax was not deducted at source on the same. The ITAT decided in favour of the assessee and held that reimbursement of expenses was not income in hands of the non-resident and hence tax was not to be deducted on the same. (AY. 2008-09)
ITO v. Cerner Health Care Solutions P. Ltd. (2016) 45 ITR 207 (Bang.)(Trib.)

876 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Advertisement contract on which VAT was paid – Not liable to deduct tax at source. [S. 194C]**
The Tribunal held that purchase of articles relating to advertisement on which VAT is paid does not attract TDS liability, hence, disallowance under section 40(a)(ia) is not sustainable. (AY. 2007-08)
Gillette India Ltd. v. ACIT (2015) 70 SOT 289 / (2016) 175 TTJ 35 (UO)(Jaipur)(Trib.)

877 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – No disallowance was made for short deduction of tax at source. [S. 194C, 194J]**
The Tribunal held that when the assessee has made deduction of tax at source under section 194C instead of section 194J, disallowance cannot be made under section 40(a)(ia) for short deduction of tax at source.
Cross object filed by assessee dismissed. (AY. 2009-10)
Dy. CIT v. Parryware Roca (P) Ltd. (2016) 175 TTJ 450 (Chennai)(Trib.)
Roca Bathroom Products (P.) Ltd. v. Jt. CIT (2016) 175 TTJ 450 (Chennai)(Trib.)

878 **S. 40(a)(ia) : Amounts not deductible – Deduction at source – Capital or revenue – Import of software products for own use as well as for trading was capital in nature on which depreciation was allowable. [S. 32, 37(1), 195]**
The assessee imported certain software products for its business as well as for the purpose of trading. The AO disallowed the expenditure, applying the provision of sec.

40(a)(i) of the Act on the ground that the tax was required to be deducted at source u/s. 195 of the Act. The CIT(A) allowed the claim in respect of import of software observing that the payment was towards copyrighted articles and only represented the purchase price of an article and could not be considered as royalty and therefore, no obligation of the assessee to deduct tax at source u/s.195 of the Act and no disallowance could be made u/s. 40(a)(i) of the Act. On appeal by department in which the assessee raised an alternative contention that it had incurred expenses on account of software acquired within India and the AO treated it as a capital expenditure and allowed depreciation thereon and the expenditure on imported software may be treated similarly. On appeal, the Tribunal held that expenses on imported software were also in the nature of capital expenditure and depreciation was allowed thereon. The AO was to allow depreciation on the imported software purchased by the assessee. (AY. 2005-06)
Dy. CIT v. Tata Consultancy Services Ltd. (2015) 174 TTJ 570 / (2016) 46 ITR 394 (Mum.) (Trib.)

S. 40(a)(ii) : Amounts not deductible – Deduction at source – Rates or tax – Foreign taxes – Amounts not eligible for DTA relief are deductible – Tax paid in Saudi Arabia attributable to income arising or accruing in India is not eligible for relief under section 91, hence disallowance is not attracted – The Explanation-1, is declaratory and has retrospective effect. [S. 2(43), 35D, 80HHB, 90, 91] 879

Allowing the appeal the Court held that; Foreign taxes are not hit by the bar in s. 40(a)(ii) and are deductible on the real income theory. After the insertion of the Explanation to s. 40(a)(ii) by the FA 2006, foreign taxes are not deductible only to the extent they are eligible for relief u/s. 90 & 91. Amounts not eligible for DTA relief are deductible. The Explanation is declaratory and has retrospective effect. Tax paid in Saudi Arabia attributable to income arising or accruing in India is not eligible for relief under section 91, hence disallowance is not attracted. (AY. 1983-84)
Reliance Infrastructure Ltd. v. CIT (2016) 76 taxmann.com 257 / (2017) 390 ITR 271 / 145 DTR 233 (Bom.)(HC)

S. 40(a)(ii) : Amounts not deductible – Deduction at source – Overseas taxes paid by the assessee not allowable. [S. 37(1)] 880

The AO disallowed the deduction of overseas tax paid by the assessee holding that such taxes were covered by the provisions of section 40(a)(ii) of the Act. The CIT(A) allowed the deduction. On appeal, the Tribunal held that the disallowance was proper. (AY. 2005-06)
Dy. CIT v. Tata Consultancy Services Ltd. (2015) 174 TTJ 570 / (2016) 46 ITR 394 (Mum.) (Trib.)

S. 40(a)(iib) : Amounts not deductible – Royalty/Privilege fee levied exclusively on State Government – The insertion of sub-clause (iib) of clause (a) of section 40 will not have retrospective effect. 881

On Writ, the High Court observed that the Revenue had drawn inspiration from the 2013 amendment, whereby clause (iib) of sub-clause (a) of section 40 was inserted by

the Finance Act, 2013, with effect from 1-4-2014. This apparently was treated by the AO, as being clarificatory in nature and had sought to apply it with retrospective effect. Therefore, the primary reasoning of the AO was that the privilege fee imposed was unreasonable and does not take on the characteristic of a privilege fee and it could not be construed as a fee at all and it is merely a device to evade tax.

The High Court held that the attempt to disallow the privilege fee in respect of the AY prior to 2014-15 was clearly without reference to any legal provision. The High Court held that as pointed out by assessee, a plain reading of the provision would not indicate that it is to be applied with retrospective effect. There were other provisions which were also amended, and wherever the Legislature intended that certain provisions would have retrospective effect, it was expressly indicated therein and therefore, there being no such express indication insofar as the present provision with which one is concerned, it cannot be said to be applicable with retrospective effect. The learned Counsel had further relied on the Memorandum explaining the Finance Bill, 2013 and decision of the Supreme Court in case of *CIT v. Vatika Township (P) Ltd. (2014) 367 ITR 466 (SC)* which stated that from the plain reading of the section, it was clearly prospective in nature.

The High Court held that therefore, it could safely be said that the privilege fee payable by the assessee to the State Government would be taxable with effect from 1-4-2014 and not prior thereto. The unreasonableness of the privilege fee payable is also not a ground to hold that it is a device by which the assessee and the State Government are avoiding payment of tax.

It is settled law that there is no illegality committed by the Assessee in paying such privilege fee on the State Government having fixed such privilege fee. There is no legal prohibition in this regard and therefore, it cannot be said that the same could have been disallowed by the AO. Thus the petition filed by the assessee was allowed. (AY. 2010-11)

Karnataka State Beverages Corpn. Ltd. v. CIT (2016) 238 Taxman 299 / 137 DTR 45 / (2017) 391 ITR 185 / 294 CTR 155 (Karn.)(HC)

882 **S. 40(a)(iii) : Amounts not deductible – Deduction at source – Salaries paid to expatriate employees overseas on which tax was paid in accordance with CBDT Circular – Allowable as deduction though tax was not deducted at source – Entries in books of account not decisive of entitlement to claim of deduction – DTAA – India-UK. [S. 192, Art. 7]**

Allowing the appeal of assessee the Court held that Salaries paid to expatriate employees overseas on which tax was paid in accordance with CBDT Circular No. 685 dated 17/20.06.1994 and Circular 686 dated 12.8.94 is permissible as a deduction even though the tax is not paid within the time limit but is paid subsequently – Entries in books of account not decisive of entitlement to claim of deduction – DTAA-India-UK. (AY. 1991-92)

ANZ Grindlays Bank v. DCIT (2016) 382 ITR 156 / 133 DTR 90 / 238 Taxman 128 / 290 CTR 188 (Delhi)(HC)

S. 40(b) : Amounts not deductible – Partner – Remuneration – partnership deed mentioned remuneration as function of annual book profit and to be equally shared by partners, was held to be allowable. 883

Dismissing the appeal of the revenue, the Tribunal held that partnership deed mentioned remuneration as function of annual book profit and to be equally shared by partners, was held to be allowable. (AY. 2010-11)

ACIT v. Modern Motors (2016) 48 ITR 579 / 142 DTR 145 / 181 TTJ 813 (Jaipur)(Trib.)

S.40A. Expenses or payments not deductible in certain circumstances.

S. 40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Foreign travelling expenses, pilgrimage expenses of directors and employees was not allowed as failed to produce the evidence. [S. 37(1)] 884

Dismissing the appeal of the assessee, the Court held that since assessee failed to satisfy requirements for claiming deductions, disallowance was held to be justified. (AY. 2011-12)

Rifah Shoes (P.) Ltd. v. ACIT (2016) 241 Taxman 345 (Mad.)(HC)

S. 40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Disallowance cannot be made in respect of interest payment made to related parties as interest rate is not in excess of the prevailing interest rate in the market. [S. 40A(2)(b)] 885

The Assessing Officer disallowed the excess interest paid to the associate concerns in respect of loan borrowed from them as, according to the Assessing Officer, the bank rate is 12% whereas, the assessee had borrowed at the rate of 15-16%. It was held that the Tribunal had found that the payment of interest at excess rate was justified as, the loans are unsecured and the assessee need not have to under the formalities as against obtaining a bank loan and therefore, interest rate is commensurate with the prevailing market rate. Therefore, the High Court refused to interfere with the finding.

PCIT v. Cama Hotels Ltd (2016) 240 Taxman 770 (Guj.)(HC)

S. 40A(2) : Expenses or payments not deductible – Excessive or unreasonable – disallowance is not applicable to co-operative societies – No disallowance should be made if the tax effect is neutral i.e., the recipient is paying tax at the same rate as the payer. 886

The assessee is a co-operative society and has made payment for availing back end services for managing its IT infrastructure from its subsidiary company SIL. The assessee's payment were held to be excessive and unreasonable as being payment made to related parties u/s. 40A(2) of the Act and to the extent considered excessive and unreasonable, disallowances of the expenditure considered unreasonable and excessive were made by the AO, which disallowance was partly confirmed by learned CIT(A). We have considered and perused the provisions of Section 40A(2)(a) and 40A(2))b) of the Act and have observed that 'co-operative society' are not covered under the said provisions, while 'association of person' is covered under the said provision. It is also observed that while defining person u/s 2(31) of the Act, the law makers have

not included 'co-operative society' while 'association of person' is included while the 'co-operative society' is defined u/s. 2(19) of the Act. Section 40A(2) of the Act applies to the person specifically named therein and since co-operative society does not found mention in Section 40A(2)(b) of the Act, the said section would not apply to co-operative society. Appeal of assessee was allowed. (ITA 8622 & 7738/Mum/2010, ITA 1140 & 694/Mum/2012, ITA 5627/Mum/2013 & ITA 1/Mum/2014, dt. 31.10.2016) (AY. 2007-08 to 2010-11)
DCIT v. The Saraswat Co-operative Bank Limited (Mum.)(Trib.); www.itatonline.org

887 **S. 40A(2) : Expenses or payments not deductible – Excessive or unreasonable – In view of fair market value of services rendered by the director, the remuneration paid to him could not be considered as excessive or unreasonable.**
Dismissing the appeal of the revenue, the Tribunal held that in view of fair market value of services rendered by the director and fact that payment was made for legitimate needs of business or profession of assessee-company, remuneration paid to him could not be considered as excessive or unreasonable. (AY. 2009-10)
ITO v. Marcopolo Products (P.) Ltd. (2016) 159 ITD 266 (Kol.)(Trib.)

888 **S. 40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Disallowance of expenses cannot be made if the related had paid the tax on the amount received from the assessee.**
The assessee was engaged in the business of manufacture of expanded poly foam and articles of plastic. The assessee claimed deduction of commission payments and transportation charges paid to DI for composite services rendered to the assessee. The Assessing Officer disallowed the payments under section 40A(2)(b) of the Income-tax Act, 1961, on the ground that the assessee had failed to explain the basis for making such commission payment and the transportation charges and that they were actually made wholly and exclusively for the purpose of business. The Commissioner (Appeals) confirmed the order of the Assessing Officer. On appeal it was held that the Assessing Officer had not brought on record any material to establish any colourable device in such payments or that the payment was against public policy or that such payment was routed back to the assessee in any manner. Admittedly, the assessee had paid the amount after deducting tax at source and the recipient had paid taxes on that amount. Therefore, the disallowance was not proper.
Shroff Textiles Ltd. v. DCIT (2016) 49 ITR 20 (Mum.)(Trib.)

889 **S. 40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Processing of material and handling charges – payment to sister concerns not more than fair market value – Recipient paying maximum marginal rate of tax – subsequent year also similar claim allowed – Held expenses were allowable**
The assessee claimed deduction of expenses on account of processing of material and handling charges. The AO held that the expenses claimed were in excess of the actual increase in the production and sales ratio over the previous year. The AO further held that the payments were made to sister concerns under Section 40A(2)(b) and no comparable case had been quoted to justify the payment so made to these concerns.

On appeal to Tribunal, it was held that the assessee did not have sufficient capacity for drawing, annealing and spooling, and had outsourced this work. The assessee's manufacturing activities were under the supervision of the Excise Department. The AO had not brought on record any evidence that the payments made were more than fair market value. The recipient company also paid the maximum marginal rate of tax and there was no revenue loss. A similar claim was allowed in the subsequent years. Therefore the expenses were allowable. (AY. 2009-10)
JLC Electronet P Ltd v. ACIT (2016) 47 ITR 85/178 TTJ 28 (UO) (Jaipur)(Trib.)

S. 40A(2) : Expenses or payments not deductible – Excessive or unreasonable – Sub-brokerage paid to holding company being more than 50 percent was not excessive or unreasonable. 890
Allowing the appeal of assessee the Tribunal held that it was not necessary for the assessee company to prove beyond doubt that payment made for sub-brokerage constituted fair market value of services received and since the assessee company had given instances in which sub-brokerage was paid ranging in ratio of 60:40 and 80:20 depending on market conditions and same was not disproved by department, hence 50 percentage sub-brokerage payment could not be disallowed by invoking provisions of section 40A(2) of the Act. (AY. 2011-12)
SHCIL Services Ltd. v. Dy. CIT (2016) 158 ITD 1006 / 181 TTJ 408 (Mum.)(Trib.)

S. 40A(2) : Expenses or payments not deductible – Excessive or unreasonable – No disallowance u/s. 40A(2) in case of Trade discounts as it was not an expenditure and actual payments were not made for such discounts. 891
The Assessee allowed trade discount of around 7.29% to its sister concerns. The AO alleged that the sister concerns were enjoying deduction u/s. 80-IB which led to shifting of profits and therefore there was a violation of s. 40A(2). The ITAT upheld the order of the CIT(A) who held that trade discounts were not expenditure incurred and actual payments were not made and hence, provisions of s. 40A(2) would not be applicable. (AY. 2010-11)
DCIT v. Power Soaps P. Ltd. (2016) 45 ITR 250 (Chennai)(Trib.)

S. 40A(3) : Expenses or payments not deductible – Payments exceeding prescribed limit otherwise than by crossed cheque or crossed bank draft – Agents appointed by assessee for locations to enable dealers of petrol pump to buy diesel and petrol – No cash payments made directly to agents but cash deposited in respective bank accounts of agents – No disallowance can be made. [R. 6DD(k)] 892
Dismissing the appeal of revenue the Court held that the findings of the Commissioner (Appeals) and the Tribunal that the assessee had appointed various representatives and agents for 110 locations wherein diesel and petrol were purchased by dealers of the petrol pumps, that no cash payment was made directly to the agents but was deposited in their respective bank accounts, and that the case of the assessee fell under the exception clause of Rule 6DD(k) of the Income-tax Rules, 1962 as the assessee had made the payment to the bank account of the agents who were required to make payment in cash for buying petrol and diesel at different locations, were findings of fact. The Assessing Officer did not find any discrepancy in the copies of

the ledger accounts produced and no unaccounted transaction had been reported or noticed by him. The finding arrived at by the Tribunal based on the material was essentially a finding of fact. No substantial question of law arose for consideration. (AY. 2008-09)
CIT v. The Solution (2016) 382 ITR 337 / 136 DTR 388 (Raj.)(HC)
Editorial : MRS Roadways v. CIT [2014] 367 ITR 62 (Ker)(HC) is distinguished.

893 **S. 40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Block assessment – Purchase of gold – Disallowance was held to be justified. [S. 158BC]**
Dismissing the appeal of assessee the Court held that the case of assessee would not fall within the exceptions provided in the proviso to the section. The purchase of gold jewellery had exceeded ₹ 20,000 as found from the loose sheets discovered during the search and seizure operations. There was no error in the order passed by the Appellate Tribunal. The disallowance of deduction by the Assessing Officer invoking section 40A(3) of the Act resulting in assessment of undisclosed income in spite of assessment purchases on an estimated basis was proper. There was no reason to interfere with the order passed by the Appellate Tribunal. (BP 1-4-1997 to 25-5-2003)
K. R. Ganesh Kumar v. ACIT (2016) 383 ITR 165 (Mad.)(HC)

894 **S. 40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Payment for purchase of fire crackers made in cash – Disallowance sustained.**
Assessee claimed that the fire crackers were not purchased from the companies themselves but from the agents and retailers in villages. Held, in absence of even names of such agents or retailers, vague statement of the assessee cannot be accepted. Disallowance sustained. (AY. 2000-01, 2001-02)
N. Mohammed Ali v. ITO (2016) 237 Taxman 211 (Mad.)(HC)

895 **S. 40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Deletion of disallowance made under section 40A(3) by the Tribunal on the ground that cash payments were made on account of business exigencies is a finding of fact and cannot be held to be perverse**
AO disallowed certain expenses exceeding ₹ 10,000 under section 40A(3) for which the payments were made in cash. ITAT accepted the contention of the assessee that cash payments were made on account of business exigencies. High Court observed that there was no dispute about the genuineness of the payment or regarding the identity of the payee. High Court held that the question whether the assessee's business exigencies required payments to be made in cash was a question of fact and such finding could not be held to be perverse. (AY. 1992-93, 1993-94)
Honey Enterprises v. CIT (2016) 381 ITR 258 / 236 Taxman 519 / 289 CTR 262 (Delhi) (HC)

S. 40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Payments made to credit of an agent of State Government, disallowance was held to be not justified. [R. 6DD] 896

Allowing the appeal the Tribunal held that; payment made by retail vendor of country made liquor in cash in bank account of wholesale licensee of State government cannot be disallowed as the payment to agent of State Government. (AY. 2010-11)

Ashok Kumar Mondal v. ITO (2016) 161 ITD 521 (Kol.)(Trib.)

S. 40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Payments made to seller in cash by agent – Genuineness of transaction and purchase not disputed – Cash payments covered by exception. [R. 6DD(k)] 897

Assessee purchased goods through agent. AO made inquiries under section 133(6) and examined the statement of accounts as well as the copy of ledger and cash book from seller which revealed that the cash payments were made through the assessee's agent only. The genuineness of the transaction and the purchases were not doubted. The agent procured the goods from seller, who doubted the credibility of the assessee and insisted on cash payment. The agent made the payment in cash to the seller and it was nowhere established that the assessee directly made the cash payment. Even in response to the notice under section 133(6), seller itself confirmed this fact to the AO that the payments were made through the agent only. Therefore, the cash payments covered by the exception laid down in clause (k) of Rule 6DD. (AY. 2010-11)

ITO v. Pranay Towers (2016) 52 ITR 258 (Delhi)(Trib.)

S. 40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Assessee could not produce any cogent evidence to support *bona fides* of claim hence, disallowance of payment was justified. [S. 194C] 898

Dismissing the appeal of the assessee the Tribunal held that since assessee could not discharge primary onus which lay upon it by adducing any cogent evidence to support *bona fides* of claim, disallowance of payment in question was justified. (AY. 2009-10)

Pawar Patkar Construction (P.) Ltd. v. JCIT (2016) 159 ITD 406 (Pune)(Trib.)

S. 40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Purchase of land – No bank account where the land was situated – No disllowance can be made. [R. 6DD] 899

Purchase of agricultural land through cash payments of ₹ 4.8 lakhs, as assessee had no bank account where said land was situated, disallowance cannot be made. (AY. 2008-09, 2009-10)

Jiya Devi Sharma (SMt.) v. ACIT (2014) 165 TTJ 20 (URO) (2016) 68 SOT 57 (Jodh.)(Trib.)

S. 40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Maharashtra State Road Corporation being "State", no disallowance can be made. [R. 6DD(b), Constitution of India, Art. 12] 900

Allowing the appeal of the assessee the Tribunal held that; MSRTC is "State" within meaning of Article 12 of the Constitution of India, it was providing vital function of public importance. Once it was held that MSRTC was "State" within meaning of Article

12 of the Constitution of India, payments could not be disallowed u/s. 40A(3). (AY. 2006-07 to 2008-09)
Sapna Sanjay Raisoni v. ITO (2016) 159 ITD 1 / 179 TTJ 34 (UO) (Pune)(Trib.)

901 **S. 40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Payments through agents – Since assessee had no direct dealings with land owners, payments in question were to be regarded as covered under Rule 6DD(k) which could not be disallowed.**
Assessee Company was engaged in business of land aggregation. Nature of assessee's business was to identify big parcels of lands and buy said land from different small landowners. The AO noted that assessee had made cash payments in excess of ₹ 20,000 for purchase of land. He thus invoked provisions of section 40A(3) to disallow said payments. It was noted that assessee had appointed agents who in turn selected land, negotiated price with land owners and purchased lands. Since assessee had no direct dealings with landowners and payments were made to them through agents, said payments were to be regarded as covered under provisions of Rule 6DD(k) of 1962 Rules, which could not be disallowed by invoking provisions of section 40A(3). (AY. 2005-06 to 2011-12)
Om Shakthy Agencies (Madras) (P.) Ltd. v. Dy. CIT (2016) 157 ITD 1062 / 177 TTJ 419 / 136 DTR 181 (Chennai)(Trib.)

902 **S. 40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Agent – Agricultural produce – Disallowance was held to be not justified.**
Assessee purchased agricultural produce from farmers through some parties who charged their commission for facilitating said transaction of sale and purchase, payments made to those parties could not be disallowed by invoking provisions of section 40A(3). (AY. 2008-09)
Anurag Radhesham Attal v. ITO (2016) 158 ITD 867 / (2017) 183 TTJ 423 / 147 DTR 207 (Pune)(Trib.)

903 **S. 40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – Payment of salary to various employees on various dates in cash does not violate 40A(3) though there may be an error in accounting entries.**
Payment of salary to various employees was made in cash and accordingly the AO disallowed the same u/s. 40A(3). The assessee submitted that the payments were made to various employees on different dates but the accountant had inadvertently posted those entries on a single day. Vouchers of different dates were submitted by the Assessee which was rejected by the AO. An affidavit of the accountant that he was not well versed with operating computers was also submitted. The ITAT deleted the disallowance and held that the genuineness of the payment was not doubted by the AO and cash payments were made to maintain good relations with the employees who insisted on cash payment only. (AY. 2008-09)
Brothers Pharma P. Ltd. v. ITO (2015) 174 TTJ 773 / (2016) 45 ITR 154 (Jaipur)(Trib.)

S. 40A(7) : Expenses or payments not deductible – Gratuity provision was held to be not deductible – Plea that provision has been made for the purpose of payment to an approved Gratuity Fund i.e. The LIC group Scheme raised for the first time before the HC was not permitted to be raised. [S. 260A] 904

Question of law before the HC was regarding the disallowance of provision for gratuity as the assessee failed to explain the disallowance amount on account of provision of gratuity should be disallowed but the assessee failed to file any reply till the date of passing of the AO. In absence of such a reply, it was not open to the assessee to claim that the provision had been made towards an approved gratuity fund. HC held in favour of the Revenue and held that Tribunal recorded that it was not a case of that it has made the provision for the purpose of Gratuity by way of any contribution towards approved Gratuity Fund or for the purpose of any gratuity that has been become payable during the financial year under consideration. Assessee was not entitled for deduction. Plea that provision has been made for the purpose of payment to an approved gratuity Fund i.e. The LIC group scheme raised for the first time before the HC was not permitted to be raised. (AY. 2003-04)

Bihar State Warehousing Corporation Ltd. v. CIT (2016) 139 DTR 16 (Patna)(HC)

S. 40A(8) : Disallowance of interest – Interest paid to current account of director – Disallowance is held to be justified [S. 37(1)] 905

On reference the Court held that the disallowance of interest paid to the current account of the director under section 40A(8) of the Act was justified. (AY. 1980-81)

Somaiya Organo Chemicals Ltd. v. CIT (2016) 388 ITR 423 / 290 CTR 30 / 142 DTR 361 (Bom.)(HC)

S. 41. Profits chargeable to tax.

S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Prepayment of deferred sales tax liability. 906

Dismissing the appeal of the Revenue the Court held that the issue of restoration of the appeal to the AO by the Appellate Tribunal in respect of the applicability of section 41(1) on account of prepayment of deferred sales tax liability stood concluded by the decision of the High Court. No question of law, arose.

CIT v. Sulzer India Ltd. (2014) 369 ITR 717 (Bom.)(HC)
CIT v. BEHR India Ltd. (No.1) 389 ITR 419 (Bom.)(HC)

S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Merely because creditor could not be traced cannot lead to cessation of liability. 907

Dismissing the appeal the Court held that just because creditor of assessee is not traceable it cannot satisfy the requirement of cessation of liability. High Court held that even if creditor has expired, the legal heirs has the right to claim the debt from the assessee. Thus, upholding the view of Tribunal, High Court held that conditions for invoking S. 41(1) were not satisfied. (AY. 2009-10)

CIT v. Alvares & Thomas (2016) 239 Taxman 456 (Karn.)(HC)

908 **S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Provision for expenses likely to be incurred on re-delivery of aircrafts taken on lease – Lease extended for further period along with liability – Liability could not be said to have ceased for purpose of invocation of section 41(1)**

The assessee had made a provision in earlier years in respect of expenses likely to be incurred on redelivery of aircrafts taken on lease. The lease period was due to expire during the year. However, the lease was extended/renewed for a further period.

The Assessing Officer invoked section 41(1) and held that there was cessation of liability and sought to bring the entire amount to tax. The CIT(A) held that there was no cessation of liability as the lease had been extended and therefore, the provision for expenses which were likely to be incurred at the time of redelivery of the four aircrafts continued. The Tribunal upheld the CIT(A)'s order.

On appeal, the High Court observed that there was a concurrent finding of the lower appellate authorities that the liability for expenses had not ceased, but deferred as the lease had been extended. The expenses were likely to be incurred when the lease expired and air crafts redelivered. Therefore, the same would have to be provided for. The High Court held that section 41(1) was application only when there was cessation and/or remission of liability incurred (which had been duly paid and/or provided for) in subsequent years, consequent to which some benefit was obtained by the assessee. There was neither the cessation/remission of liability nor any benefit obtained by the assessee for the purposes of section 41(1). (AY. 2006-07)

CIT v. Jet Airways (India) Ltd. (2016) 237 Taxman 572 / (2017) 292 CTR 7 (Bom.)(HC)

909 **S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Best judgment assessment – Where the books of account is rejected and net profit is assessed, there cannot be separate addition in respect of creditors appear in such books on the basis that they ceased to exist. [S. 144]**

Dismissing the appeal of the Revenue, the Tribunal held that; when an assessment was completed u/s. 144 applying net profit rate on turnover, addition u/s. 41(1) could not be made; when books of account as such were rejected question whether creditors appearing in such books were there or ceased to exist, would become irrelevant. (AY. 2008-09)

Dy. CIT v. JSR Constructions (P.) Ltd. (2016) 159 ITD 749 (Bang.)(Trib.)

910 **S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Advance received against booking of plots outstanding for several years – Assessee established that part of the advances adjusted in succeeding years – provision of section 41(1) cannot be invoked.**

The AO observed that there were long standing advances against the booking of plots and some of the advances were standing on the liabilities side of the balance sheet for over 20 years and no plots had been registered against these advances despite various efforts by the assessee and legal notices issued to them, these persons did not come forward to take back these advances. Therefore, AO held that these advances lying with the assessee shown as outstanding on the liabilities side of the balance sheet deserved to be forfeited and treated as income of the assessee under section 41(1). Further, he determined the real value of the advances applying the cost inflation index.

Commissioner (Appeals) allowed the appeal of the Assessee. The Tribunal dismissed the appeal of the Department and held that complete names of the persons in favour of whom the plots were registered in the succeeding year were provided. The declaration of such advances in the balance sheet for the year under consideration itself proved that the assessee had not forfeited the advances and had adjusted a part of them in the succeeding year against the sale deeds of plots. Therefore, the provisions of section 41(1) were not applicable, as the assessee had not written back these advances in its books of account. Further, the action of the Assessing Officer increasing the value of these advances by applying the cost inflation index was not justified, as the cost inflation index is never applied on the amount of advances lying with a person. (AY. 2012-13)
DCIT v. Sadguru Land Finance (2016) 52 ITR 182 (Amritsar)(Trib.)

S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Closing balance of unsecured loan – No evidence to suggest that liability squared up or paid or any cessation of liabilities, addition is to be deleted. 911
Allowing the appeal of the assessee the Tribunal held that the assessee has shown the closing balance of unsecured loan and there is no evidence to suggest that liability squared up or paid or any cessation of liabilities, addition is to be deleted. (AY. 2008-09)
Samwon Precision Mould Mfg. (India) P. Ltd. v. ITO (2016) 48 ITR 630 (Delhi)(Trib.)

S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Sundry creditors shown as liability cannot be added as income of the assessee. 912
Dismissing the appeal of the Revenue, the Tribunal held that; there are two conditions to be fulfilled in order to attract provisions of S. 41(1), firstly, there should be cessation or remission of liability and, secondly, it should be ceased to be so during previous year. Even where an amount remained unclaimed by sundry creditors for a considerable period of time, and said liability was carried forward for many years and, there was no cessation or remission during previous year, same could not be added to income. (AY. 2009-10)
ITO v. Marcopolo Products (P.) Ltd. (2016) 159 ITD 266 (Kol.)(Trib.)

S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Advances received for sale of its property that was standing as liability in balance sheet would not be taxable on writing off of corresponding amount by concerned party; said amount would be deducted from cost of acquisition in computing capital gain in case of sale of land. [S. 28(i), 51] 913
Dismissing the appeal of the Revenue, the Tribunal held that; Advances received for sale of its property that was standing as liability in balance sheet would not be taxable on writing off of corresponding amount by concerned party either u/s. 41(1) or u/s. 28(i); said amount would be deducted from cost of acquisition in computing capital gain in case of sale of land, u/s 51. (AY. 2010-11)
ITO v. Fiesta Properties (P.) Ltd. (2016) 160 ITD 426 / (2017) 53 ITR 614 (Mum.)(Trib.)

914 **S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Payments were made in subsequent years hence no addition could be made.**
No addition can be made u/s. 41(1) when creditors in question were having regular business transactions in subsequent years and actual payments were made to those parties in subsequent years also, matter set as side for verification. (AY. 2009-10)
ACIT v. Zydus Infrastructure (P.) Ltd. (2016) 161 ITD 611 (Ahd.)(Trib.)

915 **S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Amounts shown as liabilities in the Balance Sheet cannot be deemed to be cases of "cessation of liability" only because the liabilities are outstanding for several years. The AO has to establish with evidence that there has been a cessation of liability with regard to the outstanding creditors.**
Dismissing the appeal the Tribunal held that amounts shown as liabilities in the Balance Sheet cannot be deemed to be cases of "cessation of liability" only because the liabilities are outstanding for several years. The AO has to establish with evidence that there has been a cessation of liability with regard to the outstanding creditors. (ITA No. 2212/ Mum/2012, dt. 24.08.2016) (AY. 2008-09)
ITO v. Vikram A. Pradhan (Mum.)(Trib.); www.itatonline.org

916 **S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Credit balances cannot be treated as income without a bilateral waiver especially when the balances were paid off in subsequent years.**
The AO had directed the Assessee to file confirmations of parties whose balances were shown as outstanding. The creditors whose confirmations were not submitted and were very old balances were treated as income by the AO. The ITAT held that the burden was on the Revenue to prove that the there was a bilateral write-off of outstanding amounts. In case of the Assessee, evidences of repayment in subsequent years were filed which proved that the liabilities were in existence. (AY. 2008-09)
Brothers Pharma P. Ltd. v. ITO (2016) 45 ITR 154 (Jaipur)(Trib.)

S. 43. Definitions of certain terms relevant to income from profits and gains of business or profession.

917 **S. 43(1) : Actual cost – Depreciation – Technical know how – Sale of capital goods to sister concern [S. 32, 43(1), Expl. 3]**
Dismissing the appeal of assessee the Tribunal held that the assessee has earned substantial commercial profits by use of second-hand assets purchased from its sister concerns. Thus, AO was not justified in declining depreciation on the ground that WDV (Written Down Value) of assets in the books of sellers was nil, when the assessee had produced valuation by registered valuer.
Dy.CIT v. Jaya Hind Sciaky Ltd. (2016) 156 ITD 547 / 137 DTR 329 / 179 TTJ 112 (Pune) (Trib.)

S. 43(1) : Actual cost – Written down Value – Investment subsidy to start industries in backward areas – not a payment directly or indirectly to meet any portion of actual cost – not deductible 918

The assessee received investment subsidy from the Government. The AO reduced this from the actual cost of the cost of the capital asset in terms of Explanation 10 to Section 43(1) of the Act. On appeal to Tribunal, it was held that there was no material to show that the assessee had received monetary compensation which would actually reduce the cost directly or indirectly. The Government subsidy was intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries. The specified percentage of the fixed capital cost, which was the basis of determining the subsidy was only a measure adopted under the scheme to quantify the financial aid and it was not a payment directly or indirectly to meet any portion of the actual cost. (AY. 2004-05, 2005-06, 2007-08)

Mangalam Timber Products Ltd v. ITO (2016) 47 ITR 758 (Cuttack)(Trib.)

S. 43(1) : Actual cost – Subsidy granted to set up a wind Mill project is capital receipt, it cannot be reduced from the cost, nor the subsidy is assessable either under section 41(1) or section 50. [S. 4, 41(1), 50] 919

Subsidy granted to set up a wind project is a capital receipt. the subsidy cannot be reduced under Explanation 10 to S. 43(1) from the cost of the assets acquired though 100% depreciation is allowed on the cost of the assets. The subsidy is also not assessable either u/s. 41(1) or u/s. 50. (ITA No. 3473/M/2013, dt. 26.11.2015) (AY. 2008-09)

Uni Deritend limited v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 43(1) : Actual cost – Acquisition of second hand machinery from sister concern – Assessing Officer has not discharged the onus of proving that main object was reduction in tax liability. 920

Dismissing the appeal of revenue the Tribunal held that Explanation 3 to section 43(1) could not be applied in respect of acquisition of second hand plant and machinery by assessee from its sister concerns where firstly, Assessing Officer could not discharge its onus that main objective of transfer of assets was reduction of tax liability and secondly revenue did not discharge its obligation to determine fair value of assets and replace it with cost of acquisition of assessee (AY. 2005-06)

CIT v. Jaya Hind Sciaky Ltd. (2016) 156 ITD 547 / 137 DTR 329 / 179 TTJ 112 (Pune)(Trib.)

S. 43(1) : Actual cost – Subsidy – Capital or Revenue – Backward area subsidy received towards incentive on building and pollution control devices for setting up manufacturing unit – Not meant for working capital purposes – Held capital in nature 921

The assessee had set up a cement manufacturing unit in a backward district for which it was entitled to State Capital Incentive subsidy @ 25% of fixed capital investment. The assessee treated the said subsidy received towards incentive on building and pollution control devices as capital in nature. The AO treated the same as revenue subsidy for want of details. On appeal to Tribunal, it was held that the subsidy was received only as an incentive on building and pollution control devices for setting a manufacturing unit

in backward district and it was not meant for working capital purposes or for running the cement manufacturing unit. The subsidy received has gone to reduce the capital cost of the assessee in view of Explanation 10 to Section 43(1). The subsidy received by the assessee was capital in nature. (AY. 2008-09)
ACIT v. Bharat Hi-Tech (Cement) P. Ltd. (2016) 176 TTJ 166 (Kol.)(Trib.)

922 **S. 43(5) : Speculative transaction – Forward foreign exchange contracts – Derivatives in foreign currency are commodity – Loss incurred is not speculative in nature – Allowable as business loss.**
Assessee-company was a domestic company registered as an approved SEZ and was a KPO primarily involved in revenue cycle management for clients across America and was billing its overseas clients in foreign currency. It had entered into forward foreign exchange contracts and had booked marked-to-market loss on unexpired contracts as on date of balance sheet based on adverse movement of value of United States Dollar *vis-a-vis* in relation to Indian rupees based on prevailing rate at year end. The Assessing Officer held these transactions of foreign exchange as speculative in nature and disallowed the set off of same against the income from business other than speculation business. The Assessing Officer also held the said marked to market loss on the forward contracts of foreign exchange as contingent and notional loss and, hence, disallowable under the Act. On appeal CIT(A) affirmed the order of AO. On appeal, allowing the appeal Tribunal held that; since assessee-company had entered into derivative transactions in foreign currency through a recognised stock exchange and those transactions were backed by time stamped contract notes carrying unique client identity number and PAN allotted under Act, those derivative transactions duly fulfilled all conditions as specified under section 43(5) and, hence, were not speculative transactions as defined under section 43(5) and loss incurred on such transactions was not speculative loss under section 43(5). Further said loss was not a notional or contingent loss rather it was ascertained liability which had crystallised on date of balance sheet and could be computed with reasonable certainty and accuracy and, hence, allowable as non-speculation loss. (AY. 2009-10)
Inventurus Knowledge Services (P.) Ltd v. ITO (2016) 156 ITD 727 / 45 ITR 57 / 177 TTJ 269 / 143 DTR 113 (Mum.)(Trib).
Editorial : Araska Diamond (P.) Ltd. v. A CIT / (2015) 152 ITD 203 (Mum.) was distinguished and Instruction No. 3 of 2010 dt 23-03-2010 is also considered.

923 **S. 43(5) : Speculative transaction – Business loss – Hedging – Loss on account of forex forward contracts consequent to cancellation of export orders not speculation loss allowable as business loss. [S. 28(i)]**
It was held that forward contracts in question being purely hedging transactions entered into by the assessee to safeguard against loss arising out of fluctuation in foreign currency are not speculative transactions falling within the ambit of S. 43(5) and, therefore, loss incurred on account of such forex forward contracts consequent to cancellation of export orders is not speculative loss. (AY. 2009-10)
ITO v. LGW Ltd. (2016) 130 DTR 201 (Kol.)(Trib.)

S. 43A : Rate of exchange – Foreign currency – Expenditure incurred to get rid of forward contracts which assessee had entered into for purpose of hedging against fluctuations of foreign exchange, could not come within four corners of section 43A 924

The assessee incurred expenditure for of cancellation of foreign exchange covers. The assessee capitalised the same under section 43A and accordingly claimed depreciation. The revenue authorities rejected assessee's claim, which was reversed by the Tribunal. On appeal, the High Court held that from the submissions advanced by the assessee himself it would appear that the claim could not have come within the four corners of section 43A. The assessee did not incur any loss arising out of fluctuations in the exchange price. The Court further observed that the assessee might have claimed it as an expenditure which could have been considered in accordance with law, but there was no case for any claim being put forward on account of depreciation. (AY. 2002-03)
CIT v. ITC Ltd. (2016) 237 Taxman 533 / 134 DTR 293 (Cal.)(HC)

S. 43B : Certain deductions to be only on actual payment.

S. 43B : Deductions on actual payment – Service tax – Same footing as excise duty or sale tax, hence allowable only on actual payment basis. [S. 37(1)] 925

Dismissing the appeal of the revenue, the Court held that; Service tax is to be treated as same footing as excise duty or sale tax, hence allowable only on actual payment basis. (AY. 2007-08, 2008-09)
CIT v. Knight Frank (India) (P) Ltd. (2016) 143 DTR 32 / 242 Taxman 313 / 290 CTR 25 (Bom.)(HC)

S. 43B : Deduction on actual payment – Rebate on interest – Liability neither payable nor arising in assessment year in question – Disallowance proper. 926

Dismissing the appeal of assessee the Court held that Rebate on interest due to IFCI and sales tax transferred to recoverable account in earlier years. Aggregate of sums charged to profit and loss account in year in question and written off and claimed as deduction. Liability neither payable nor arising in assessment year in question. Disallowance was held to be proper. (AY. 1995-96)
Cebon India Ltd. v. CIT (2016) 387 ITR 502 (P&H)(HC)

S. 43B : Deduction on actual payment – Bank interest – Overdraft account – Interest not to be disallowed. [S. 43B(e), Explan. 3D] 927

On appeal, the Commissioner (Appeals) held that where there was no schedule of repayment, the exact amount of interest not being known, the amount of interest and what amount of principal were comprised in a deposit made in the overdraft account could not be found out. He also held that there was no material which proved that there was outstanding interest as on March 31, 2004 in the overdraft account and that the interest accrued on month to month basis and that it was paid on month-to-month basis as the deposit of each month was much more than the corresponding interest deposited in the respective month and as such no part of such interest remained which could be said to have been converted into any loan or advance as on the close of the previous

year so as to be deemed as not actually paid. The Commissioner (Appeals) deleted the addition and his order was upheld by the Tribunal. High Court affirmed the order of the Tribunal. (AY. 2004-05)
CIT v. Shreekant Phumbhra (2016) 387 ITR 523 (Cal.)(HC)

928 **S. 43B : Deductions on actual payment – Excise duty on closing stock – Allowed in the year even though the assessment of the closing stock would be made in the subsequent assessment year [S. 145A, 263]**
Dismissing the appeal of revenue the Court held that since the excise duty on the closing stock was paid upto the due date of filing the return of income, the deduction of the same should be allowed in the year even though the assessment of the closing stock would be made in the subsequent assessment year. Section 145A would have no effect on section 43B in view of the *non-obstante* clause in section 43B. (AY. 2004-05)
CIT v. NCR Corporation India (P.) Ltd. (2016) 387 ITR 725 / 240 Taxman 598 / 293 CTR 225 (Karn.)(HC)

929 **S. 43B : Deductions on actual payment – Payment before due date for filing return – Benefit available both in respect of employer's contribution and employee's contribution. [S. 2(24)(ix), 36(1)(va)]**
By the amendment made with effect from April 1, 2004 it was made clear that the benefit of deduction would be applicable, provided the payments were made before the due date for filing of the return. Both the employees' and employer's contributions are covered by the amendment of section 43B of the Act. (AY. 2003-04)
Bihar State Warehousing Corporation Ltd. v. CIT (2016) 386 ITR 410 / 242 Taxman 142 / 287 CTR 556 / 139 DTR 16 (Patna)(HC)

930 **S. 43B : Deductions on actual payment – Explanation 3C to section 43B retrospectively applicable – Issue of debenture for interest payable not actual payment – Not entitled to deduction. [S. 43C]**
Allowing the appeal of revenue, the Court held that the Explanation 3C to section 43B was inserted with retrospective effect and operated for the period in question and the assessee did not dispute that. The actual payment was essential for applicability of section 43B of the Act. (AY. 1996-97)
CIT v. M. M. Aqua Technologies Ltd. (2016) 386 ITR 441 / 242 Taxman 153 / 288 CTR 372 / 139 DTR 315 (Delhi)(HC)

931 **S. 43B : Deductions on actual payment – Service tax – Service-tax billed on rendering of services is not includible as trading receipts. No disallowance can be made for the unpaid service tax liability which is not claimed as a deduction [S. 145A]**
Dismissing the appeal of revenue the Court held that Service tax billed on rendering of services is not includible as trading receipts. No disallowance can be made for the unpaid service tax liability which is not claimed as a deduction. (ITA No. 247 and 255 of 2014, dt. 16.08.2016) (AY. 2007-08, 2008-09)
CIT v. Knight Frank (India) Pvt. Ltd. (Bom.)(HC); www.itatonline.org

S. 43B : Deductions on actual payment – Sales tax deferred loan incentive scheme – Amount of sales tax collected deemed paid and cannot be taxed. 932

The amount representing sales tax deferred under the sales tax deferred loan incentive scheme was to be deemed as paid and, therefore, not taxable. The provisions of section 43B of the would not be applicable. Since the assessee was succeeding on the merits, the question of reassessment had become purely academic. The Tribunal remanded the matter to the Assessing Officer for fresh consideration. (AY. 2003-04)

CIT v. McDowell and Co. Ltd. (2016) 380 ITR 80 (Karn.)(HC)

S. 43B : Deductions on actual payment – Provision of entry tax made on account of pending litigation – Amount neither collected not charged to profit and loss account, no disallowance can be made. 933

Dismissing the appeal of the revenue, the Tribunal held that the assessee neither amount was collected nor charged to profit & loss account and only accounting entry was passed hence provision of section 43B is not applicable. (AY. 2010-11)

ACIT v. Modern Motors (2016) 48 ITR 579 / 142 DTR 145 / 181 TTJ 813 (Jaipur)(Trib.)

S. 43B : Deductions on actual payment – Purchase of raw material – There is no obligation whether statutory or otherwise on the part of the purchaser to pay the VAT to the government, the amount represented purchase price of raw materials, hence, amount cannot be disallowed. 934

Dismissing the appeal of the Revenue, the Tribunal held that when an assessee Company purchased raw materials at Bangalore and Hyderabad Branches, sales tax (VAT) was charged by sellers. Assessee company debited VAT component to "sales tax payable account" for claiming it as "Input Credit" and purchase cost of raw materials (excluding VAT paid) was included in the cost of materials. Since assessee company was making stock transfer of finished goods, it could not claim input credit in respect of VAT paid on purchase of raw materials. This VAT paid on purchase of raw materials was hence transferred from VAT payable account to other expenses. In respect of this "VAT paid", the tribunal observed that there is no obligation whether statutory or otherwise on the part of the purchaser to pay the VAT to the Government. Thus, the assessing officer was factually incorrect in arriving at the conclusion that the amount disallowed u/s. 43B is 'sales tax payable'. (AY. 2007-08)

ACIT v. Plant Lipids (P) Ltd. (2016) 157 ITD 811 (Cochin)(Trib.)

S. 43B : Deductions on actual payment – Provision for leave encashment – Deduction was not allowed however the direction was given to give effect to the order of Supreme Court on merit on receipt of the order. [S. 43B(f)] 935

Assessee claimed deduction in respect of provision of expenditure on leave encashment on ground that Calcutta High Court in *Exide Industries Ltd. v. UOI (2003) 292 ITR 470* has held provision of s. 43B(f) as *ultra-vires* Constitution. Apex Court had while admitting SLP against High Court's decision, stayed its operation holding that during pendency of appeal assessee would pay tax on impugned sum as if s. 43B(f) was on statute. Tribunal held that matter need not be restored back to file of AO and revenue would give effect to decision by Apex Court on merits of case and would modify instant

assessment accordingly and thus, claim of deduction on amount of provision for leave encashment was to be disallowed. (AY. 2007-08)
Lupin Ltd. v. ACIT (2016) 159 ITD 10 (Mum.)(Trib.)

936 **S. 43B : Deductions on actual payment – Employees or employers' contribution made to PF after due date prescribed under PF Act, but before due date prescribed for filing of income-tax return is deductible. [S. 139(1)]**
Dismissing the appeal of the revenue the Tribunal held that there is no difference between employees and employer's contribution to PF and if such contribution is made on or before due date of furnishing return of income u/s. 139(1), then deduction is to be allowed under provisions of s. 43B. (AY. 2011-12)
Dy. CIT v. Eastern Power Distribution Company of A. P. Ltd. (2016) 160 ITD 432 (Visakh) Trib.)

937 **S. 43B : Deductions on actual payment – Employee's contribution – Amount received from his employees as their contribution towards PF to be allowed to him as business expenditure, If he deposits same before due date. [S. 139(1)]**
Tribunal held that employees' contribution to PF paid by the assessee before the due date of filing ROI is an allowable expenditure. In case there is default on the part of an employer to deposit the employees' contribution to such fund, the same is deposited after the due date as provided under their respective statutes, there are consequences provided in those respective statutes. (AY. 2007-08, 2008-09)
Vaneet Sood v. ACIT (2016) 159 ITD 320 (Chd.)(Trib.)

938 **S. 43B : Deductions on actual payment – Employee's contribution to PF/ESI) – Payments were made before due date of filing of return no disallowance can be made.**
Dismissing the appeal of the Revenue the Tribunal held that if assessee made payments of employee contribution to PF and ESI authorities before due date of filing return u/s. 139(1), AO was not justified in disallowing same by invoking provisions of section 43B. (AY. 2005-06)
DCIT v. Xpro India Ltd. (2016) 161 ITD 93 (Kol.)(Trib.)

939 **S. 43B : Deductions on actual payment – Employees' contribution to PF and ESIC allowable if made before the due date of filing return. [S. 36(1)(va), 139(1)]**
The Assessee had made delayed payments of employees' contribution towards PF and ESIC. The AO disallowed the same since delayed payment was not allowable u/s. 36(1)(va). The ITAT deleted the addition since the payments, though delayed as per the respective acts, were made before the date of filing of return u/s. 139(1). (AY. 2006-07)
Casby Logistics P. Ltd. v. DCIT (2016) 47 ITR 230 (Mum.)(Trib.)

940 **S. 43B : Deductions on actual payment – Provision for lease transfer fees, which is disputed in High Court was held to be not allowable.**
Where assessee created provision for lease transfer fee, levy of which was already subject matter of dispute in High Court, disallowance for said provision was justified. (AY. 2007-08)
Vasant J. Khetani v. JCIT (2016) 158 ITD 339 / 179 TTJ 475 / 138 DTR 265 (Mum.)(Trib.)

S. 43B : Deductions on actual payment – Delayed payment of employees' contribution to state insurance fund would be allowed if it is made within the due date of filing return. 941

The Assessee deposited the employees' contributions to the state insurance fund after the due date and the AO disallowed the same u/s. 36(1)(x). The CIT(A) upheld the same and held that provisions of section 43B would be applicable only on employer's contribution and not on employees' contribution. The ITAT held that the contributions to employees' state insurance fund were made within the due date of filing return and hence the addition was to be deleted. (AY. 2008-09)

Brothers Pharma P. Ltd. v. ITO (2016) 45 ITR 154 (Jaipur)(Trib.)

S. 43B : Deductions on actual payment – Interest on sales tax deferment – Matter remanded to AO to verify difference in liability recorded in books and actual liability of sales tax. 942

On appeal, the Tribunal held that the fact that there was a difference in liability recorded in the books of the subsidiary and the actual liability of sales tax needed verification by the AO. Therefore, the issue was remitted to the file of the AO for verification in accordance with the law. (AY. 2006-07 and 2007-08)

Rain Commodities Ltd. v. Dy. CIT (2016) 46 ITR 1 (Hyd.)(Trib.)
Rain Cements Ltd. v. Dy. CIT (2016) 46 ITR 1 (Hyd.)(Trib.)

S. 43B : Deductions on actual payment – Deduction of service tax only on actual payment – Assessee precluded from claiming amount again in subsequent assessment year. 943

According to the terms of agreement, the liability to pay service tax was placed upon the assessee as service receiver. The AO noticed that during the AY 2007-08 that the assessee had provided service-tax liability of ₹ 104.45 crores in its books of account but it had actually paid a sum of ₹ 101.21 crores only. Hence, he disallowed the difference of the amount of ₹ 2.93 crores u/s. 43B of the Act. Moreover, assessee had paid service tax of ₹ 22.91 crores in advance in the AY 2006-07 which was claimed as deduction by the assessee and disallowed by the AO on the view that assessee cannot claim deduction on the advance payment of service tax. Since the disallowance made in AY 2006-07 was disputed by the assessee by filing an appeal, the AO, as a protective measure, added the amount in the AY 2007-08 also. The CIT(A) deleted the addition. On appeal by the department, held that the assessee claimed a sum of ₹ 22.91 crores on payment basis in the AY 2006-07 and the same was allowed by the CIT(A) in that year. Hence, the assessee was precluded from claiming the amount again in the AY. 2007-08. (AY. 2004-05, 2007-08 to 2010-11)

Mazgaon Dock Ltd. v. ITO (2016)46 ITR 162 (Mum.)(Trib.)

S. 43D. Special provision in case of income of public financial institutions, public companies, etc.

944 **S. 43D : Public financial institutions – Interest on non-performing assets would be chargeable to tax in the year in which it is actually received.**
The Assessee, a Government owned NBFC, did not recognize interest income on loans lent since they were categorized as non-performing assets. AO sought to tax the same on the ground that RBI norms were not binding under Income-tax Act. The ITAT held that as per s. 43D, interest on non-performing assets were chargeable to tax in the year in which it is credited to the P&L a/c or in the year in which it is actually received, whichever is earlier. The assessee, being a State Industrial Investment Corporation, is eligible for the same as per Explanation (f) though it was not a public financial institution within the meaning of Explanation (c). Further, the ITAT observed that having regard to the real income theory and RBI's prudential norms, interest on NPAs would be recognized only at the time receipt due to the uncertainty in its receipt. (AY. 2001-02, 2003-04 to 2008-09)
West Bengal Infrastructure Development Finance Corporation v. ACIT (2016) 45 ITR 285 (Kol.)(Trib.)
DCIT v. West Bengal Infrastructure Development Finance Corporation (2016) 45 ITR 285 (Kol.)(Trib.)

S. 44: Insurance business

945 **S. 44 : Insurance business – Income from shareholders account was to be taxed as a part of life insurance business and not as income from other sources. [S. 56]**
Dismissing the appeal of the revenue, the Court held that Income from shareholders account was to be taxed as a part of life insurance business and not as income from other sources. (AY. 2006-07 and 2008-09)
CIT v. ICICI Prudential Insurance Co. Ltd. (2016) 242 Taxman 159 (Bom.)(HC)
Editorial : SLP is granted to the revenue; CIT v. ICICI Prudential Life Insurance Co. Ltd. (2016) 242 Taxman 97 (SC)

S. 44AD. Special provision for computing profits and gains of business on presumptive basis.

946 **S. 44AD : Civil construction – Computation – Depreciation – Income exceeding limit of ₹ 40 lakhs – Bar does not apply. [S. 32]**
On appeal against the decision of the High Court upholding the order of the Commissioner in revision affirming the order of the Assessing Officer calculating the assessee's profit at a flat rate of 8 per cent. on the gross receipts and disallowing depreciation claimed by the assessee: Held, that admittedly, the proviso to section 44AD of the Income-tax Act, 1961, was applicable to the assessee in view of the fact that its income for the assessment year in question, i.e., 2009-10, was above ₹ 40 lakhs and therefore, the bar to the entitlement for depreciation under section 44A(2) of the Act would not apply. Grant of depreciation under section 32 of the Act would, therefore,

become mandatory. However, if on verification, it was found that the income of the assessee was less than ₹ 40 lakhs and, therefore, the proviso to section 44AD of the Act had application, the Department may seek modification of the court's order. (AY. 2009-10)
Awasthi Traders v. CIT (2016) 388 ITR 185 (SC)

S. 44AD : Civil construction – Best judgement assessment – Estimation of net profit – In preceding two years, assessee had shown net profit at 1.7 per cent and 2.21 per cent and same had been accepted by Authority, estimation of net profit at 8 per cent by AO was not justified. [S. 144] 947
Dismissing the appeal of the Revenue the Tribunal held that; in preceding two assessment years, assessee had shown net profit of 1.7 per cent and 2.21 per cent which were accepted by AO. Estimation of net profit of 8 per cent was not justified average of preceding two years was to be taken as GP rate. (AY. 2008-09)
Dy. CIT v. JSR Constructions (P.) Ltd. (2016) 159 ITD 749 (Bang.)(Trib.)

S. 44AD : Civil construction – When profit declared under presumptive taxation is accepted, AO could not make separate addition by invoking provisions of S. 69C. [S. 69C] 948
Allowing the appeal of the assessee the Tribunal held that when, profit declared by assessee under presumptive taxation as provided u/s. 44AD was accepted, AO could not make separate addition by invoking provisions of section 69C. (AY. 2007-08, 2009-10)
Nand Lal Popli v. Dy. CIT (2016) 160 ITD 413 (Chd.)(Trib.)

S. 44BB. Special provision for computing profits and gains in connection with the business of exploration, etc., of mineral oils.

S. 44BB : Mineral oils – Computation-Presumptive tax – Services provided in connection with prospecting for mineral oils – Matter remanded to consider whether the assessee had permanent establishment in India and whether the consideration received by it was connected with that of permanent establishment. [S. 44DA, 115A] 949
Held that; since the Assessment Year 2008-09 fell within the period from April 1, 2004 to April 1, 2011, the income of the assessee to the extent it fell within the scope of section 44DA(1) of the Act and stood excluded from section 115A(1)(b) of the Act, would be computed in accordance with section 44BB(1) of the Act. The contention of the assessee that since it was engaged in the business of providing services in connection with prospecting for mineral oils, its income fell within the ambit of section 44DA(1) of the Act and it would be taxable under section 44BB(1) was to be accepted. If the consideration received by the assessee for services rendered was found to be fees for technical services, the Assessing Officer would specifically have to determine (a) whether the assessee had a permanent establishment during the relevant period and (b) if so, whether the contracts entered into by the assessee with BG and RIL were effectively connected with the assessee's permanent establishment in India. It was only if the Assessing Officer found that the two conditions were satisfied, that the income of the assessee would be computed under section 44BB(1) of the Act. However, if such

conditions were not satisfied the income-tax payable by the assessee would have to be computed in accordance with section 115A(1)(b) of the Act. The Tribunal's decision to remit the matter to the Assessing Officer for determining whether the assessee had a permanent establishment in India and whether the consideration received by it was connected with that permanent establishment, was to be sustained. (AY. 2008-09)
PGS Exploration (Norway) AS v. Addl. DIT (2016) 383 ITR 178 / 239 Taxman 333 / (2017) 291 CTR 146 (Delhi)(HC)

950 **S. 44BB : Mineral oils – Non-resident – Prospecting for, or extraction or production of mineral oils – Service tax collected by assessee on amount paid to it for rendering services – Service tax not an amount paid or payable or received or deemed to be received by assessee for services rendered by it – Assessee only collecting service tax for passing it on to Government – Not includible in gross receipt.**
The assessee provided equipment on hire and manpower for exploration and production of mineral oil and natural gas. For the AY 2008-09, it declared an income of ₹ 49,31,260 according to the provisions of section 44BB(3). In computing the gross receipts for the purposes of determining the taxable income, the assessee did not include a sum of ₹ 2,09,24,553 being the service tax received from its customers. The Assessing Officer included ₹ 2,09,24,553 in the gross receipts for computing the taxable income u/s 44BB. The appellate authorities allowed the claim of the assessee. On appeals:
Held, dismissing the appeals, (i) that for the purposes of computing the presumptive income of the assessee for the purposes of section 44BB the service tax collected by the assessee on the amount paid to it for rendering services was not to be included in the gross receipts in terms of section 44BB(2) read with section 44BB(1). The service tax is not an amount paid or payable, or received or deemed to be received by the assessee for the services rendered by it. The assessee only collected the service tax for passing it on to the Government.
(ii) That Circular No. 4 of 2008, dated April 28, 2008*, clarified that service tax paid by the tenant does not partake of the nature of income of the landlord. The landlord only acts as a collecting agency for Government for collection of service tax. Circular No. 1 of 2014, dated January 13, 2014**, also clarified that service tax is not to be included in the fees for professional services or technical services. (AY. 2008-09)
PCIT v. Mitchell Drilling International P. Ltd. (2015) 234 Taxman 818 / (2016) 380 ITR 130 (Delhi)(HC)

951 **S. 44BB : Mineral oils – Computation – providing various services in connection with prospecting, extraction or production of mineral oil, would be assessed. [S. 4DA]**
Dismissing the appeal of the revenue, the Tribunal held that Payment received by assessee from a non-resident company for providing operations of highly specialized offshore personnel being an integral part of prospecting, extraction or production of mineral oil, would be assessed u/s. 44BB, and not u/s. 44DA. (AY. 2009-10)
ADIT v. International Technical Services LLC (2016) 159 ITD 958 (Delhi)(Trib.)

S. 44BB : Mineral oils – Insurance claim for recovery of cost of installation of off-shore platform, even if received outside India, would be a business receipt taxable in India only on existence of Permanent establishment in India – DTAA – India-Mauritius. [Art. 7] 952

Assessee a Mauritius based company was engaged in execution of installation of offshore platform for oil exploration. Assessee received certain amount of insurance claim. Claim was received outside India and was towards reimbursement of cost incurred, therefore, it was not offered to tax in India. It was held that amount was recovery of expenses/ cost incurred with respect to operations carried out in impugned projects in India, these receipts were part and parcel of business operations in India. Taxability of impugned receipts had to be examined as per section 44BB as well as Article 7 of Indo-Mauritius Treaty. As per article 7 said amounts could be brought to tax only if assessee had a PE in India for concerned project. Matter remanded. (AY. 1998-99, 2000-01, 2004-05, 2008-09)

ADIT (IT) v. J. Ray McDermott Eastern Hemisphere Ltd. (2016) 158 ITD 923 / 49 ITR 300 / 180 TTJ 660 (Mum.)(Trib.)

S. 44BB : Mineral oils – Income received by a non-resident under a time charter agreement accrues and arises in India even when the vessel and crew are outside the territorial waters of India. Such income is assessable on a presumptive basis. [S. 9(1)(vii), 44DA] 953

Income received by a non-resident under a time charter agreement accrues and arises in India even when the vessel and crew are outside the territorial waters of India. Such income is assessable on a presumptive basis. (ITA No. 4542/del/2013, dt. 11.03.2016) (AY. 2008-09)

Siemoffshore Crewing AS v. ADIT (Delhi)(Trib.); www.itatonline.org

S. 44BB : Mineral oils – Computation – When income was computed at 10 per cent of gross receipts separate deduction of fuel cost cannot be claimed – Demobilisation revenue of entire transit period had to be included in gross receipts. 954

Dismissing the appeal of assessee the Tribunal held that where profits and gains of business carried out by assessee-company were to be computed at 10 per cent of gross receipts as per deeming provisions of section 44BB, it could not claim separate deduction of fuel cost incurred in respect of contract undertaken for construction of offshore facilities for development of certain gas fields. In terms of section 44BB, demobilisation revenue of entire transit period had to be included in gross receipts. (AY. 2010-11)

Fugro Rovtech Ltd. v. ACIT (IT) (2016) 157 ITD 250 / 175 TTJ 41 (UO) (Mum.)(Trib.)

S. 44BB : Mineral oils – Consideration receivable by applicant is taxable in accordance with section 44BB 955

Applicant, UK based company, has entered into a contract with ONGC for hiring of services for acquisition, processing & integration of long offset of 2D Seismic, gravity, magnetic sea bed based reflection-refraction survey in block Offshore India, consideration receivable by applicant is taxable in accordance with section 44BB.

Marine Geology Services LLP U. K., In re (2016) 242 Taxman 491 (AAR)

956 **S. 44BB : Mineral oils – Coring service/sample analysis service for examination of presence of petroleum in block is a service in connection with the business of exploration of mineral oils. Hence, would be taxable u/s. 44BB – DTAA – India-UK [S. 9, 44D, 44DA, Art. 12]**

Coring service/sample analysis service for examination of presence of petroleum in block is a service in connection with the business of exploration of mineral oils. Hence, consideration received for rendition of such services would be taxable u/s. 44BB.

Corpo Systems Ltd., In re (2016) 389 ITR 29 / 239 Taxman 185 / 289 CTR 306 (AAR)

957 **S. 44BB : Mineral oils – Extracting, prospecting or production of mineral oil – Entire consideration received for scope of work was taxable in India.**

Assessee entered into a contract with RIL to provide facilities in connection with extracting, prospecting or production of mineral oil. Assessee signed a change order with RIL to facilitate certain amendments in scope of work of original contract. Original contract and 'change order' were inextricably linked with each other. Entire consideration received for scope of work was taxable in India under section 44BB.

Aker Contracting FP ASA, In re (2016) 381 ITR 489 / 237 Taxman 427 / 283 CTR 250/ 130 DTR 321 (AAR)

S. 44BBA: Special provision for computing profits and gains of the business of operation of aircraft in the case of non-residents.

958 **S. 44BBA : Aircraft – Non-residents – In the absence of any income, section 44BBA cannot be applied to bring to tax the presumptive income constituting 5% of the gross receipts in terms of section 44BBA(2) – Not assessable on deemed income. [S. 147]**

Assessee was established by the Ministry of Transport of the Kingdom of Jordon to carry passengers and cargo on international flights to and from Jordan. Assessee did not file its return of income in India as it was incurring losses since commencement of its operations in India. AO held that 5% of the gross receipts earned by the assessee were deemed to be taxable income on a presumptive basis as per section 44BBA. High Court held that section 44BBA is not a charging provision but only a machinery provision and it cannot preclude an assessee from producing books of account to show that in any particular AY there is no taxable income. High Court held that where there is no income, section 44BBA cannot be applied to bring to tax the presumptive income constituting 5% of the gross receipts in terms of section 44BBA(2). (AY. 1989-90 to 1993-94)

DIT v. Royal Jordanian Airlines (2016) 383 ITR 465 / 236 Taxman 10 / 287 CTR 407 (Delhi)(HC)

S. 44C. Deduction of head office expenditure in the case of non-residents.

S. 44C : Non-residents – Head office expenditure – to be allowed fully in view of Article 7(3) of the treaty prior to 1 April 2008 – Amendment brought by way of protocol which mandates applicability of domestic laws – Prospective in nature – DTAA – India-UAE [Art. 7(3)] 959

The assessee was a banking company incorporated in UAE and has 2 branches in India. The income from banking operations in India was offered for tax in India in view of India-UAE DTAA. The business profit of the bank related to its Indian operations was required to be computed in accordance with the provisions of Art. 7 of the DTAA which allowed the deduction of all expenses wherever incurred and reasonably allocable to the PE. During the year under consideration, the assessee had incurred head office expenses. There were administrative expenses which were allocated by head office to its branches. In the first round of proceedings, the Tribunal had set aside the claim to AO in view of amendment to Section 44C. In the second round of proceedings, the AO restricted the expenses in view of Section 44C. On appeal to Tribunal, it was held that in view of provisions contained in Article 7(3) of Indo-UAE DTAA prior to 1st April 2008, the income of the PE of the assessee was to be computed as business income after allowing all the expenses attributable to its business in India including the head office expenses without invoking the provisions of Section 44C. The amendment brought by way of Protocol by which Article 7(3) has been amended and limitation clause has been brought in, which mandates applicability of domestic law, would apply from 1st April 2008 and has no retrospective effect. (AY. 1995-96 to 2000-01)

Abu Dhabi Commercial Bank Limited v. ADIT (2016) 176 TTJ 115 (Mum.)(Trib.)

S. 45. Capital gains.

S. 45 : Capital gains – Share capital not to be treated as business income – Two units separately leased to directors – Not on par with other properties – Income therefrom to be treated as capital gains with deduction for cost. [S. 28(i)] 960

Court held that the amount of ₹ 45,84,000 on account of share capital received from the various shareholders ought not to have been treated as business income. Two units separately leased to directors is not on par with other properties. Income therefrom to be treated as capital gains with deduction for cost. (AY. 1996-97)

G.S. Homes and Hotels P. Ltd. v. Dy. CIT (2016) 387 ITR 126 / 242 Taxman 58 / 289 CTR 105 (SC)

Editorial : Decision in G.S. Homes and Hotels P. Ltd. v. Dy. CIT, ITA No. 16 of 2003 dated 16-09-2011 is partly affirmed.

S. 45 : Capital gains – Transfer – Surrender of Floor Area Ratio ('FAR') would amount to transfer, thus, consideration received would be taxable as capital gains. [S. 2(47)] 961

Assessee was in business of real estate and owned acres of land. Out of total land area, major portion was used for business and was subjected to joint development agreement. The remaining land area was kept for personal use. During the course of search, documents were seized which depicted that assessee received consideration

for surrendering the FAR in respect of land area kept for personal use. The AO treated surrender of FAR as transfer u/s. 2(47) and taxed the consideration as capital gains which was confirmed by CIT(A). The Tribunal, however, set aside the order on the ground that the land retained by assessee was not a capital asset and there was no transfer of immovable property as defined u/s. 2(47) of the Act. On appeal, the High Court held that surrender of FAR is relinquishment of rights amounting to 'transfer' as defined u/s. 2(47). The view of High Court was upheld by Supreme Court. (AY. 1999-2000)
Dinesh D. Rankha v. CIT (2016) 239 Taxman 262 (SC)

962 **S. 45 : Capital gains – Business income – Shares were held as investment hence gains from sale of shares assessable as capital gains. [S. 28(i)]**
Dismissing the appeal of the revenue the Court held that the peculiar facts were that the investment made was shown as investment and the cost was reflected throughout in the balance-sheet and it was never treated as stock-in-trade. The profit derived from sale of shares was assessable as capital gains. (AY. 1997-98)
PCIT v. Telestar Investments P. Ltd. (2016) 387 ITR 248 (Karn.)(HC)

963 **S. 45 : Capital gains – Capital loss – Transfer of shares while company under liquidation proceedings without permission of court was held to be void – No capital gains or loss can be said to arise – Shares under pledge at time of transfer – Transfer if at all of residuary rights whose value not ascertainable – No question of setting off loss accruing on sale thereof. [S. 2(47), Companies Act, 1956, S. 536(2)]**
During the previous year relevant to the assessment year 1995-96, the assessee had pledged with a bank shares in a company R, which had gone in liquidation. The assessee claimed long-term capital loss on sale of such shares to its sister concern. The Assessing Officer noted that the shares which the assessee sold were pledged with the bank and treated the transfer as invalid and disallowed the long-term capital loss claimed by the assessee on account of the sale. The Commissioner (Appeals) upheld the assessee's claim and directed the allowance of the long-term capital loss claimed. The Appellate Tribunal allowed the Department's appeal reversing the order of the Commissioner (Appeals). On appeal:
Held, dismissing the appeal, that the transfer of shares by the assessee by way of deed of assignment was void and did not fall under section 2(47) of the Income-tax Act, 1961 with no consequences as to the claim for long term capital loss. Under section 536(2) of the Companies Act, 1956 any transfer of shares after commencement of winding up proceedings was void unless the High Court otherwise ordered in respect of particular transactions and hence the transfer of shares by the assessee during the liquidation proceedings was void. The transfer of shares included the transfer of rights in shares which was declared void under section 536(2) of the Companies Act, 1956 and therefore, it was not a transfer. It was borne out from the record, that the assessee had not taken permission of the relevant statutory authority in respect of the sale of shares. It was found by the Appellate Tribunal that the assigned shares being encumbered to the extent of the liability guaranteed by the assessee company to the bank, what could have been assigned was only the residuary rights in the shares, the

cost of which was not ascertainable with reference to the provisions of the Income-tax Act, 1961. (AY. 1995-96)
Bijal Investment Co. P. Ltd. v. ITO (2016) 389 ITR 53 / 241 Taxman 435 / (2017) 147 DTR 404 (Guj.)(HC)
Editorial : Order of the Income-tax Appellate Tribunal in Dy. CIT v. Bijal Investment Co. P. Ltd. (2008) 303 ITR (AT) 350 (Ahd.) affirmed.

S. 45 : Capital gains – Business income – Sale of plot of land assessable as capital gains and not as business income. [S. 28(i)] 964
Allowing the appeal of the assessee, the Court held that the plot of land was purchased in 1971 and thereafter, prior to its sale in parts, no transfer of rights in favour of any third party ever took place, therefore the sale of such land could not be termed as "business adventure". (AY. 2002-03)
Arjundev K. Khanna (HUF) v. ITO (2016) 241 Taxman 380 (Guj.)(HC)

S. 45: Capital gains – Failure of vendor to show the receipts in their account cannot be the ground to reject the claim of assessee as long term capital gains. [S. 2(29B)] 965
Dismissing the appeal of the revenue, the Court held that merely because vendor of shares failed to disclose receipt of consideration in their returns of income and had not offered same for tax, STCG could not be presumed instead of LTCG, where assessee had paid purchase consideration of shares by account payee cheques and vendors had issued confirmation. (AY. 2005-06)
CIT v. Sadanand B. Sule. (2016) 242 Taxman 116 (Bom.)(HC)

S. 45 : Capital gains – Compensation relating to standing trees in the agricultural land – since acquisition was of the entire land on 'as is where is' basis, question of payment of capital gains only on the compensation for standing trees cannot be justified in law. [S. 2(IA)] 966
While calculating the valuation of trees, which was done by the Land Acquisition Officer of the Board, part relief had been granted by the authorities with regard to certain kind of trees and also the building and the borewell. But mango trees, which were approximately 12 years of age, were valued separately, and compensation on the same was treated as a separate transaction and was held as taxable.
Overruling the decision of the Tribunal, the High Court held that even though while computing the compensation in relation to such acquisition, the land and trees growth were valued separately, it does not mean that there were two transactions. Thus, the High Court held that splitting one transaction into two for the purpose of taxation would be against law and hence since acquisition was of the entire land on 'as is where is' basis, question of payment of capital gains only on the compensation for standing trees cannot be justified in law.
Shivanna, M. v. ACIT (2016) 142 DTR 319 (Karn.)(HC)

967 **S. 45: Capital gains – Transfer of capital asset to firm – Firm being held to be non- genuine, profit on sale of land was held to be assessable in the assessment of individual partner. Reassessment was also up held. [S. 45(3) 147, 148, 184]**

On appeal, High Court concurred with the observation of the AO, that the partnership firm was not genuine in nature, as the assessee did not place the original partnership deed on record and registered the firm after a lapse of 15 years in 2003, just a year before executing the retirement-cum-reconstitution deed in 2004. Thus, the claim of the assessee that the consideration received on retirement was not in relation to his transfer of land but by way of retirement of partners in the firm was rightly rejected by the Tribunal. On this basis, the HC upheld the order of the Tribunal that, the amount received on retirement was to be treated as capital gains on sale of land. Reassessment was done after recording reasons and basis of information hence the reassessment was held to be valid (AY. 2005-06)

V.S. Balasubramanyam v. ITO (2014) 47 taxmann.com 282 / (2017) 393 ITR 486 (Karn.) (HC)

Kalavathi v. ITO (2014) 47 taxmann.com 282 / (2017) 393 ITR 486 (Karn.)(HC)

Editorial : SLP of the assessee was dismissed, V. S. Balasubramanyam v. ITO (2016) 242 Taxman 255 / 389 ITR 2 (St.) (SC)

968 **S. 45 : Capital gains – Principle of mutuality – Right to occupancy of flats attached to shares – Shareholder selling shares to third party – Capital gains taxed in hands of shareholder – No transfer of land or any asset by assessee giving rise to capital gains. [S. 27(iii)]**

The assessee was a non-profit making company working on the principle of mutuality. It constructed a building on land owned by it and entitled its shareholders to occupy flats in the building recovering only the cost of construction. During the year one of its shareholders sold its shares to a third party. The shareholder was subjected to tax on the capital gains arising on the transfer. The AO held that as the land was owned by the assessee and its floor space index was utilised, the land was impaired and the profit on the sale of flats was compensation for the impairment and computed the gains after reducing the cost of construction of the flats from the consideration for the transfer. Tribunal deleted the addition. On appeal by revenue, dismissing the appeal the Court held that the only sale which took place was the assessee's shares, which carried the right to occupy the flats, which were held by its shareholder and the consideration had already been subjected to tax in the hands of the shareholder. The assessee had not sold any asset including any flat. (AY. 2006-07)

CIT v. Calico Dyeing and Printing Mills P. Ltd. (2016) 386 ITR 132 (Bom.)(HC)

Editorial : Order in ITO v. Calico Dyeing and Printing Mills P. Ltd. (2016) 7 ITR (Trib.)-OL 140 (Mum.)(Trib.) is affirmed.

969 **S. 45 : Capital gains – Joint development agreement – Possession delivered as licensee and not as transferee for development – No capital gains arise in respect of remaining land for which no consideration received – Matter remanded. [S. 2(47)(v), Transfer of Property Act, 1882, S 53A]**

Allowing the appeal of assessee the Court held that no possession had been given by the assessee to the transferee of the entire land in part performance of the joint development

agreement. In the absence of registration of the joint development agreement, it did not fall under section 53A of the Transfer of Property Act, 1882 and consequently section 2(47)(v) did not apply. It was urged by the assessee that as and when any amount was received, capital gains tax would be discharged thereupon. The assessee should remain bound by its stand. When there was no exigibility to tax on capital gains there was no question of exemption under section 54. The authorities below were not right in holding that the assessee was liable to capital gains tax in respect of the remaining land for which no consideration had been received when the agreement had stood cancelled and was incapable of performance due to various orders passed by the Supreme Court and the High Court in public interest litigations. Matter was remanded to Tribunal.] (AY. 2007-08)

Punjabi Co-op House Building Society v. CIT (2016) 386 ITR 116 (P&H)(HC)

Editorial : SLP is granted to revenue; CIT v. Punjabi Co-op House Building Society (2016) 383 ITR 1 (St.)

S. 45 : Capital gains – Capital receipt – Amount received upon termination of joint venture agreement not taxable. No provision to bring capital gains from transfer of trade – marks or brand name or non-compete covenant to tax prior to 1-4-2003 – Amendment is prospective in nature. [S. 2(47)(ii), 55(2)(a)] 970

Dismissing the appeal of revenue the Court held that as a result of the termination of the joint venture agreement, a bundle of rights of the assessee would stand extinguished, which included the right to manufacture computers using HP know-how and HP labels, trade-marks and patents. At the same time, the assessee's right to manufacture its own computers was not taken away by the termination and that stood revived. The assessee's income earning apparatus was impaired and its source of income got sterilised. Therefore, the amount received by the assessee upon termination of the joint venture agreement was in the nature of a capital receipt. Till April 1, 2003, there was no provision under which the capital gains arising from the transfer of a trade-mark or brand name associated with a business could be brought to tax. Similarly, the capital gains arising from the transfer of a right to carry on business or negative non-compete right also could not be brought to tax at the relevant time. The amendments were prospective in nature. (AY. 1998-99)

CIT v. HCL Infosystems Ltd. (2016) 385 ITR 35 / 136 DTR 194 (Delhi)(HC)

S. 45 : Capital gains – International transaction – Chapter X deals primarily with evasion of tax – No income chargeable to tax. [S. 2(47), 92B, 92C] 971

Held, that the conclusions of the Tribunal did not in any manner indicate that the essential ingredients of amended section 2(47) were satisfied. If the transaction was indirect, circuitous and to take place in future, then, on the basis thereof the Tribunal could not have concluded that the amended definition of the term "transfer" was attracted, that the matter must be viewed differently and distinctly and not in the manner noted by the Supreme Court in *Vodafone International Holdings B. V. v. Union of India [2012] 341 ITR 1 (SC)*. A holistic view and approach ought to be adopted in considering such intricate deals and complex transactions. One transaction cannot be picked up in isolation so as to hold that it was a deliberate and intentional act of the

parties to circumvent Indian tax structure. Capital asset means property and throughout there was only a transfer of a share. Further, the overseas transaction and thereafter all the agreements or arrangements evinced an intention of the assessee to control the telecommunication business of HEL in India through TII and downstream companies. On the same transactions and same set of facts reaching a different conclusion than that reached by the Supreme Court was not possible and was impermissible. The Tribunal's order was vitiated by serious errors of law apparent on the face of the record. It was also perverse for it ignored vital materials which had been noted extensively in the judgment of the Supreme Court. None of the amendments post the Supreme Court judgment would enable the Department to urge that the position as noted in the Supreme Court judgment no longer subsisted. There were no capital gains. Since there was no income the provisions of section 92B read with section 92F(v) were not applicable. (AY. 2008-09)

Vodafone India Services P. Ltd. v. CIT (2016) 385 ITR 169 / 284 CTR 441 / 69 taxmann.com 283 / 132 DTR 121 (Bom.)(HC)

Editorial : The Supreme Court has granted special leave to the Department to appeal against this judgment; CIT v. Vodafone India Services P. Ltd. (2016) 384 ITR 182 (St.) 240 Taxman 347)]

972 **S. 45 : Capital gains – Transfer – Distribution of capital asset – Where AOP could not be taxed at the time of distribution of capital assets, it is not open to department to tax the members of AOP. [S. 2(47), 4, 45(4)].**

Dismissing the appeal of revenue the Court held that when the AOP was dissolved and assets were distributed among the members of AOP, at that time, the department ought to have taxed the AOP u/s. 45(4) of the Act. Having failed to do so, it is not now open to the department, to tax the erstwhile members of AOP on the distributed amounts. Merely because the right person could not be taxed, it is not open to department to tax wrong person.

PCIT v. Ind Sing Developers (P.) Ltd. (2016) 239 Taxman 350 / 288 CTR 154 / 139 DTR 237 (Karn.)(HC)

Editorial : Order of Tribunal in Ind Sing Developers (P.) Ltd v. ACIT (2015) 155 ITD 543 (Bng.)(Trib.) is affirmed

973 **S. 45 : Capital gains – Income from other sources – Casual and non-recurring receipts – Auction sale of property mortgaged with bank set aside by Supreme Court – Auction purchasers and judgment debtors compromising in execution proceedings – Amount received by auction purchaser not casual and non-recurring receipt – Capital receipt not taxable. [S. 10(3), 56]**

The Appellate Tribunal upheld the order of the Commissioner (Appeals). In the appeals filed by the assessees, the Department sought consideration of the amount received by the assessees as revenue receipt, held, allowing the appeals, (i) that the Department could not be permitted to shift its stand from one forum to another. The consistent case of the Department was to be tested at various levels for its correctness. It was possible that in the interregnum there might be decisions of the Supreme Court which might support or negate the case of the Department. That would then have to be taken

to its logical end. Under these circumstances, the court was not prepared to permit the Department to urge a new plea for the first time in the High Court.
(ii) That the Assessing Officer was in error in proceeding on the basis that a sum of ₹ 10 lakhs received by each of the assessees was in the nature of a casual and non-recurring receipt which could be brought to tax under section 10(3) of the Act. The Assessing Officer having held that it could not be in the nature of capital gains it was not open to the Department to seek to bring it to tax under the heading revenue receipt. What was in the nature of a capital receipt could not be sought to be brought to tax resorting to section 10(3) read with section 56 of the Act. (AY. 1993-94, 1994-95)
Gynendra Bansal v. UOI (2016) 384 ITR 161 (Delhi)(HC)

S. 45 : Capital gains – Transfer of a "trademark" related to some products cannot be considered as transfer of "goodwill" of the business – In the absence of any cost of acquisition of such a "trademark", it cannot be taxed as capital gain – Prior to amendment of section 55(2)(a) w.e.f. 1-4-2002 [S. 45, 48, 55(2)(a)]. 974
Assessee was carrying on the business of manufacturing electronic appliances. Some of the products manufactured by the assessee were sold under the name "Sharp". During the year, assessee transferred the trademark "Sharp" along with goodwill and common law rights related to the trademark to a Japanese company for ₹ 3,99,75,000. The AO taxed it as capital gain resulting from transfer of goodwill of the business. The tribunal reversing the order of the CIT(A) held that assessee had transferred a "trademark" and not goodwill, and in the absence of any cost of acquisition of such a "trademark", it cannot be taxed as capital gain u/s 45. On appeal by the Revenue, the High Court held that the various clauses of the agreement clearly suggest that assessee had transferred the trademark "Sharp" to the Japanese company. Further, transfer of a "trademark" related to business cannot be considered as "goodwill" of the business as variety of factors go into making of the goodwill of the business. Also held that if contention of revenue is accepted then the amendment made by the Finance Act, 2001 to section 55(2) of the Act was not required at all. (AY. 1996-97)
CIT v. Associated Electronics & Electrical Industries (Bangalore)(P.) Ltd. (2016) 65 taxmann.com 253 / 130 DTR 222 (Karn.)(HC)

S. 45 : Capital gains – Business income – Profit from sale of flats is to be assessed as Capital gains and not as business income. [S. 2(45), 28(i)] 975
The assessee was the owner of a house property. The assessee approached a builder for the purpose of construction of additional flats in the extra space available and the assessee received a flat on the rear side as consideration. The assessee was also entitled to the profit on sale of flats. It was held by the high court that the profits is to be assessed as capital gains and cannot be said to be adventure in the nature of trade for the profits to be assessed as business income as assessee never had the intention to exploit the flat as commercial venture. (AY. 1990-91)
Raj Dhulari Bhasin v. CIT (2016) 236 Taxman 573 (Delhi)(HC)

976 **S. 45 : Capital gains – Immovable property converted into stock-in-trade in 1995 – Transfer to Power of Attorney agent in accounting year relevant to AY. 2001-02 – Sale of property in accounting years relevant to AYs. 2004-05 and 2005-06 – Gains assessable in AYs. 2004-05 and 2005-06. [S. 2(47)(vi), 45(2), Transfer of Property Act, 1882 S. 53A]**

Sub-section (1) of section 45 deals with profits and gains arising from the transfer of a capital asset. Sub-section (2) of section 45 contains a *non obstante* clause saying notwithstanding anything contained in sub-section (1), the profits or gains arising from the transfer by way of conversion by the owner of a capital asset into or its treatment by him as stock-in-trade of business carried on by him shall be chargeable to income-tax as his income of the previous year in which such stock-in-trade is sold or otherwise transferred by him. Therefore, in so far as stock-in-trade is concerned, the relevant year in which the capital gains tax is leviable is the previous year in which such stock-in-trade is sold. The word "used" is sold or otherwise transferred by him. In view of the express words used in section 45(2), it is clear that section 45(1) deals with capital gains on transfer of a capital asset, section 45(2) deals with payment of capital gains in a transaction where stock-in-trade is sold or otherwise transferred by him. Having regard to the scheme of the entire section and the express words used in sub-section (2) of section 45, the case of considering stock-in-trade otherwise transferred, would arise only if stock-in-trade is not sold. If stock-in-trade is sold, the question of considering whether the stock-in-trade is otherwise transferred would not arise for consideration. The object of using the words "otherwise transferred" as it is in the other provisions in the same section is to prevent avoidance of payment of tax on capital gains by the owners thereof resorting to modes which are not recognised in law, but which in substance have the same effect. In other words, if the owner by such transfer ceases to have any interest in the property and transfers all his interest in the property to the transferee and earns profits and gains, but declines to pay tax on the capital gains, on the ground that such transfer is not a transfer recognised in law, then the law in such cases to plug the loop hole has used the term "otherwise transferred". Once it is sold, the question of considering whether it has been otherwise transferred would not arise. Under section 2(47), any transaction involving the allowing of possession of immovable property to be taken or retained in part performance of a contract of the nature referred to in section 53A of the Transfer of Property Act, 1882 is a deemed transfer in relation to a capital asset. Therefore even if the stock-in-trade which was prior to its conversion a capital asset, as treated by the Tribunal as a capital asset, as possession is not delivered, it would not become a transfer and the question of payment of tax on capital gains would not arise. The Central Board of Direct Taxes Circular No. 495, dated September 22, 1987 (see [1987] 168 ITR (St.) 87) which came into effect from April 1, 1988 explains the purpose of sub-clause (vi) of section 2(47). (AY. 2001-02 to 2004-05)

Dy. CIT v. Wipro Ltd. (2016) 382 ITR 179 / 236 Taxman 209 / 282 CTR 346 (Karn.)(HC)

977 **S. 45 : Capital gains – Business income – Profits from purchase and sale of shares – Assessable as capital gains [S. 28(i)]**

Dismissing the appeal of revenue, the Court held that the Assessee not registered with any authority or body to trade in shares. Entire investments made out of assessee's own

funds. That purchase and sale of shares were for investment accepted by Department in earlier years. No material placed on record by Department to come to different conclusion. Gains from purchase and sale of shares cannot be taxed as business income. (AY. 2006-07)
CIT v. SMAA Enterprises P. Ltd. (2016) 382 ITR 175 / 138 DTR 373 / 288 CTR 103 (J&K) (HC)

S. 45 : Capital gains – Colourable device – Gain arising from sale of share and renunciation of rights is business income and not capital gains. Further, the loss claimed on renunciation of rights was a contrived loss and the transaction of renunciation of rights was a colourable device to claim such a loss. [S. 28(i), 260A] 978
During the year, the assessee sold shares and declared the income arising therefrom as long term capital gains. Further, right issue was declared in respect of certain shares held by assessee. The assessee sold its right entitlement to a related company and claimed a capital loss on such renunciation of rights.
The AO noted that the renunciation of rights was made below the market price. Further, the AO held that the transaction was a sham transaction to purchase losses for set off against gains. The CIT(A) confirmed the order of the AO. The ITAT, however, accepted the assessee's contention and allowed the claim of loss as capital loss. The ITAT was of the view that the shares were held as investments and not trading assets. On appeal, the HC held that Income received from renunciation of rights is assessable as business income and not capital gains since the closing stock was valued at cost or market value, whichever is lower. This treatment could only be accorded to shares held as stock in trade and not as investment. There was no explainable position as to why the rights were renounced for merely a meagre portion of its market value. Hence, in order to avoid paying of tax, the assessee had entered into transaction of renunciation of shares with related company which was not for business purpose but to contrive a loss. Hence, the transaction was a sham transaction or colourable device to claim loss. (AY. 1992-93)
CIT v. Abhinandan Investment Ltd. (2016) 282 CTR 466 (Delhi)(HC)

S. 45 : Capital gains – Accrual – Deferred consideration dependent on a contingency does not accrue unless the contingency has occurred and is not liable to capital gains tax in year of transfer. [S. 48] 979
Dismissing the appeal of revenue the Court held that The Tribunal held that what amount has to be brought to tax is the amount which has been received and/or accrued to the assessee and not any notional or hypothetical income as the revenue is seeking to tax the assessee in the subject assessment year 2006-07… learned counsel for the Revenue urged that in terms of section 45(1) of the Act that transfer of capital asset would attract the capital gains tax. It is further submitted that the amount to be taxed under section 45(1) is not dependent upon the receipt of the consideration. In support of the above he invites our attention to Section 45(1)(A) and section 45(5) of the Act which in contrast brings to tax capital gains on amount received… in the subject assessment year no right to claim any particular amount gets vested in the hands of the assessee. Therefore, entire amount of ₹ 20 crores which is sought to be taxed by the Assessing Officer is not the amount which has accrued to the assessee. The test of accrual is

whether there is a right to receive the amount though later and such right is legally enforceable… contention of the Revenue that the impugned order is seeking to tax the amount on receipt basis by not having brought it to tax in the subject assessment year, is not correct. This for the reason, that the amounts to be received as deferred consideration under the agreement could not be subjected to tax in the assessment year 2006-07 as the same has not accrued during the year. (AY. 2006-07)
CIT v. Hemal Raju Shete (Mrs.) (2016) 136 DTR 417 / 239 Taxman 176 (Bom.)(HC)

980 **S. 45 : Capital gains – Business income – sale of shares and mutual funds held as investment – maintenance of two separate accounts in respect of shares held in trading portfolio and investment portfolio – gains arising on sale of shares held in investment portfolio to be treated as capital gains. [S. 28(i)]**
The assessee held two separate accounts in respect of dealing in shares and mutual funds under trading portfolio and under investment portfolio. During the year under consideration, the assessee sold shares and mutual funds in investment portfolio and returned long term capital gain on the same. The Assessing Officer held that the gains arising out of the same has to be treated as business income as he is a trader in shares for the reason that the assessee held the shares of the same company both under investment portfolio and trading portfolio and the assessee has the discretion to decide which scrip is to be held under investment portfolio and which one under trading portfolio. On appeal, the CIT(A) upheld the order of the Assessing Officer, which was subsequently reversed by the Tribunal. On appeal by the Revenue, the High Court held that the tests applied by the Assessing Officer is not correct relying upon Circular No. 4 of 2007 dated 15-6-2007 which gives the discretion to the assessee to treat a particular scrip either as investment or as stock in trade. Further, also following the principle of consistency as it was held that the gain is to be assessed as capital gain in the preceeding previous year, it was held that the gain arising on the sale of shares and mutual funds is to be assessed as capital gain in the year under consideration. (AY. 2006-07)
CIT v. IHP Finvest Ltd. (2016) 236 Taxman 64 (Bom.)(HC)

981 **S. 45 : Capital gains – Sale of business of firm as a going concern to a company for consideration of paid up capital does not amount to transfer liable as tax as capital gains – Conversion of capital asset in to stock-in-trade – Distribution of capital assets necessary to invoke the provisions of the section. [S. 2(47) 28(v), 45(2)]**
The assessee was a firm and was having a shopping centre and land which was non business asset and hence was kept out of the Balance sheet. During the year under appeal, the said asset was brought into the stock of the business and corresponding credit was given to the respective capital accounts of the partners in their profit sharing ratio. The firm was converted into a joint stock company with the same objects to deal in land, building and construction. The Assessing Officer noticed that the asset i.e. is the shopping centre was introduced for the first time in the books and thus charged this receipt of income. Alternatively, the Assessing Officer observed that in this transaction the assessee has transferred an asset where the cost of acquisition is nil for a consideration of ₹ 1,16,40,000/- for Shopping Centre and for the land which had acquisition value of ₹ 12,00,000/- for a consideration of ₹ 65,00,000/- The Assessing

Officer treated the same as short term capital gain as the asset had been brought for the first time in its books of account and added it to the income of the assessee.
Before the CIT(A) the assessee contended that the provisions of section 28(iv) of the Act were not applicable as neither the act of bringing an asset into the books or revaluation thereof would amount to benefit or perquisite because the asset was already owned by the assessee, though not reflected in its books. The fact that the asset had been brought into its books did not amount to obtaining any benefit by the assessee. It was further contended that no capital gains had occurred when it had converted the firm into a joint stock company as in view of the provisions of Chapter IV of the Companies Act, the act of declaring a firm as a company did not amount to transfer. It was contended that if the property is transferred from an individual to himself, then no profit or gain accrues to such person.
The CIT(A) held that a transfer of assets by a partnership firm to a company comprising only of shareholders who were earlier partners of the firm attracts liability under section 45 of the Act and directed the Assessing Officer to compute the capital gains as per the provisions of section 48 read with section 55 of the Act. The Tribunal held that capital gains can be brought to assessment only, if the full value of the consideration is received by or accrues to the transferor. The consideration in the instant case is stated to be allotment of shares though the shares were issued by the company not to the firm but to its partners. Even if it was considered that the shares somehow represented the consideration, the firm would not be liable to tax.
After going through the various submissions and contentions of both the parties and relying on various judicial precedents the High Court (including decision of Bombay High Court in case of *Texspin Engineering and Manufacturing Works (263 ITR 345) (Bom.)* and held that impugned transaction is not chargeable to tax under section 28(iv), 45 and 45(4) of the Act. Accordingly department's appeal was dismissed. (AY. 1996-97)
Dy. CIT v. R. L. Kalathia and Co. (2016) 381 ITR 180 / 237 Taxman 621 / 139 DTR 189 (Guj.)(HC)
Editorial : SLP is granted to the Revenue, DCIT v. R. L. Kalathia & Co. (2016) 242 Taxman 104 (SC)

S. 45 : Capital gains – Penny Stocks – The fact that the stock is thinly traded and there is unusually high gain is not sufficient to treat the long-term capital gains as bogus when all the paper work is in order. The revenue has to bring material on record to support its finding that there has been collusion/connivance between the broker and the assessee for the introduction of its unaccounted money. [S. 48, 68] 982
Allowing the appeal of assessee the Tribunal held that the fact that the stock is thinly traded and there is unusually high gain is not sufficient to treat the long-term capital gains as bogus when all the paper work is in order. The revenue has to bring material on record to support its finding that there has been collusion/connivance between the broker and the assessee for the introduction of its unaccounted money. On facts the assessee has produced all relevant documents as per the law. (ITA No. 19/kol/2014, dt. 02.12.2016) (AY. 2005-06)
Dolarri Hemani v. ITO (Kol.)(Trib.); www.itatonline.org

983 **S. 45 : Capital gains – Benami transaction – No profit arises on execution of sale deed by Assessee as GPA holder – Any material collected at the back of the assessee cannot be read in evidence against him.**
Any material collected at the back of the assessee cannot be read in evidence against him in light of *Kishinchand Chellaram v. CIT (1980) 125 ITR 713 (SC).* No profit arises on execution of sale deed by Assessee as GPA holder and hence there is no transfer of capital asset by the assessee to give rise to Capital gains. (AY. 2007-08)
Inder Singla v. ITO (2016) 181 TTJ 368 / 141 DTR 137 (Chd.)(Trib.)

984 **S. 45 : Capital gains – Business income – Shares were held as investment – Income assessable as capital gains and not as business income. [S. 28(i)]**
Allowing the appeal of the assessee, the Tribunal held that; Shares purchased and sold in systematic and organized manner, treated as investment and accepted by Department for several years as investment. Income from same transaction cannot be treated as business gains by Department upon scrutiny assessment when no change in facts for current year. (AY. 2008-09)
Tarujyot Investment Ltd. v. ACIT (2016) 48 ITR 33 (Ahd.)(Trib.)

985 **S. 45: Capital gains – Business income – Profits on sale of shares – Assessee consistently treating securities as investment and not stock-in-trade in previous years – Revenue cannot take contrary view in present year.**
Dismissing the appeal of the revenue, the Tribunal held that stand once taken, cannot be allowed to be changed in the consequent years. Therefore, observing the fact that the assessee treated the transactions and the income arising therefrom as capital gains in the preceding years consistently, the Revenue was not justified to take a contrary view in the present year. (AY. 2008-09)
Dy. CIT v. Mahender Kumar Bader (2016) 48 ITR 596 (Jaipur)(Trib.)

986 **S. 45 : Capital gains – Transfer of land as per joint development agreement was held to liable to capital gains tax though the sale deed was executed in next year, however part of expenditure recorded by developer which had no direct nexus with construction could not be adopted as sale consideration for transfer of land for purpose of computing capital gain in hands of assessee [S. 2(47)(v), 48, 269UA]**
Tribunal held that AS per Joint Development Agreement, builder would get 47 per cent and landowner 53 per cent of built up area and during current year landowner handed over entire land to developer, though sale deed was executed in next year, in current year itself there was transfer of capital assets for consideration being cost of 53 per cent of built up area. However part of expenditure recorded by developer which had no direct nexus with construction could not be adopted as sale consideration for transfer of land for purpose of computing capital gain in hands of assessee. (AY. 2005-06)
Essae Teraoka Ltd. v. DCIT (2016) 157 ITD 728 (Bang.)(Trib)

987 **S. 45 : Capital gains – Capital asset – Agricultural land – Buying and selling of agricultural land – Assessable as short term capital gains. [S. 2(14)(iii), S. 2(42B)]**
Assessee engaged in buying/selling of immovable properties was to be upheld as land was converted from agricultural to non-agricultural prior to sale with sole purpose and

intent to sell land for industrial purpose and period of holding was also very short; land in question did not fall under exclusion clause (iii) to section 2(14) hence assessable as capital gains. (AY. 2007-08)
Dy. CIT v. B. Sudhakar Pai (2016) 159 ITD 875 (Bang.)(Trib.)

S. 45 : Capital gains – Transfer – Joint development agreement – In the year of handing over of physical possession of property to builder is liable to be assessable to capital gains and not in later assessment year when sale deed was registered. [S. 2(47)(v)] 988

The assessee claimed that it had originally entered into Joint Development Agreement (JDA) with promoters on 9-7-2005 and according to him, transfer took place in AY. 2006-07 and not in A.Y. 2009-10. The AO disagreed with contention of assessee and observed that transfer took place *vide* registered sale deed dated 1-4-2008 in AY. 2009-10 and, thus, taxability of gains arising on transfer of said lands had to be dealt in AY 2009-10. CIT(A) held that Transfer took place in the year 2006-07. On appeal by revenue dismissing the appeal of the Revenue, held that in AY. 2006-07, in terms of JDA, assessee handed over physical possession of property to builder/developer who had given substantial amount to assessee in form of refundable deposit and had also shown willingness to perform his part of duty to assessee and there was no question of going back from his consent to act as builder. Merely because an agreement of sale had not been registered in year of transfer, it could not be taken out of ambit of S. 2(47)(v) when parting of possession of immovable property had already taken place. (AY. 2009-10)
ITO v. Ayisha Fathima (Smt.) (2016) 160 ITD 377 / 182 TTJ 437 (Chennai)(Trib.)

S. 45 : Capital gains – Transfer took place when possession was taken over by buyer and not when buyer exercised option to buy said property after five years. [S. 2(47)(v), Transfer of Property Act, 1882, S. 53A) 989

Assessee entered into an agreement for sale of office premises and parking space to a bank. As per agreement sale would be completed only after expiration of five years but before sixth year from purchaser and would have option to complete transaction or rescind same. Possession of property in question was handed over to bank in part performance of contract. As per agreement purchaser-bank exercised its option to purchase said property. The AO held that transaction of transfer within meaning of s. 2(47) took place and capital gain was chargeable to tax in relevant assessment year. Tribunal held that in terms of s. 2(47) date of transfer would be date on which any transaction involving allowing of possession of any immovable property to be taken or retained in part performance of a contract of nature referred to in s. 53A of Transfer of Property Act, 1882 takes place. Since in instant case, possession was allowed to be taken over by bank in part performance of sale agreement, transfer within meaning of s. 2(47)(v) took place. Therefore, capital gain in relation to capital asset in question could not be taxed in relevant assessment year. (AY. 1991-92)
Zuari Estate Development & Investment Company (P.) Ltd. v. JCIT (2016) 159 ITD 28 (Panaji)(Trib.)

990 **S. 45 : Capital gains – Call options – Capital asset – When call option would be exercised, option right was to be reckoned as a transfer/alienation of a valuable right but the consideration received therefor would not be taxed as capital gain in India in terms of article 13(6) – DTAA – India-Singapore. [S. 2(47), 5(2), 9(1)(i), Art. 13]**

The assessee was tax resident of Singapore and was a non-resident Indian. The strike price or the call option was agreed for US $ 1 and the consideration mentioned was US $ 2450,000 and such call option was spread in to period of 150 years. The AO held that the assessee had received income through or from transfer of capital asset situated in India and therefore, the consideration of USD 24.50,000 equivalent to Indian Rupees 11,71 00,000 received by the assessee was taxable in India as per section 5(2) read with section 9(1) as income from other sources. In appeal CIT(A) also up held the order of the Assessing Officer. Allowing the appeal of the assessee the Tribunal held that in common parlance, a call option is reckoned as a contract in which the holder (buyer) has the right (but not an obligation) to buy a specified quantity of a security/shares at a specified price (strike price) within a fixed period of time. In the present case, there is very peculiar agreement/arrangement, where the strike price has been mentioned and the fixed period of time for exercising the call option has been fixed for 150 years. This factum itself means that the call option in the shares has been given for perpetuity. Not only that, an irrevocable power of attorney has also been executed in favour of the ING Bank in respect of all the shares in Assessee confirming that assessee will not at any time purport to revoke the same, which *inter alia* shows that assessee has alienated a substantive and valuable right as an owner of the shares in perpetuity, albeit without dejure alienating the shares itself. Hence, it cannot be held merely as a call option agreement simplicitor.

The option right in the shares has to be reckoned as transfer/alienation of a valuable and substantive right. Such a valuable right/interest in shares would certainly be a 'capital asset'. Parting with any substantive interest in the asset or creating any substantive interest in any asset or extinguishment of a right/in an asset, directly or indirectly would surely be reckoned as a 'transfer' of an asset/property even under the domestic law, that is, under section 2(47). When call option would be exercised, option right was to be reckoned as a transfer/alienation of a valuable right but the consideration received therefor would not be taxed as capital gain in India in terms of article 13(6). (AY. 2002-03)

Praful Chandaria v. ADDIT (2016) 161 ITD 153 / 181 TTJ 731 / 143 DTR 1 (Mum.)(Trib.)

991 **S. 45 : Capital gains – Joint development agreement – Possession was not parted with, development agreement was not registered, there was no intention to transfer, capital gain cannot be taxed [S. 2(47)(v), 51, Transfer of Property Act, S. 53A, Registration Act, 1908 S. 17(IA)]**

In terms of agreement, possession of land was to be given to developer only upon fulfilment of certain conditions, Thus, important condition of transfer u/s. 2(47)(v) was not fulfilled, as possession was not parted with, development agreement was not registered and therefore transaction does not fall u/s. 2(47)(v) hence no capital gain can be taxed. (AY. 2008-09)

ACIT v. Jawaharlal L. Agicha (2016) 161 ITD 429 / (2017) 183 TTJ 176 (Mum.)(Trib.)

S. 45 : Capital gains – Business income – Share investment was continuously shown shares as investment, entitled to treat gains arising on purchase and sale of shares as capital gain. [S. 28(i), 111A] 992

Assessee declared gain arising on purchase and sale of shares as short-term capital gain, took a view that shares were held for a short period and meant for purpose of business and therefore gain would be part of business activity, taxable as 'business income'. Tribunal held that assessee had disclosed shares as investment in balance sheet, entitled to treat gains as short-term capital gain. (AY. 2008-09)

Suresh Babulal Shah (HUF) v. DCIT (2016) 161 ITD 514 (Pune)(Trib.)

S. 45 : Capital gains – Transfer – Entering into a "joint development agreement" with the builder and handing over possession/power of attorney will not amount to a "transfer" and gives rise to capital gains. [S. 2(47)(v), Transfer of Property Act, 1882, S. 53A, Indian Registration Act, 1908, S. 17(IA)] 993

Dismissing the appeal of revenue, the Tribunal held that; entering into a "joint development agreement" with the builder and handing over possession/power of attorney will not amount to a "transfer" and gives rise to capital gains. (ITA No. 1844/Mum/2012, dt. 28.09.2016) (AY. 2008-09)

ACIT v. Jawaharla Agicha (Mum.)(Trib.), www.itatonline.org

S. 45 : Capital gains – Consideration for alienation of rights under a "Call Option agreement" for shares is not taxable as "capital gains" or as "income from other sources" – DTAA – India-Singapore DTAA. [S. 5(2), 9(1), 48, 56, Art. 13] 994

Allowing the appeal of assessee the Tribunal held that; the consideration received has to be taxed under the head “capital gain” as there is a transfer of an asset/property. The taxability of a capital gain under India-Singapore DTAA has been given in Article 13. So far as conditions and factors mentioned in paragraphs 1, 2 & 3 of Article 13, surely same would not be applicable here in this case. As regards the alienation of shares as mentioned in paras 4 and 5, the same again will not be applicable because here no actual shares which has been transferred or alienated albeit a substantive and valuable right has been given in the shares, which has to be reckoned as capital asset or property as per our discussion herein above. Hence, it is gains from the alienation of an asset or property and any gain from alienation of such kind of “property” will fall within the scope of Para 6 of Article 13, whereby, the taxing right has been given to the resident state, that is, the state of the alienator, which here in this case is Singapore. The allocation of taxing right under Article 13(6) cannot be attributed to India but to the resident state. Thus, on the facts and circumstances of the case as discussed above, we hold that, firstly, the consideration received by the assessee is arising from the assignment of substantive and valuable rights in the shares of an Indian company which is assessable under the head “capital gain” and secondly¸ such a capital gain cannot be held to be taxable in India in terms of para 6 of para 13 of India-Singapore-DTAA. With these observations, the addition made by the AO and as confirmed by the CIT(A) is directed to be deleted. (AY. 2002-03)

Praful Chandaria v. ADIT (2016) 143 DTR 1 (Mum.)(Trib.)

995 **S. 45 : Capital loss – Long term – Off market sale transaction of shares and carried forward said amount for future set off – Genuine loss could not be disallowed as it did not fall within ambit of s. 10(38) because of non-payment of STT. [S. 10(38)]**

Assessee suffered long-term capital loss on off market sale transaction of shares and carried forward said amount for future set off. The AO observing that if those transactions h ad been made through recognized Stock Exchange with STT payment, then loss would not have been carried forward within meaning of s. 10(38), held that assessee used a colorable device to avoid tax and, therefore, disallowed such loss by holding it as bogus. The ITAT held that the lacuna in s. 10(38) had been lawfully exploited by assessee by transferring shares held as long-term capital assets through off market transactions resulting into genuine loss and, thus, escaping rigor of exemption provision contained in s. 10(38), which would have otherwise disentitled it to claim set off and carry forward of such a loss. This was a glaring example of tax planning rather than tax avoidance as had been held by AO and such loss being a genuine loss could not be disallowed as it does not fall within ambit of section 10(38) because of non-payment of STT. (AY. 2010-11)

Mridu Hari Dalmia Parivar Trust v. ITO (2016) 158 ITD 521 / 139 DTR 143 / 179 TTJ 577 (Delhi)(Trib.)

996 **S. 45 : Capital gains – Co-owner – Mere fact that the assessee is shown as a co-owner of the property does not mean that the capital gains are partly assessable in her hands if the facts show that the other co-owner bought the property from his own funds and showed it as his sole property in the balance sheet.**

Dismissing the appeal of revenue the Tribunal held that; Mere fact that the assessee is shown as a co-owner of the property does not mean that the capital gains are partly assessable in her hands if the facts show that the other co-owner bought the property from his own funds and showed it as his sole property in the balance sheet. (AY. 2009-10)

ITO v. Vandana Bhulchandani (Dr.) (2016) 140 DTR 25 (Mum.)(Trib.)

997 **S. 45 : Capital gains – Assessee acquiring land on distribution of assets in family settlement pursuant to partition – Not transfer – Holding asset as beneficial holder since 1963 – period of holding from 1963 – FMV as on 1981 to be taken [S. 48]**

The assessee acquired land on distribution of assets on partition of the Hindu undivided family in a family settlement dated November 15, 1985, which was recognized by the High Court through an award dated January 21, 1987. The Department contended that the assessee became the owner of the property in the year 1987 only by incurring a cost and hence the property was to be deemed to be held from 1987 and the benefit of indexation was to be granted from that date only. The Commissioner (Appeals) held that the family settlement could not be termed a transfer and directed the Assessing Officer to allow the cost of acquisition of the property as a market value as on April 1, 1981, and indexation on that cost. The Tribunal held that the land was originally acquired in the family partnership in the year 1963. The assessee along with his two sons were 50 per cent partners in the firm. In terms of section 47 of the Income tax Act, 1961, any distribution of capital assets on the total partition of a Hindu undivided

family would not be regarded as transfer within the meaning of section 45. Hence, it could not be said that the assessee acquired the property in 1987. In terms of law, the rights of the assessee in the property had been only reinstated or redetermined and no fresh rights had taken birth. It was just refixation of the rights which the assessee was already having, in one way or the other. The assessee was holding the property as beneficial owner of the property since 1963. Hence, the cost incurred by the previous owner shall be adopted while computing the capital gains in the hands of the assessee, and also, the period of holding of the assets in the hands of the assessee was also to be reckoned from 1963, and accordingly for the purpose of taking the cost of acquisition, the value as on April 1, 1981, was to be adopted in the hands of the assessee for the purpose of computing the taxable amount of capital gains. The benefit of indexation was accordingly to be provided with effect from April 1, 1981. (AY. 2007-08)
ITO v. P.M. Rungta (HUF) (2016) 46 ITR 579 (Mum.)(Trib.)

S. 45 : Capital gains – Business income – Investment in share – Substantial and frequent transactions – Considering the circular of Board No. 6 /2016 dated 29-2-2016 – Profit is assessable as capital gains. [S. 28(i)] 998
Tribunal held that since the assessee has treated the securities as investment and not as stock-in-trade in all the years, therefore, in view of the CBDT Circular No. 6/2016 dated 29.02.2016, the revenue is not permitted to take a contrary view in the present year and claim that the security is stock-in-trade and, therefore, the profit/gain caused to the assessee be treated as business income. In our view, there is no merit in the contention of the revenue and is deserves to be dismissed in view of the circular. (ITA No. 605/JP/2013, dt. 18.03.2016) (AY. 2008-09)
DCIT v. Mahendra Kumar Bader (Jaipur)(Trib.); www.itatonline.org

S. 45 : Capital gains – Business income – Investment in shares – Frequency of transaction being very low assessable as capital gains. [S. 28(i)] 999
Where shares were purchased by assessee as an investor and frequency of share transactions was very low, profit arising from sale of such shares was liable to tax under head 'capital gains' and not 'business income'. (AY. 2005-06).
Anjana Devi Agarwal v. ACIT (2016) 157 ITD 702 (Kol.)(Trib.)

S. 45 : Capital gains – Long term capital gains from equities – Shares held as investment was settled by the settlor as corpus of Trust – Shares were sold within a week of settlement – Assessable as capital gains and not as business income. [S. 10(38), 28(i)] 1000
Assessee-trust was created in 2010 to ensure effective succession planning mechanism and intergenerational transfer of trust corpus and income Six lakh shares of Tech Mahindra were contributed by settlor towards corpus of assessee-trust. Out of total number of shares, 96% were allotted to settlor under ESOP in 2007 by his company. Remaining 4% shares were bought by settlor in 2008. In books, these shares were treated as an investment and not as stock-in-trade. Sales of these shares were affected within a week of settlement for securing investment because of down trend of price of share. AO assessed the capital gains as business income. CIT(A) accepted the income

as capital gains. On appeal by revenue dismissing the appeal the Tribunal held that; activity was neither a business activity, nor was it an adventure in nature of trade hence profit on sale of shares was assessable as capital gain and exempt under section 10(38). (AY. 2010-11)
ACIT v. Vernan Private Trust (2016) 157 ITD 211 / 137 DTR 223 / 178 TTJ 550 (Mum.) (Trib.)

1001 **S. 45 : Capital gains – Business income – Transaction of sale and purchase of shares – Assessable as capital gains. [S. 28(i)]**
Assessee declared certain amount of short-term and long-term capital gains from transaction of sale and purchase of shares. AO treated same as business income of assessee holding that assessee was engaged in systematic trading activity. CIT(A) accepted the income as capital gains. On appeal by revenue dismissing the appeal, the Tribunal held that liquidating of investment with a view to minimize losses when share market is showing volatility could not be considered as business Act of maintaining regular books along with demat account and contract notes and, thus, organising proper records could not be considered as systematic and regular trading activity since maintaining books and organising records is necessary for evaluating investment activity in shares. Portfolio held by assessee, when considered in light of lack of frequency of transactions, consistent valuation of shares at cost value, separation of speculation/F&O business from investment activity, investment being made from own funds, showed that assessee was engaged as investor in shares and not as trader and, therefore, income returned by assessee as short-term and long-term capital gain had to be assessed under respective heads as claimed by assessee and not as business income. (AY. 2010-11)
ACIT v. Nemichand P. Jain HUF (2016) 157 ITD 257 (Mum.)(Trib.)

1002 **S. 45 : Capital gains – Cost of acquisition – Partition of HUF Family arrangement – Cost incurred by previous owner shall be adopted and period of holding of the assets should be reckoned from 1963 – Benefit of Indexation to be granted from 1981. [S. 2(42A), 47, 49, 55(2)(b)]**
Held that the family arrangements which was settled through award in 1987 should not be regarded as transfer u/s. 47 as section provides that any distribution of capital assets on the total partition of HUF shall not be regarded as transfer. It cannot be said that assessee acquired property in 1987 because as per law the rights of assessee have only been reinstated or redetermined. No fresh rights have taken birth. Assessee was a beneficial owner of the property since 1963 as term 'held' in section 2(42A) does not imply that it should be actually be held as owner. Even otherwise, assessee would fall in situations as provided in sec. 49(1). Hence, in any case cost incurred by the previous owner shall be adopted while computing capital gains in the hands of assessee and period of holding of assets in the hands of the assessee should also be reckoned from 1963. Therefore, value for the purpose of taking cost and benefit of indexation should be adopted as on 1st April 1981. (AY. 2007-08)
ITO v. P.M. Rungta (HUF) (2016) 176 TTJ 648 / 133 DTR 146 (Mum.)(Trib.)

S. 45 : Capital gains – Long term or Short term – Gains arising on the assignment of leasehold interest in the land being a capital asset was rightly offered for tax as long term capital gains – Consideration attributable to the transfer of the building was rightly offered as short term capital gains – Treatment in books of account doesn't have bearing on taxability – Amount paid to trust directly in view of agreement was to be taxed in the hands of trust only there being no diversion of overriding title. [S. 4] 1003

The assessee acquired a plot of land on lease for the period of 98 years. The assessee constructed a factory building on the land taken on lease which it was using for its business. It granted lease of first floor of the said constructed building to a trust. During the year under consideration the assessee entered into an agreement pursuant to which it transferred to S Ltd., the factory building and assignment of benefits of his leasehold interest for the unexpired period for ₹ 4.95 crores out of which 1.5 cr was towards sale consideration for the land which was offered as long term capital gains. The Trust was paid ₹ 1.5 cr as per terms of agreement on vacation of premises. Balance 1.95 cr was reduced from block of assets in respect for building. The AO held that land was an integral part of the asset on which the factory building existed and accordingly he held that entire consideration was on account of sale of a depreciable asset i.e., factory building. Further he contended that assessee has not shown the land in its fixed asset schedule. On appeal to Tribunal, it held that assessee transferred two rights i) lease right which is a capital asset and 2) factory building. Treatment of assets in purchaser's account does not have any material bearing on taxability of the receipt in the hands of assessee. Since assessee had not paid any sum by way of premium for acquisition of land, there was no question of reflecting land as an asset in the balance sheet. As evident from the agreement and Form 37-I submitted before appropriate property, the assessee had transferred independent interests in two different assets and therefore the capital gains arising on the assignment of leasehold interest in the land being a capital asset was rightly offered for tax as long term capital gains and the consideration attributable to the transfer of the building was rightly offered as short term capital gains. Further the amount paid to trust by S Ltd. cannot be held as income in the hands of the assessee as the same was paid in view of agreement and therefore was based on a legal obligation on vacant of premises by trust. Since the payment was received by trust directly, there is no diversion of overriding title and the amount was taxable in the hands of trust only. (AY 2003-04)

DCIT v. J. B. Engg. Works (2016) 176 TTJ 699 / 133 DTR 63 (Mum.)(Trib.)

S. 45 : Capital gains – Slump sale – Sale of entire shareholding to subsidiary company to third party – It was mere transfer of shares cannot be assessed as slump sale. [S. 2(19AA, 2(42C) 48, 50B] 1004

The assessee sold its entire share holdings in its subsidiary company to a third party. On the said sale the assessee worked the capital gains under section 48 of the Act. The AO treated the sale consideration as slump sale of undertaking and computed the capital gains under section 50B. CIT(A) upheld the order of AO. On appeal the Tribunal held that where the assessee sold its entire share holdings to third party, since it was a case of mere transfer of shares and moreover sale consideration was received by assessee itself and not by subsidiary it could not be treated as slump sale within the meaning of section 2(42C) of the Act. (AY. 2007-08)

UTV Software Communications Ltd. v. ACIT (2016) 157 ITD 71 / 176 TTJ 315 / 131 DTR 352 (Mum.)(Trib.)

1005 **S. 45 : Capital gains – Slump sale of undertaking – Capital gain is not chargeable if valuation placed on various assets was not ascertainable. [S. 50B]**

The Tribunal held that capital gain on sale of business undertaking for a lump sum consideration is not chargeable to tax if valuation placed on various assets is not ascertainable. The Tribunal held that capital gain is not chargeable. (AY. 1996-97 to 1998-99)

ICI India Ltd. v. Dy. CIT (2016) 175 TTJ 217 (Kol.)(Trib.)

1006 **S. 45 : Capital gains – Slump sale – where assessee did not sell all assets of tea estate owned by it and, moreover, consideration stipulated for transfer of estate had been split over different assets, both movable and immovable, it could not be regarded as a case of slump sale. [S. 42C, 50B]**

Assessee-company carried on business of growing and manufacture of tea. It owned two tea gardens. During relevant year, assessee sold one tea estate for a total value of ₹ 18 crores. Assessing Officer held that the assessee company sold its entire tea estate as a going concern basis hence liable to assessed as slump sale. CIT(A) held that the sale of tea estate was not a slump sale within the meaning of section 2(42C) read with section 50B of the Act. On appeal the tribunal held that the assessee had not sold all assets belonging to tea estate. Moreover, total consideration stipulated for transfer of estate had been split over different assets, both movable and immovable, hence on facts, it was not a case of slump sale merely for reason that tea estate was transferred to buyer as a going concern,therefore, impugned addition was to be deleted. (AY. 2000-01)

Dy.CIT v. Tongani Tea Co. Ltd. (2016) 156 ITD 188 (Kol.)(Trib.)

1007 **S. 45 : Capital gains – Short term – Transfer – (Sweat equity Stock option) – Exercised the option after three years and same day shares were sold – Gains will be short term or alternative income from other sources – Not entitled exemption under section 10(38). [S. 2(47), 10 (38)]**

Allowing the appeal of revenue, the Tribunal held that where sweat equity shares were offered to assessee by employer was accepted immediately and assessee exercised option after three years and on same date shares were also sold, gains would be short-term capital gain or, in alternative, income from other sources, not liable for exemption under section 10(38) or section 54EC. (AY. 2002-03, 2004-05)

ACIT v. Pramod H. Lele (2016) 156 ITD 571 (Mum.)(Trib.)

1008 **S. 45 : Capital gains – Premium received on grant of tenancy right was held to be assessable as capital gains and not as income from house property. [S. 2(14), 2(47), 54EC, 147, Transfer of Property Act, S. 105]**

The assessee trust received the premium from the tenants for grant of tenancy rights. Assessee has shown the said receipt as long term capital gain and invested the said amount and claimed exemption under section 54F of the Act. Assessing Officer assessed the premium as income from house property and denied the exemption under section 54EC of the Act. on appeal the Commissioner (Appeals) allowed the claim of assessee. On appeal by revenue, dismissing the appeal the Tribunal held that the premium received by the assessee from the tenants is a capital asset and not advance rent exigible

to tax under the head income from house property. Tribunal has also allowed the Cross objection of assessee on the reassessment. (ITA No. 844/Mum/2014 & C.O. 76/Mum/2015 dt. 29.02.2016) (AY. 2005-06)
ITO v. Dr. Vasant J. Rath Trust (Mum.)(Trib.); www.itatonline.org

S. 45 : Capital gains – Not liable to tax in India – No liability to withhold tax – No need to file return of income – Section 115JB not applicable to foreign companies – DTAA-India-Mauritius. [S. 115JB, 195, Art. 13(4)] 1009
Assessee, an investment company incorporated in Mauritius and holding tax residency certificate. Shares subscribed by it in its own name in Indian asset company and Indian trustee company and bank statements showing it had paid for such shares. Share purchase agreement for sale of shares held in Indian asset company and Indian trustee company to non-resident company. Bank party to agreement only in its capacity as sponsor and in order to comply with mutual funds regulation. AAR held that the assessee was not liable to tax in India. No liability to withhold tax. No need to file return of income. Section 115JB is not applicable to foreign companies.
Shinsei Investment I Ltd. In re (2016) 389 ITR 11 / 242 Taxman 293 / 290 CTR 490 (AAR)

S. 45: Capital gains – Non-resident – Transfer of shares in Indian company by company in Mauritius to U.S company, was held to be not taxable in India as control and management was not wholly in India – Position prior to 1-4-2017 – DTAA-India-Mauritius. [S. 112(1), Art. 13(4)] 1010
AAR has held that transfer of shares in Indian company by company in Mauritius to U. S. company, was held to be not taxable in India as control and management was not wholly in India. Effective control and management of affairs of applicant not wholly in India. Position prior to 1-4-2017.
Mahindra-BT Investment Company (Mauritius) Ltd., In re (2016) 389 ITR 19 / 289 CTR 614 / 73 taxmann.com 74 (AAR)

S. 45 : Capital gains – To be calculated on real gains and not on basis of notional values – No tax chargeable where no consideration accrues – Transfer of share or interest which derives, directly or indirectly, its value substantially from assets located in India – "Substantial" – Means at least 50 per cent – Transfer pricing – Provisions not attracted where there is no charge – DTAA-India-Italy. [S. 2(47), 9(1)(1), 47(vi), 55(2), 92 to 92F, 195, Art. 14, 25] 1011
Amalgamation of Italian company having branch in India with Italian group company holding 15 per cent shareholding in it. Shareholders of transferor company (excluding transferee) allotted additional shares in transferee company. No consideration received by transferor company before amalgamation. Notional market value of Indian branch could not be treated as consideration. Transferor company not liable to tax in India. Exemption under section 47(vi) available to transferor company. No consideration accrued to transferee company and no capital gains chargeable to tax in its hands in India. Shareholders of transferor company parting with their shares in it and not movable property of Indian branch, hence not chargeable to tax in India. Transfer of share or interest which derives, directly or indirectly, its value substantially from assets

located in India – "Substantial". Means at least 50 per cent. Transfer pricing provisions is not attracted where there is no charge.
Banca Sella S.P.A. In re (2016) 387 ITR 358 / 242 Taxman 475 / 288 CTR 661 (AAR)

1012 **S. 45(3) : Capital gains – Transfer of capital asset to firm – Stock-in-trade – Land was brought in a firm by partners as current assets and firm had also accounted for it as a current asset, section 45(3) would not be applicable. [S. 10(2A), 45 147]**
Dismissing the appeal of the revenue, the Tribunal held that, S. 45(3) is applicable only in respect of a capital asset and thus, where the land was brought in a firm as current asset and the said firm has shown the land as current asset provision of section 45(3) cannot be invoked. Accordingly on revaluation of asset the assessee did not make any short term capital gain addition on account of such revaluation was not sustainable. Tribunal also held that the reassessment was not valid by law. (AY. 2008-09)
ITO v. Orchid Griha Nirman (P.) Ltd. (2016) 161 ITD 818 / 182 TTJ 415 (Kol.)(Trib.)

1013 **S. 45(4) : Capital gains – Distribution of capital asset – Dissolution of firm – Partners of assessee firm constituted a private limited company – Company made partner in the firm – partners gave their interest in the firm to the company in consideration of shares of the company – AO invoked section 45(4) – Held, whatever rights natural partners had in capital assets of firm by way of being its partners, continued to exist in form of equity shares they held in company – Held, not a case of transfer of assets on dissolution. [S. 2(47), 45]**
The partners of assessee-firm, constituted a private limited company. The company was admitted as partner in the assessee-firm. Later on, the natural partners executed a release deed giving up all their rights in assessee-firm, in favour of the company. As a consequence, the company became absolute owner of the assessee-firm. The natural partners were allotted shares in the company for relinquishing their rights in the assessee-firm. AO invoked section 45(4) in the hands of the firm and held that there was a transfer of assets by way of distribution of capital assets on dissolution of the assessee-firm. High Court held that every distribution of capital assets may not lead to the attraction of section 45(4) unless it happens on the dissolution of a firm and also every distribution of capital assets on the dissolution of a firm may not attract section 45(4) unless it was a case of transfer of a capital asset. High Court, further, held that whatever rights partners had in the capital assets of the firm by way of being its partners, continued to exist in the form of equity shares that they held in the private limited company and it was a mere change in form of ownership. Accordingly, it was held that section 45(4) was not attracted. (AY. 1991-92)
Pipelines India v. ACIT (2016) 238 Taxman 9 / 288 CTR 603 (Mad.)(HC)

1014 **S. 45(4) : Capital gains – Distribution of capital asset – Conversion of firm to a company – When a partnership firm is transformed into a limited company with no change in the number of partners and extent of property, there is no transfer of assets involved and hence, there is no liability to pay tax on capital gains. [S. 2(47), 45]**
The assessee, erstwhile registered firm, was engaged in the business of training and trading of software. It consisted of only two partners, who were holding equal stakes in the firm. Subsequently, the assessee firm revalued its assets and the partnership business

was converted into the business of Private Limited Company as a going concern and all the assets of the firm got vested as assets of the Private Limited Company, in which, the same partners were interested.
The Assessing Officer opined that the transfer of business assets of the assessee firm to the Private Limited Company would constitute distribution of assets and would attract capital gains as contemplated under section 45(4) and that the assessee was liable to pay tax on 'capital gains'.
The Commissioner (Appeals) allowed the appeal holding that when a partnership firm was transformed into a private limited company, there was no transfer of capital assets as contemplated under section 45(4).
The Tribunal again held that the transfer of assets of a partnership firm, without dissolution, to a private limited company fell within the expression 'otherwise' as contemplated under section 45(4) and, therefore, the assessee was liable to pay tax.
The High Court held that before a levy on the capital gain can be imposed, it is a must to ensure that, such a gain has arisen from the disposal of the asset, by any one of the mode, referred to in the definition of the term 'transfer' in section 2(47). It was well settled that when a partnership firm is transformed into a private limited company, there is no distribution of assets and as such, there was no transfer and therefore, the assessee was not liable to pay any tax on capital gains. There was no case law supporting the proposition that even in cases of subsisting partners of a partnership firm transferring assets to a private limited company, there would be a transfer, covered under the expression 'otherwise'. So far as this case is concerned, there is no transfer of asset as (a) no consideration was received or accrued on transfer of assets from the firm to the company; (b) the firm has only revalued its assets which will not amount to transfer; (c) the provision of section 45(4) of the Act is applicable only when the firm is dissolved. In the instant case, there is no distribution of asset, but only taking over of the assets from the firm to the Company. Therefore, it is clear that the vesting of the property in the private limited company is not consequent or incidental to a transfer. There is no transfer of a capital assets as contemplated by section 45(1). (AY. 1992-93)
CADD Centre v. ACIT (2016) 383 ITR 258 / 237 Taxman 401 (Mad.)(HC)

S. 45(4) : Capital gains – Firm – Retirement – No property or asset of the firm was transferred to retiring partner additions cannot be made. [S. 45] 1015
Assessee was a partnership firm constituted by two partners, engaged in business of construction of housing and commercial projects. In terms of partnership deed, one partner contributed land and other partner had contributed funds. Subsequently, two new partners were admitted and all four partners continued. After word one of the partner retired from firm who contributed land in firms. In terms of agreement, retiring partner accepted amount of credit standing in its name and cash in lieu of agreed constructed area from stock-in-trade of firm. Department invoked provisions of s. 45(4) and computed capital gains chargeable to tax in hands of firm. ITAT held that in order to attract S. 45(4), there has to be a transfer of a capital asset from firm to retiring partners, by which firm ceases to have any right in property which is so transferred. Since, no property or asset of firm had been handed over or given to retiring partner, S. 45(4) had no implication. (AY. 2006-07)
Keshav & Company v. ITO (2016) 161 ITD 798 (Mum.)(Trib.)

1016 **S. 45(4) : Capital Gains – Distribution of capital asset – Retirement – Amount received is not chargeable to tax. [S. 45]**

Amount received by assessee on retirement as partner from firm, on account of credit balance standing in capital account and current account, and not for relinquishing or extinguishing his rights over any assets of firm, would not be chargeable under section 45(4) as capital gains. (AY. 2009-10)

Sharadha Terry Products Ltd. v. ACIT (2016) 180 TTJ 284 (Chennai)(Trib.)

1017 **S. 45(5) : Capital gains – Compensation and enhanced compensation awarded on compulsory acquisition of land – Question relating to ownership of rights in land which had been transferred pending in High Court – Compensation, enhanced compensation and interest thereon – Not assessable in hands of assessee – transferor. [S. 45, Land Acquisition Act, 1894, S. 4, 18, 31]**

As a result the appeals arising, both from the proceedings under section 31 of the Land Acquisition Act and the proceedings for enhancement of the compensation under section 18 of the Land Acquisition Act, were pending before the Court. Compensation and enhanced compensation awarded on compulsory acquisition of land, question relating to ownership of rights in land which had been transferred pending in High Court. Therefore the compensation, enhanced compensation and interest thereon is not assessable in hands of assessee-transferor. Income cannot be said to accrue or arise to an assessee unless and until there is created in favour of the assessee a debt due by somebody. Unless that happens it could not be said that the assessee had acquired a right to receive the income or the income has accrued to him. (AY. 1985-86, 1988-89 to 1992-93)

CIT v. Suman Dhamija (2016) 382 ITR 343 (Delhi)(HC)

S. 47 : Transactions not regarded as transfer.

1018 **S. 47 : Capital gains – Transaction not regarded as transfer – Transfer of development rights – Assessee was not wholly owned subsidiary of holding company hence not entitle to exemption. [S. 47(v)]**

Transfer of development was claimed as exemption u/s. 47(v). AO has held that the assessee has not proved that the transfer was to wholly owned subsidiary. CIT(A) has allowed the claim of the assessee. On appeal by the revenue, allowing the appeal of the revenue, the Tribunal held that; the assessee was unable to prove that it was a wholly-owned subsidiary of holding company it would not be entitled to benefit of section 47(v), because to claim benefit under section 47(v), assessee must be a wholly owned subsidiary of holding company hence transfer of development rights was held to be taxable. (BP. 1-4-1990, 21-11-2000)

DCIT v. Sunaero Ltd. (2016) 161 ITD 472 (Delhi)(Trib.)

S.48. Mode of computation.

S. 48 : Capital gains – Slump sale – Deduction – Payment to ESOP Fund was to be allowed while computing capital gain arising from slump sale of trading business. [S. 2(19A), 2(42C)], 45, 50B] 1019

Assessee-company, engaged in trading of chemicals, sold a part of its unit as a going concern. Assessee had created an ESOP Trust Fund for its employees. In terms of business transfer agreement, assessee had to buy back shares from its employees. In assessment proceedings, assessee's claim for deduction of said payment while computing amount of capital gain was rejected. Tribunal allowed the claim of assessee. On appeal by revenue, dismissing the appeal the Court held that; since transferee had disclaimed any responsibility to honour ESOP conditions, funding of ESOP Fund became integral part of transfer itself, therefore, assessee's claim for deduction of payment to ESOP Fund was to be allowed while computing capital gain arising from slump sale of trading business. (AY. 2005-06 to 2009-10)

PCIT v. Nitrex Chemicals India Ltd. (2016) 243 Taxman 371 (Delhi)(HC)

S. 48 : Capital gains – Full value of consideration – Part of consideration was paid by said other company directly to shareholders of assessee with its consent would not absolve assessee from recognising entire consideration for computing capital gains. [S. 45] 1020

Allowing the appeal of revenue the Court held that where in terms of scheme of arrangement assessee transferred one of its divisions to other company, it was only assessee which was entitled to receive entire consideration for transfer of its assets and mere fact that part of consideration was paid by said other company directly to shareholders of assessee with its consent would not absolve assessee from recognising entire consideration for computing capital gains. (AY. 1997-98)

CIT v. Salora International Ltd. (2016) 386 ITR 580 / 240 Taxman 7 (Delhi)(HC)

Editorial : SLP is granted to the assessee Salora International Ltd CIT v. (2016) 242 Taxman 474 (SC)

S. 48 : Capital gains – Full value of consideration – Market value cannot be substituted. [S. 45, 45(2), 45(4), 50C] 1021

AO substituted the consideration received on sale of shares by break up method and converted loss in to gain. On appeal CIT(A) held that in the absence of any provision in the Act to replace the consideration received on sale of shares by adopting the market value is not permissible. Tribunal up held the order of CIT(A). On appeal by revenue dismissing the appeal the Court held that when ever the Parliament thought it fit that the consideration on a transfer of a capital asset has to be ascertained on the basis of market value of the asset transferred, specific provision has been made in the Act. To illustrate section 50C provides for stamp value duty in case of transfer of land and buildings. Similarly, section 45(2) and section 45(4) provide that in cases of conversion of investment in to stock in trade or transfer of shares on dissolution of a firm to its partners respectively has to be market value. Accordingly the consideration disclosed on sale of shares by the assessee was in fact the only consideration received/accrued

to it, no occasion to substitute the same can arise. (ITA No. 2337 of 2013 dt 8-3-2016) (AY. 2008-09)
CIT v. B. Arunkumar & Co (Bom.)(HC) (Unreported) (2016) BCAJ-March-P. 46

1022 **S. 48 : Capital gains – Computation – Sale of property acquired under gift or Will, if title of previous owner was itself defective or subject to some encumbrance, cost incurred on its removal or discharge would qualify for deduction. [S. 45]**
Tribunal held that in case of sale of property acquired under gift or Will, if title of previous owner was itself defective or subject to some encumbrance, cost incurred on its removal or discharge would qualify for deduction. However, cost incurred by legatee/s, if any, towards discharge of a mortgage created either by him or even by previous owner would not qualify to be considered or included as a part of cost of acquisition. (AY. 2012-13)
Kumar Rajaram v. ITO (2016) 157 ITD 772 / 178 TTJ 168 (Chennai)(Trib.)

1023 **S. 48 : Capital gains – Computation – Sale of inherited property – Cost inflation index has to be applied with reference to year in which said capital asset was first acquired by previous owner. [S. 2(42A), 45, 47(iii), 49(1)(ii)/(iii), 55(2)(b)(ii)]**
Dismissing the appeal of the revenue, the Tribunal held that where assessee sells an inherited property, for computing amount of capital gain, cost inflation index has to be applied with reference to year in which said capital asset was first acquired by previous owner. (AY. 2007-08)
ITO v. Sudip Roy. (2016) 161 ITD 709 (Kol.)(Trib.)

1024 **S. 48 : Capital gains – Cost of improvement of asset – Payments made to brothers who were living with him for vacating the house was held to be allowable as deduction from capital gains. [S. 45]**
Allowing the appeal of the assessee, the Tribunal held that Payment made by assessee to brothers who were living with him, for vacating house to be sold would be considered as an expenditure incurred for improvement of asset or title and would be deducted from long term capital gain on sale of said house. (AY. 2008-09)
Nanubhai Keshavlal Chokshi HUF v. ITO (2016) 161 ITD 211 (Ahd.)(Trib.)

1025 **S. 48 : Capital gains – Cost of acquisition – Matter remanded. [S. 45]**
Allowing the appeal of the assessee Tribunal held that evidence in form of completion certificate, depositing compounding fee for change in structure etc. was enough to show that some construction work must have been carried out on said plot. Accordingly, matter was remanded back for recomputation of capital gain. (AY 2007-08, 2009-10)
Nand Lal Popli v. Dy. CIT (2016) 160 ITD 413 (Chd.)(Trib.)

1026 **S. 48 : Capital gains – Cost of improvement – Maintenance expenses of for remaining life of tree cannot form cost of improvement – Loss likely to incur for future earning from trees can not be allowed as deduction. [S. 45]**
Dismissing the appeal of the assessee the Tribunal held that maintenance expenses for remaining life of trees cannot form cost of improvement since once a tree becomes

able to bear fruit, whatever expenses are incurred same will be revenue and recurring expenses. Further, no deduction could be allowed to assessee for loss of likely/future earning from trees. (AY. 2007-08)
Jai Chand v. ITO (2016) 157 ITD 684 (Chd.)(Trib.)

S. 48 : Capital gains – Portfolio management service fee paid by assessee to various portfolio managers could not be allowed as deduction while computing capital gain. [S. 45] 1027
Portfolio management service fee paid by assessee to various portfolio managers could not be allowed as deduction while computing capital gain arising from sale of shares kept in portfolio management service accounts held with various funds. (AY. 2008-09)
Capt. Avinash Chander Batra v. Dy. CIT (2016) 158 ITD 604 (Mum.)(Trib.)

S. 48 : Capital gains – Computation – Interest on borrowed money utilized for acquiring shares can be capitalized as cost of acquisition. [S. 45] 1028
Dismissing the appeal of revenue the Tribunal held that the interest paid by the assessee on loans taken for acquiring the shares the past can be allowed as a deduction u/s 48 as cost of acquisition while computing capital gain on sale of such shares. Followed *Trishul Investments Ltd. (2008) 305 ITR 434 (Mad.)(HC).* ITA No. 236/Mum/2010, dt. 08.05.2015) (AY. 2005-06)
DCIT v. Fritz D. Silva (Mum.)(Trib.); www.itatonline.org

S. 48 : Capital gains – Cost of Improvement – Legal expenses were incurred to protect the investments of assessee and should be added to the cost of shares as cost of improvement. [S. 45] 1029
The assessee was engaged in the business of manufacturing and processing of Ayurvedic medicines. The assessee engaged lawyers as financial advisors to evaluate the maximum value to get and to prevent other companies to buy the shares at low price. The assessee claimed the expenditure incurred towards legal services as legal expenses. The AO invoked section 14A of the Income-tax Act, 1961, and disallowed the expenses on the ground that the expenses were incurred to safeguard the investment and that investment would yield exempt income in form of dividend. The CIT(A) confirmed the order of the AO.
On appeal, the Tribunal held that there was an improvement in the value of the shares held by the assessee. Hence, the expenses could be added to the cost of shares as cost of improvement. The AO was to recompute the amount of capital gains earned by the assessee. (AY. 2009-10)
Vaipa Pharmaceuticals Pvt. Ltd. v. ACIT (2016) 46 ITR 109 (Mum.)(Trib.)

S. 48 : Capital gains – Computation – Cost of improvement – Fails to establish his claim of renovation – Deduction was not allowed. [S. 45] 1030
Dismissing the appeal of the assessee, Tribunal held that Assessee's claim towards cost of improvement while computing capital gain on sale of a flat was rejected where assessee failed to establish his claim of renovation being carried out in said flat with any cogent or reliable evidence. (AY. 2009-10)
Yashovardhan Sinha v. ITO (2016) 156 ITD 540 (Patna)(Trib.)

S. 49. Cost with reference to certain modes of acquisition.

1031 **S. 49 : Capital gains – Previous owner – Cost of acquisition – Succession of firm by company – Firm purchased land and subsequently revalued it, after taking over of said firm by assessee, cost of acquisition would still be original purchase price; and not revalued amount. [S. 45, 47]**

Firm purchased a piece of land in AY 2006-07 for ₹ 2.5 lakh. In AY 2007-08, the cost was revalued and valuer enhanced book value to ₹ 3.70 crore. The firm was taken over by Assessee along with its assets and liabilities. The assessee company sold the assets for a consideration of ₹ 2 crore and showed the STCL of ₹ 1.81 crore. AO took cost of acquisition in hands of Assessee at ₹ 2.5 lakh instead of enhanced value of ₹ 3.7 crore and accordingly computed gains. The CIT(A) conformed the order of the AO. ITAT held that the firm is succeeded by the company, therefore, the cost of acquisition of the company would be as that of acquisition of the firm. The valuation of land and assets of firm though valued by the valuer will not change or alter the cost of acquisition of the firm despite valuation of assets of the firm and would remain the same, and therefore the cost of acquisition of the company would be cost of acquisition of the firm. The firm is being succeeded by the company and the company is not buying or purchasing the assets of the firm. The element of sale and purchase of the assets of the firm were not involved in the case of succession of the firm to the company. The assessee would only be entitled to the indexation on the cost of acquisition of the firm and not on revalued assets. (AY. 2009-10)

Utsav Cold Storage (P.) Ltd. v. ITO (2016) 159 ITD 639 / 181 TTJ 704 (Jaipur)(Trib.)

1032 **S. 49 : Capital gains – Previous owner – Cost of acquisition – There is no difference between gift and settlement and, therefore, settlement of asset in favour of assessee has to be considered as gift in terms of S. 49(1)(ii) for computing the period of holding by previous owner. [S. 2(42A), 49(1)(ii), 54F]**

The assessee was gifted a trademark by a deed of settlement. During the year the assessee has sold the trademark and claimed deduction under section 54F by relying on provisions of section 49(1)(ii), since the period of holding by previous owner is to be considered. The Assessing Officer held that the sale of trademark was short term capital gains hence not eligible for exemption u/s. 54F. On appeal the CIT (A) held that the settlement deed could not be considered as gift deed. On appeal by the assessee, allowing the appeal the Tribunal held that for purpose of section 49(1)(ii), there is no difference between gift and settlement and, therefore, settlement of asset in favour of assessee has to be considered as gift in terms of section 49(1)(ii) and, accordingly, Explanation 1(i)(b) to section 2(42A) has to be applied so as to compute period of holding of asset after taking into consideration holding period of said capital asset by previous owner i.e. settlor. Accordingly the exemption u/s. 54F was allowed. (AY 2012-13)

T.T. Siddarth v. DCIT (2016) 159 ITD 519 (Chennai)(Trib.)

S.50. Special provision for computation of capital gains in case of depreciable assets.

S. 50 : Capital gains – Depreciable assets – Block of assets – Restricted to mode of computation of gains, does not affect entitlement to exemption where asset held for more than thirty six months. [S. 2(29B), 45, 48, 49, 54E] 1033

The assessee disclosed capital gains from sale of its loading platform in the year 1989 and claimed exemption under section 54E of the Income-tax Act, 1961 thereon. The asset had been purchased in the year 1972. The Assessing Officer rejected the claim to exemption under section 54E of the Act on the ground that the assessee had claimed depreciation on this asset and, therefore, the provisions of section 50 were applicable. This was upheld by the Commissioner (Appeals), but the Appellate Tribunal allowed the assessee's appeal holding the assessee entitled to exemption under section 54E of the Act. The High Court, following its decision in *CIT v. ACE Builders Pvt. Ltd. (2006) 281 ITR 210*, affirmed the view of the Tribunal that the assessee was entitled to deduction under section 54E in respect of capital gains on which depreciation had been allowed and dismissed the Department's appeal. On further appeal dismissing the appeal the court held that the view of the High Court was correct. Decision of the Panaji Bench of the Bombay High Court (printed below) affirmed. (AY. 1989-90)

CIT v. V.S. Dempo Company Ltd. (2016) 387 ITR 354 / 242 Taxman 434 / 290 CTR 401 / 144 DTR 1 (SC)

Editorial : Decision in, CIT v. V.S. Dempo Company Ltd., ITA No. 61 of 2016 dt. 11-12-2016 (Bom.)(HC) is affirmed.

S. 50 : Capital gains – Depreciable assets – Block of assets – When property is acquired the same is sufficient for the concept of block of asset and not for the purpose of claim of depreciation. [S. 2(11), 32, Transfer of Property Act, S. 53A] 1034

Allowing the appeal of the assessee, the Tribunal held that where assessee had parted with full sale consideration and reduced terms of agreement into writing by way allotment letter and by gaining ability to have every other person excluded from dealing with property, it had demonstrated that assessee had acquired property for purposes of S. 50(1)(iii). Use is relevant for the purpose of claiming depreciation and not for section 50(1)(iii). (AY. 2012-13)

Indogem v. ITO (2016) 160 ITD 405 (Mum.)(Trib.)

S. 50 : Capital gains – Depreciable assets – Cost of shares allotted to members of BSE pursuant to corporatization of BSE would be calculated as per section 50 and not as per section 55(2)(ab) if depreciation was claimed on BSE membership – Indexation benefit on sale of such share would be available from date of corporatization of BSE and not from date of acquisition of original membership of BSE. [S. 55(2)(ab)] 1035

Dismissing the appeal of assessee, the Tribunal held that cost of shares allotted to members of BSE pursuant to corporatization of BSE would be calculated as per section 50 and not as per section 55(2)(ab) if depreciation was claimed on BSE membership; further, indexation benefit on sale of such share would be available from date of corporatization of BSE and not from date of acquisition of original membership of BSE. (AY. 2008-09)

Twin Earth Securities (P.) Ltd. v. ACIT (2016) 158 ITD 764 / 177 TTJ 527 / 136 DTR 300 (Mum.)(Trib.)

S. 50B. Special provision for computation of capital gains in case of slump sale.

1036 **S. 50B : Capital gains – Slump sale – Assets were put to sale after their valuation hence cannot be assessed as slump sale – Capital gains on liquidation of a firm are chargeable to tax. [S. 2(14), 2(42C), 45]**

Dismissing the appeal of assessee the court held that; where partnership firm had dissolved and assets were put to sale after their dissolution and there was specific and separate valuation for individual assets and even liabilities were taken care of when amount of sale was apportioned amongst outgoing partners, said transactions could not be treated as slump sale. Capital gains on liquidation of a firm are chargeable to tax. The upshot of the aforesaid discussion would be to allow the appeals partly only to the extent that business income/revenue income in the Assessment Year in question is to be assessed at the hands of AOP-3, in terms of the orders of the High Court, as AOP-3 retained the tax amount from the consideration which was payable to the assessees herein and it is AOP-3 which was supposed to file the return in that behalf and pay tax on the said revenue income. (AY. 1995-96)

Vatsala Shenoy v. JCIT (2016) 389 ITR 519 / 243 Taxman 152 / 289 CTR 457 / 142 DTR 201 (SC)

CIT v. Mangalore Ganesh Beedi works (2016) 289 CTR 457 / 142 DTR 201 (SC)

Editorial: Review petition was dismissed Vatsala Shenoy v. JCIT (2017) 391 ITR 363 (SC)

1037 **S. 50B : Capital gains – Slump sale – The fact that certain assets of the "undertaking" are left out of the sale transaction because it would cause inconvenience for the purchaser does not mean that the transaction is not a "slump sale". To expect a purchaser to buy and pay value for defunct or superfluous assets flies in the face of commercial sense. [S. 2(19A), 2(42C)]**

Allowing the appeal the Court held that (i) The sale transaction was reported for a total consideration of ₹ 45.83 crores. The sale was for a going concern, which included ongoing service contracts, employment contracts and other tangible assets, and intangible assets such as technical know-how etc. To expect a purchaser to buy and pay value for defunct or superfluous assets flies in the face of commercial sense. Unfortunately, the Revenue's understanding is that in a going concern the buyer is bound to pay good money, transact and purchase bad and irrecoverable debts. Not only does it fly in the face of common and commercial understanding, but it is not even a pre-condition, as is evident from the definition of "undertaking", cited in Explanation (1) to Section 2(19)(A) of the Act.

(ii) This definition of "undertaking" is what has been engrafted into by reference, under Section 2(42C) of the Act. Therefore, if certain assets or properties are left out because they would cause inconvenience or lead to some kind of a trouble for the purchasing party, it is well within its right to exclude it from the list of assets. (AY. 2006-07)

Triune Project Pvt. Ltd. v. DCIT (2017) 145 DTR 190 / 291 CTR 268 (Delhi)(HC)

S. 50B : Capital gains – Slump sale – Net worth of undertaking – Aggregate value of total assets not to be taken at written down value of block of assets – Actual cost to be reduced, *inter alia*, by depreciation as would have been allowable for years commencing on or after 1-4-1988 – Depreciation actually allowed for these years not relevant. [S. 2(11), 32, 43(6)(i)(C)] 1038

The Tribunal had accepted the assessee's contention that in case the entire block of assets was sold, the written down value of the block of assets as existing must be taken at the aggregate value of the total assets. On appeal allowing the appeal of revenue the Court held that this was not correct for the reason that there was no provision which mandates adopting this method of computation. It could not be disputed that the plain language of sub-clause (b) of clause (C) contemplates reduction from the actual cost of assets of the depreciation "that would have been allowable to the assessee for any AY commencing on or after the 1st day of April, 1988, as if the asset was the only asset in the relevant block of assets. In view of the plain language, there was no scope to read the provisions of sub-clause (b) of clause (C) to permit deduction of depreciation actually allowed and not as "would have been allowable". With the introduction of the concept of block of assets, the direct co-relation between depreciation allowed and a separate asset constituting the block is lost. Therefore, it was not possible to co-relate the quantum of depreciation allowed in respect of individual assets constituting a block. (AY. 2001-02)

CIT v. Dharampal Satyapal (2016) 380 ITR 527 / 283 CTR 37 / 237 Taxman 452 / 130 DTR 145 (Delhi) (HC)

S. 50C. Special provision for full value of consideration in certain cases.

S. 50C : Capital gains – Full value of consideration – Stamp valuation – Once reference made report of Departmental Valuation Officer binding on Assessing Officer for assessment – Assessment done without reference to such report on basis of valuation by stamp valuation authority is not proper. [S. 45] 1039

Dismissing the appeal of revenue the Court held that once a reference was made by the Assessing Officer under section 50C of the Act, to the Departmental Valuation Officer, for valuation of the capital asset, the Assessing Officer was obliged to complete the assessment in conformity with the estimation made in the report by the Valuation Officer pursuant to such reference made by him. Under sub-section (2) of section 50C, it was such lower valuation which was required to be taken into consideration for the purposes of assessment. There was no legal infirmity in the orders of the Appellate Authorities warranting interference. No question of law arose. (AY. 2006-07)

CIT v. Ravjibhai Nagjibhai Thesia (2016) 388 ITR 358 / 76 taxmann.com 76 / (2017) 150 DTR 166 (Guj.)(HC)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – Value declared by assessee exceeded value adopted by Stamp Valuation Officer, there was no question of referring valuation of plot to Valuation Officer. [S. 45] 1040

During year, assessee had sold a plot of land and declared its value at ₹ 8 crores. Assessing Officer made reference to Departmental Valuation Officer to determine fair

market value of plot. Valuation Officer determined value of plot at ₹ 10 crores. Tribunal deleted the addition. On appeal by revenue, dismissing the appeal the Court held that; since value of plot declared by assessee exceeded value adopted by Stamp Valuation Officer, condition precedent for invoking sub-section (1) of section 50C was not satisfied. Therefore, there was no question of referring valuation of plot to Valuation Officer. (AY. 2007-08)
PCIT v. Shanubhai M. Patel (2016) 73 taxmnn.com 138 (Guj.)(HC)
Editorial : SLP of revenue was dismissed, PCIT v. Shanubhai M. Patel (2016) 242 Taxman 114 (SC)

1041 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – Provision will not be applicable while computing capital gains on transfer of leasehold rights in land and buildings. [S. 2(14), 45, 260A]**
Revenue has informed that they have not filed appeal before the High Court in *Atul J. Puranik v. ITO (2011) 132 ITD 499 (Mum.)(Trib)*. Dismissing the appeal of the revenue, the Court held that where the Department had accepted the decision of the court or the Appellate Tribunal on an issue and had not appealed against it, then a subsequent decision following the earlier decision could not be challenged. That the Department had not shown that there were any distinguishing features either in facts or in law in the present appeal from that which arose in the earlier decision of the Appellate Tribunal which was not appealed against. No question of law arose. (AY. 2007-08)
CIT v. Greenfield Hotels and Estates P. Ltd. (2016) 389 ITR 68 / (2017) 77 taxmann.com 308 (Bom.)(HC)

1042 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – Reference to DVO was held to be valid. [S. 45, 142A]**
During relevant year, assessee sold three pieces of agricultural lands situated in different villages. While scrutinizing such assessment, Assessing Officer desired to obtain valuation of such properties, for which purpose he made a reference to DVO under section 50C(2). The assessee challenged the reference made to DVO on the ground that capital gain could not be computed on basis of report of DVO as same had been assessed on basis of Jantri rates prevailing at time of sale. Dismissing the petition the Court held that Jantri rates had not been revised for a long time. Moreover, in terms of section 142A Assessing Officer had power to obtain valuation reports even in context of issues other than that of capital gains computation. (AY. 2008-09)
Kanaiyalal Dhansukhlal Sopariwala v. DVO (2016) 243 Taxman 378 / (2017) 391 ITR 56 (Guj.)(HC)

1043 **S. 50C : Capital gains – Full value of consideration – Stamp valuation Provision does not apply to transfer of land and building, being leasehold property – When revenue has accepted the order of Tribunal in one assessee, if the facts are identical, revenue cannot challenge the order of Tribunal in another assessee. [S. 45, 260A]**
The issue before the Tribunal was whether Section 50C of the Act would be applicable to transfer of leasehold rights in land and buildings. The Tribunal followed its decision in *Atul G. Puranik v. ITO (ITA No. 3051/Mum/2010) decided on 13th May, 2011 (2011)*

132 ITD 499 (Mum.)(Trib.) which held that Section 50C is not applicable while computing capital gains on transfer of leasehold rights in land and buildings. On appeal by the department to the High Court HELD dismissing the appeal.
The Revenue has not preferred any appeal against the decision of the Tribunal in the case of *Atul Puranik (supra)*. Thus, it could be inferred that it has been accepted. Our Court in *DIT v. Credit Agricole Indosuez (2015) 377 ITR 102 (Bom.)(HC)*, (dealing with Tribunal order) and the Apex Court in *UOI v. Satish P. Shah (2001) 249 ITR 221 (SC)* (dealing with High Court order) has laid down the salutary principle that where the Revenue has accepted the decision of the Court/Tribunal on an issue of law and not challenged it in appeal, then a subsequent decision following the earlier decision cannot be challenged. Further, it is not the Revenue's case before us that there are any distinguishing features either in facts or in law in the present appeal from that arising in the case of Atul Puranik (supra). In the above view, the question as framed by the Revenue does not give rise to any substantial question of law. Thus, not entertained. (AY. 2007-08)
CIT v. Greenfield Hotels & Estates Pvt. Ltd. (2017) 245 Taxman 125 (Bom.)(HC)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – Assessable in the year of handing over of possession of property and not on entering into agreement for sale of property. [S. 2(47)(v), 45] 1044
Dismissing the appeal the Court held that; Even if the agreement to sell was executed in the financial year 2004-05, possession of the property was handed over only in the financial year 2005-06 and therefore, the transfer of the land would not fall under section 2(47)(v) of the Act and therefore, section 50C of the Act was applicable. Since the assessee itself had claimed capital gains in the return filed for the AY 2006-07 on the basis of the sale deed dated May 10, 2005, it would not be open to the assessee to challenge its assessability in the AY. 2006-07 contending that it was taxable in the AY. 2005-06 on the basis of the retrospective amendment by the Finance Act, 2012 incorporating Explanation 2 to section 2(47) which was made effective from April 1, 1962. The assessee was unable to substantiate that on the basis of the sale deed dated May 10, 2005, the capital gains could not be taxed in the AY. 2006-07 and equally had failed to demonstrate that section 50C of the Act was not applicable particularly when the Assistant Valuation Officer had assessed the fair market value at ₹ 18,16,250. (AY. 2006-07)
Guru Dashmesh Rice and General Mills v. CIT (2016) 386 ITR 97 (P&H)(HC)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – Value ascertained by the DVO lesser than the value adopted by the State Stamp Duty authority – Held, value ascertained by DVO to be taken as full value of consideration [S. 45] 1045
Assessee sold the property for a total consideration of ₹ 47 lakh. Sub-Registrar of the Stamp Duty valued the asset at ₹ 3.4 crores. The assessee carried the said valuation in appeal before the Deputy Collector, Stamp Duties who valued the property at ₹ 1.33 crores. AO adopted the latter value as the full value of consideration. CIT(A) called for the valuation report from DVO, who inturn valued the property at ₹ 71.98 lakh. The said value was adopted by the CIT(A) as full value of consideration. Held, as per the

provisions of section 50C, where the value ascertained by the DVO is lesser than the value adopted by the State Stamp Duty authority, then the earlier one is to be taken as full value of consideration. (AY. 2007-08)
PCIT v. Rajabhai Lumbhabhai Hadiya (2016) 237 Taxman 528 (Guj.)(HC)

1046 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – Agreement was entered in 2001 and part consideration was received and later sale deed was executed in April 2003, transfer of property could be said to have taken place in 2001, when provision of section 50C was not in existence hence same was not applicable. [S. 2(47), 45, 48]**
The provisions of section 50C are not applicable in the case where the agreement for sale is entered into prior to the introduction of section 50C, i.e. AY 2003-04 and sale deed is entered into after the introduction of Section 50C. The moment the agreement for sale is entered into, transfer is said to have taken place for the purpose of section 50C and relying upon the decision of the Supreme Court in the case of *Sanjeev Lal v. CIT [2014] 365 ITR 389* wherein it was held that once an agreement to sell is executed in favour of some person, the said person gets a right to get the property transferred in his favour and, consequently, some right of the vendor is extinguished, it was held that the transfer in the instant case took place in 2001 i.e. the year in which the agreement for sale was entered into and as provisions of section 50C were not in the statute then, there was no case of application of section 50C of the Act. (AY. 2003-04, 2004-05)
CIT v. Shimbhu Mehra (2016) 236 Taxman 561 (All.)(HC)

1047 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – Valuation adopted by DVO is more than stamp valuation stamp valuation is to be adopted. [S. 45]**
Assessee had sold house property for an amount of ₹ 73.60 lakhs and stamp duty had been paid at circle rate of ₹ 1.25 crores. District Valuation Officer (DVO) valued property at ₹ 2.97 crores, treating same to be commercial property. Assessing Officer considered sale consideration on basis of valuation made by DVO and accordingly made addition. On appeal, Commissioner (Appeals) considered sale value on basis of valuation made by stamp valuation authorities. On appeal to Tribunal the assessee raised objections regarding valuation made by DVO. Tribunal held that objections raised against valuation made by DVO had no meaning, as assessment in hands of assessee had not been made on such valuation report but on a much lesser value as determined by stamp valuation authorities. On appeal High Court upheld the order of Tribunal. (AY. 2006-07)
B.M.J. Real Estate (P.) Ltd. v. CIT (2016) 236 Taxman 579 (P&H)(HC)

1048 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – Provisions could not be applied to sale of development rights of land owned by assessee [S. 45, 269UA]**
Provision could not be applied to sale of development rights of land owned by assessee. (AY. 2005-06)
Voltas Ltd. v. ITO (2016) 161 ITD 199 (2017) 183 TTJ 788 / (2017) 148 DTR 84 (Mum.) (Trib.)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – Flats in re-developed property – Sale consideration was combination of sale and exchange total value of which was more than stamp duty valuation therefore value declared in development agreement was to accepted as consideration. [S. 45] 1049

Dismissing the appeal of the Revenue, the Tribunal held that since assessee received consideration in two-folds i.e. partly cash and partly in kind, i.e., by way of property in shape of flats in re-developed property, such transactions were thus a combination of sale and exchange. Since market value of assessee's share including additional consideration in respect of carpet area given to assessee was higher than stamp duty valuation value declared in development agreement was to accepted as consideration. (AY. 2007-08)

ITO v. Bharat Raojibhai Patel (2016) 159 ITD 473 (Mum.)(Trib.)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – Where assessee has transferred only rights in impugned land which cannot be equated to land or building or both, provisions cannot be applicable. [S. 45] 1050

Allowing the appeal of the assessee the Tribunal held that on facts assessee had transferred only rights in impugned land which could not be equated to land or building or both and, therefore, provisions of section 50C could not be applied. (AY. 2006-07)

Devindraben I. Barot (Smt.) v. ITO (2016) 159 ITD 162 / 182 TTJ 805 (Ahd.)(Trib.)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – Provision is applicable when residential property is transferred by executing sale-cum-General power of Attorney. [S. 2(47)(v), 45] 1051

The stamp duty authority has determined the market value of the property and has collected *ad hoc* stamp duty. Further admitted fact that the assessee admitted long-term capital gain. This clearly shows that the transfer took place within the meaning of S. 2(47)(v). The moment transfer took place, the deeming provisions provided in s. 50C is applicable when the sale consideration shown in the sale deed is less than the value determined by the stamp duty authority for the purpose of payment of stamp duty. (AY. 2007-08)

DCIT v. Chalasani Mallikarjuna Rao (Dr.) (2016) 161 ITD 721 (Visakha)(Trib.)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – Insertion of proviso to S. 50C by Finance Act, 2016 with effect from 1-4-2017, has retrospective effect. [S. 45] 1052

Assessee entered into an 'agreement to sell' a piece of land on 29-6-2005. Sale deed of land was executed on 24-4-2007. The AO having invoked provisions of S. 50C, adopted stamp duty valuation rate prevailing on date on which sale deed was executed and accordingly, certain addition was made to capital gain arising from sale of land.

Insertion of proviso to S. 50C by the Finance Act, 2016 with effect from 1-4-2017, has retrospective effect. in view of the same addition set aside for recomputation of capital gain on basis of stamp duty valuation rate prevailing on date of 'agreement to sell'. (AY. 2008-09)

Dharamshibhai Sonani v. ACIT (2016) 161 ITD 627 / 181 TTJ 721 (SMC) (Ahd.)(Trib.)

1053 **S. 50C : Capital gains – Full value of consideration-Stamp valuation – Right in land – Section would have no application where assessee has transferred only rights in impugned land which cannot be equated to land or building or both. [S. 45]**
Allowing the appeal the Tribunal held that section 50C is a deeming provision and it extends only to land or building or both. Section 50C can come into play only in a situation where the consideration received or accruing as a result of the transfer by an appellant of a capital asset, being land or building or both is less than the value adopted or assessed or assessable for the purpose of payment of stamp duty in respect of such transfer. It is settled legal proposition that deeming provision can be applied only in respect of the situation specifically given and, hence, cannot go beyond the explicit mandate of the section. Clearly, therefore, it is essential for application of Section 50C that the transfer must be of a capital asset, being land or building or both. If the capital asset under transfer cannot be described as 'land or building or both', then Section 50C will cease to apply. (AY. 2006-07)
Devindraben I. Barot (Smt.) v. ITO (2016) 141 DTR 302 / 159 ITD 162 (Ahd.)(Trib.)

1054 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – In view of provisions of section 50C, for purpose of computing capital gains arising from sale of land, DVO has to take into consideration rates prevailing on date of agreement to sell and not on date of execution of sale deed of land. [S. 45]**
Assessee entered into an agreement to sell a piece of land on 7-5-2007. Sale deed of plot was executed on 21-10-2010. For relevant year, assessee filed its return declaring certain long term capital gain arising from sale of plot. Assessing Officer referred the matter to DVO for determining value of plot for purpose of computing capital gains. DVO computed sale price of plot on basis of rates prevailing on date of execution of sale deed. Accordingly, certain addition was made to assessee's income. It was held that for purpose of computing capital gains arising on sale of plot, rates applicable on date of execution of sale agreement were to be taken into consideration. Therefore, impugned addition was to be set aside and, matter was to be remanded back for fresh disposal. (AY. 2011-12).
Dharmidevi Kanaiyalal Suthar v. ITO (2016) 51 ITR 55 (Ahd.)(Trib.)

1055 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – Matter was set aside to decide *de novo* as the valuation report was received after the passing of the order. [S. 45]**
Tribunal set aside the order of CIT(A) to AO to decide *de novo* as the valuation report was received after the passing of the order. (AY. 2009-10)
ITO v. Ruchita Gir (Smt.) (2015) 70 SOT 486 / 41 ITR 634 (Hyd.)(Trib.)

1056 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – If the difference between the sale consideration of the property shown by the assessee and the FMV determined by the DVO u/s. 50C(2) is less than 10%, the AO is not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee. Unregistered sale agreements prior to 01.10.2009 are not subject to S. 50C as per CBDT Circular No. 5/10 dt. 03.06.2010 [S. 45]**
Allowing the appeal of assessee the Tribunal held that, If the difference between the sale consideration of the property shown by the assessee and the FMV determined

by the DVO u/s. 50C(2) is less than 10%, the AO is not justified in substituting the value determined by the DVO for the sale consideration disclosed by the assessee. Unregistered sale agreements prior to 01.10.2009 are not subject to s. 50C as per CBDT Circular No. 5/10 dt. 03.06.2010. (AY. 2007-08)
Krishna Enterprises v. ACIT (2017) 146 DTR 73 (Mum.)(Trib.)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – Investment in new house – For exemption entire investment in new house to be considered irrespective of source of funds. [S. 45, 54F] 1057
Dismissing the appeal of revenue the Tribunal held that, for the purpose of exemption u/s. 54F the consideration determined as per section 50C is to be adopted. For exemption entire investment in new house to be considered irrespective of source of funds. (ITA No 848/Hyd/2015 dt 13-5-2016) (AY. 2010-11)
ITO v. Kondal Reddy Mandal Reddy (2016) BCAJ–June P. 53 (Hyd.)(Trib.)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – The proviso to S. 50C inserted by the Finance Act, 2016 w.e.f. 01.04.2017 – It should accordingly be given retrospective effect from 1st April 2003, i.e. the date effective from which s. 50C was introduced. [S. 45] 1058
The proviso to S. 50C inserted by the Finance Act 2016 w.e.f. 01.04.2017 to provide that the stamp duty valuation of property on the date of execution of the agreement to sell should be adopted instead of the valuation on the date of execution of the sale deed is curative and intended to remove an undue hardship to the assessee and an apparent incongruity. It should accordingly be given retrospective effect from 1st April, 2003, i.e. the date effective from which S. 50C was introduced. (AY. 2008-09)
Dharamshibhai Sonani v. DCIT (2016) 142 DTR 62 (Ahd.)(Trib.)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – Leasehold property – Provisions of the Act could not be invoked in respect of transfer of leasehold rights. [S. 45] 1059
The assessee acquired a land on lease for 99 years from the Kanpur Development Authority. During the previous year relevant to the assessment year 2007-08, the assessee transferred the leasehold rights to a company. The Assessing Officer brought the capital gains to tax under section 50C of the Income-tax Act, 1961 as long term capital gains on sale of leasehold property. The Commissioner (Appeals) reversed this holding that section 50C of the Act was applicable only to transfer of capital assets and not to the transfer of leasehold rights in capital assets. On appeal the Tribunal held that the provisions of section 50C of the Act could not be invoked in respect of transfer of leasehold rights. (AY. 2007-08)
ITO v. Hari Om Gupta (2016) 45 ITR 137 (Lucknow)(Trib.)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – The stamp duty value on the date of agreement and not date of sale deed has to be taken. [S. 45] 1060
Allowing the appeal of assessee the Tribunal held that the issue as to whether the date of agreement or the date of execution of sale deed has to be considered for the

purpose of adopting the SRO value under S. 50C of the Act, is now settled in favour of the assessee by the decisions of the Hon'ble Supreme Court in the case of *Sanjeev Lal and Smt. Shantilal Motilal v. CIT (2014) 365 ITR 389 (SC)* as well as decisions of the coordinate bench of this Tribunal at Visakhapatnam in the cases of *Lahiri Promoters Visakhapatnam v. ACIT, Circle 1(1), Visakhapatnam (ITA No.12/Vizag/2009 dated 22.6.2010)* and *Moole Rami Reddy v. ITO* (ITA No.311/Vizag/2010 dated 10.12.2010). Therefore, the SRO value as on the date of agreement of sale has to be considered for the purpose of computation of capital gains. (AY. 2006-07)
Mohd. Imran Baig v. ITO (2016) 130 DTR 33 / 175 TTJ 319 (Hyd.)(Trib.)

1061 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – Stock-in-trade – Provision applies to development agreement. [S. 45]**
Land purchased by a builder with the knowledge that there are encumbrances on it and development is not feasible is a "capital asset" and not "stock-in-trade". The gains on transfer of such land is assessable as capital gains and not as business profits. S. 50C applies to development agreements if the effect of the development agreement read with the conveyance deed is that the entire land with ownership rights are transferred. (AY. 2007-08)
ACIT v. Dattani Development (2017) 147 DTR 224 (Mum.)(Trib.)

1062 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – Valuation is a matter of estimation and some degree of difference is bound to be there. If the difference between the stamp duty valuation and the declared sale consideration is less than 10%, addition u/s. 50C should not be made. [S. 45]**
Allowing the appeal of the assessee the Tribunal held that (i) The Pune Bench of the Tribunal in the case of *Asstt. CIT v. Harpreet Hotels (P) Ltd. vide ITA Nos. 1156-1160/Pn/2000* dismissed the appeal filed by the Revenue where the CIT(A) had deleted the unexplained investment in house construction on the ground that the difference between the figure shown by the assessee and the figure of the DVO is hardly 10 per cent.
(ii) The Pune Bench of the Tribunal in the case of *ITO v. Kaaddu Jayghosh Appasaheb, vide ITA No. 441/Pn/2004* for the asst. yr. 1992-93 following the decision of the J&K High Court in the case of *Honest Group of Hotels (P) Ltd. v. CIT (2002) 177 CTR (J&K) 232* had held that when the margin between the value as given by the assessee and the Departmental valuer was less than 10 per cent, the difference is liable to be ignored and the addition made by the AO cannot be sustained.
(iii) In *Rahul Construction v. DCIT in ITA No. 1543/PN/2007 (2010) 38 DTR (Pune)(Trib.)* it was held that since the difference is less than 10 per cent and considering the fact that valuation is always a matter of estimation where some degree of difference is bound to occur, the AO is not justified in substituting the sale consideration at ₹ 20,55,000/- as against the actual sale consideration of ₹ 19,00,000 disclosed by the assessee.
(iv) In the instant case, the difference between the valuation adopted by the Stamp Valuation Authority and declared by the assessee is less than 10%. Therefore, respectfully following the decision of the Hon'ble Co-ordinate Bench, we hereby direct the AO to adopt the value as declared by the assessee. This ground of the assessee is allowed. (AY. 2010-11)
Sita Bai Khetan v. ITO (2016) 142 DTR 122 (Jaipur)(Trib.)

S. 50C : Capital gains – Full value of consideration – Stamp valuation – The stamp duty value on the date of agreement and not date of sale deed has to be taken. The nature of the property on the date of agreement has to be considered – Proviso to S. 56(2)(vii)(b) is curative and retrospective left open. [S. 56(2)(vii)(b)] 1063

The stamp duty value on the date of agreement and not date of sale deed has to be taken. Followed the ratio in *Sanjeev Lal and Smt. Shantilal Motilal v. CIT (365 ITR 389)* as well as decisions of the Coordinate Bench of this Tribunal at Visakhapatnam in the cases of *M/s. Lahiri Promoters Visakhapatnam v. ACIT, Circle 1(1), Visakhapatnam (ITA No. 12/Vizag/2009 dated 22.6.2010)* and *Moole Rami Reddy v. ITO (ITA No. 311/Vizag/2010 dated 10.12.2010)*. It is therefore, now settled that the SRO value as on the date of agreement of sale has to be considered for the purpose of computation of capital gains. The next question is the nature of the property for valuation under S. 50C, because, according to the assessee, even if the date of registered sale deed is considered for determination of the fair market value under S. 50C, the SRO value should be taken for residential area and not commercial area. He submitted that if the value of the residential area as on 1.4.2006 i.e. ₹ 10,000 per sq. yard, is taken into consideration, the sale consideration received by the assessee was more than the SRO value and no addition was warranted. Therefore, the nature of the property as on the date of transfer attains importance. There cannot be any dispute that the nature of the property on the date of transfer/sale is to be considered. Proviso to s. 56(2)(vii)(b) is curative and retrospective left open. (ITA No. 1942/hyd/2014, dt. 27.11.2015) (AY. 2006-07)

Mohd. Imran Baig v. ITO (Hyd.)(Trib.); www.itatonline.org

S. 50C : Capital gains – Full value of consideration – Stamp valuation does not apply to transfer of leasehold rights in land. [S. 45] 1064

Allowing the appeal of assessee the Tribunal held that; Section 50C of the Act provides that if the consideration received or accruing is less than the value adopted or assessed or assessable by the Stamp Valuation authority of the State Government for such transfer then the value so adopted or assessed or assessable shall be deemed to be the full value of consideration and the capital gains will be computed accordingly. 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". The moot question before us is as to whether such expression would cover the transfer of a capital asset being leasehold rights in land or building. There cannot be a dispute to the proposition that the expression land by itself cannot include within its fold leasehold right in land also. Ofcourse, leasehold right in land is also a capital asset and we find no fault with this stand of the Revenue. So however, every kind of a 'capital asset' is not covered within the scope of section 50C of the Act for the purposes of ascertaining the full value of consideration. In fact, the heading of section itself provides that it is "Special provision for full value of consideration in certain cases". Therefore, there is a significance to the expression "a capital asset, being land or building or both" contained in section 50C of the Act. The significance is that only capital asset being land or building or both are covered within the scope of section 50C of the Act, and not all kinds of capital assets. (ITA No. 5136/Mum/2014, dt. 16.03.2016) (AY. 2010-11)

Farid Gulmohamed v. ITO (Mum.)(Trib.); www.itatonline.org

1065 **S. 50C : Capital gains – Full value of consideration – Stamp valuation difference being less than 2% addition was held to be not justified. [S. 45]**
It was held that difference between the valuation for the stamp duty and the actual consideration received by the assessee being less than 2 per cent the addition made by the AO by adopting the valuation of the impugned property as determined for stamp duty purposes as the sale consideration for the purpose of computing the long term capital gains is not sustainable. (AY. 2009-10)
ITO v. LGW Ltd. (2016) 130 DTR 201 (Kol.)(Trib.)

1066 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – Provision cannot be applied in case of transfer of leasehold rights. [S. 45]**
The capital gains arising out of transfer of leasehold rights was not offered to tax by the assessee. The AO computed the capital gains by applying provisions of s. 50C. The ITAT held that provisions of s. 50C cannot be invoked in respect of transfer of leasehold rights. (AY. 2007-08)
ITO v. Hari Om Gupta [2016] 45 ITR 137 (Luck.)(Trib.)

1067 **S. 50C : Capital gains – Full value of consideration – Stamp valuation – Amount of sale consideration has been determined in view of stamp duty valuation – Consideration cannot be estimated. [S. 45]**
Held that provisions of sec. 50C lays down that the value adopted or assessed by Stamp Valuation Authority shall be deemed be full value of consideration. Law is well settled that scope of deeming fiction cannot be extended beyond what has been clearly mentioned in law. Full value of consideration of the asset has been determined based upon the value as was assessed by the Stamp Valuation authority. Therefore, once the amount of sale consideration has been determined keeping in view of provisions of law no question would arise of estimating the value of consideration once again. CIT(A) erred in estimating lease rent as it was beyond the provisions of law. (AY. 2003-04, 2006-07, 2007-08)
Kamala Brothers v. ITO (2016) 176 TTJ 178 / 131 DTR 106 (Mum.)(Trib.)

1068 **S. 50C : Capital gains – Full value of consideration – Fair Market Value – Primary duty of the AO to refer to the Departmental Valuation Officer – Failure by AO to discharge his duty – Matter Remanded to refer the matter to the Departmental Valuation Officer.[S. 45]**
The assessee, a HUF, was engaged in the business of money lending. During the previous year, the assessee sold an item of immovable property comprising of land and building. The assessee stated that the sale deed was not released after registration owing to sudden dispute and the case was pending before the court of law. The AO after confirming the market value of that land from the Sub-Registrar's office, invoked the provisions of section 50C of the Act and computed the capital gains on the sale of the immovable property. The Commissioner (Appeals) confirmed this.
On appeal, the Tribunal held that the AO failed to refer the matter to the Department Valuation Officer for valuing the property in accordance with the section 50C(2) of the Act and also failed to consider the matter of litigation involved in the title to the property. The AO was to refer the matter to the Departmental Valuation Officer and decide it afresh. (AY. 2009-10)
S. D. Vimalchand Jain v. ITO (2016) 45 ITR 628 (Chennai)(Trib.)

S. 54. Profit on sale of property used for residence.

S. 54 : Capital gains – Profit on sale of property used for residence – Utilisation of capital gains in construction of residential house within a period of two years would suffice to claim exemption, irrespective of fact neither the sale transaction was concluded nor registration had taken place within two years. [S.45] 1069

Dismissing the appeal of the Revenue, the Court held that utilisation of capital gains in construction of residential house within a period of two years would suffice to claim exemption, irrespective of fact neither the sale transaction was concluded nor registration had taken place within two years. (AY. 2003-04)

CIT v. Shakuntala Devi (Mrs.) (Decd.) (2016) 389 ITR 366 / 75 taxmann.com 222 (Karn.) (HC)

S. 54 : Capital gains – Profit on sale of property used for residence – Merely because the assessee got the occupancy certificate after 4 years and such delay was beyond control of the assessee, assessee's claim for deduction was to be allowed. [S.45] 1070

Dismissing the appeal of revenue where assessee sold a residential property and entered into an agreement with a builder for purchasing flat by investing the sale proceeds within the prescribed period of two years. Merely because the assessee got the occupancy certificate after 4 years and such delay was beyond control of the assessee, assessee's claim for deduction u/s. 54 was to be allowed.

CIT v. Girish L. Ragha (2016) 239 Taxman 449 / 140 DTR 418 / 289 CTR 213 (Bom.)(HC)

S. 54 : Capital gains – Profit on sale of property used for residence Residential house along with land was transferred for purpose of development, it would be eligible for exemption.[S. 45] 1071

Allowing the appeal of the assessee the Tribunal held that ;Transfer of residential house along with land was transferred for purpose of development, it would be eligible for exemption. (AY. 2006-07)

Rukmani Santhanam (Smt.) v. ITO (2016) 160 ITD 338 / 182 TTJ 388 (Chennai)(Trib.)

S. 54 : Capital gains – Profit on sale of property used for residence – Advance payment to builder would amount to purchase of house and entitled exemption. [S.45, 54G] 1072

Dismissing the appeal of the revenue, the Tribunal held that payment made by the assessee before the due date of filing of return towards advance for purchase of flat from the builder would amount to utilization of capital gains as required under section 54(2). The assessee is entitled to exemption under section 54. Followed Supreme Court in *Fibre Boards (P) Ltd. v. CIT (2015) 376 ITR 596 (SC)*(AY. 2011-12)

ACIT v. Kannan Santhanam (2016) 161 ITD 792 / (2017) 183 TTJ 8 (Chennai)(UO)(Trib.)

S. 54 : Capital gains – Profit on sale of property used for residence – Agricultural land – Land was a Jirayat fallow land and that no agricultural activity having been carried on by assessee – Denial of exemption was held to be justified. [S. 2(14), 45, 153A] 1073

Assessee claimed that suit land was an agricultural land and it fell outside definition of capital asset u/s. 2(14). AO held that land in question was not an agricultural land as it

was Jirayat fallow land i.e. land being not capable of cultivation. Therefore, profit from transfer of such land was not exempt as an agricultural income and denied deduction claimed by assessee. CIT(A) upheld order of AO holding that land in question was not an agricultural land. On appeal, the Tribunal observed that according to 7/12 extract, land was a Jirayat fallow land and that no agricultural activity having been carried on by assessee. Also, Report of Inspector was obtained by AO, which clearly mentioned that land was not fit for cultivation which had not been challenged by assessee. Assessee in return of income had not claimed that it sold agricultural land, but on other hand had claimed deduction u/s. 54, in support of which, assessee failed to furnish any documents and hence that claim of section 54 was held to be not allowable to assessee. Accordingly, Assessee's appeal was dismissed. (AY. 2009-10)
Abhijit Subhash Gaikwad v. Dy. CIT (2015) 70 SOT 429 / 60 taxmann.com 259 (Pune)(Trib.)

1074 **S. 54 : Capital gains – Profit on sale of property used for residence – Advance payment – Amount utilized of capital gain for purchasing of new flat before due date of filing of return would be entitled to claimed exemption even though construction of flat did not complete on date of payment.[S. 45, 54G]**
Assessee sold residential flat and earned as capital gain. He advanced a sum of rupees for purchase of residential flat from a builder on due date of filing of return. He claimed exemption u/s. 54. The AO disallowed the claim stating that advance payment was made by the assessee for purchase of flat. The CIT(A) allowed the claim of the assessee.
Tribunal held that amount utilized of capital gains for purchasing of new flat before due date of filing of return and, therefore assessee would be entitled to claimed exemption u/s. 54 even though construction of flat did not complete on date of payment. (AY.2011 -12)
ACIT v. Kannan Santhanam (2016) 161 ITD 792 / (2017) 183 TTJ 8 (UO) (Chennai)(Trib.)

1075 **S. 54: Capital gains – Profit on sale of property used for residence – Date of commencement of construction of house property is irrelevant, construction may be commenced even before transfer of asset. [S.45]**
Profit on sale of property used for residential house in order to claim deduction u/s. 54, date of commencement of construction of house property is irrelevant and thus construction may be commenced even before transfer of asset. (AY. 2007-08)
DCIT v. Chalasani Mallikarjuna Rao (Dr.) (2016) 161 ITD 721 (Visakh)(Trib.)

1076 **S. 54 : Capital gains – Profit on sale of property used for residential house – Investment in construction of house – Construction did not materialize and the amount was refunded. Assessee was entitled to exemption. [S. 45]**
Where assessee having sold residential property, paid entire sale consideration for purchase of another house property within time limit prescribed, even though said transaction did not eventually materialise and amount was refunded which was paid by assessee, still assessee's claim for deduction was to be allowed. (AY. 2009-10)
T. Shiva Kumar v. ITO (2016) 158 ITD 329 (Bang.)(Trib.)

S. 54 : Capital gains – Profit on sale of property used for residence – Cost of improvement to make it habitable – Exemption cannot be denied. [S. 45] 1077

Assessee is allowed to purchase or construct residential house without any ceilings as to amount of investment, then merely because taxpayer has purchased a residential house and thereafter followed it with alterations and modifications carried out to make said house habitable, benefits cannot be denied by revenue. (AY. 2009-10)

Rustom Homi Vakil v. ACIT (2016) 158 ITD 588 (Mum.)(Trib.)

S. 54 : Capital gains – Profit on sale of property used for residence – The date of "purchase" of the new residential house is the date when the assessee receives possession and not the date of the agreement of purchase. [S. 45] 1078

Allowing the appeal of the assessee the Tribunal held that, in the given facts of the case and also the case law relied on by learned Counsel for assessee in the case of V. M. Dujodwala co-ordinate Bench of this Tribunal and also of Hon'ble Bombay High Court in the case of Smt. Beena K. Jain, we are of the view that the assessee's claim of deduction u/s. 54 of the Act is to be reckoned from the date of handing over of the possession of the flat by the builder to the assessee i.e. 11.09.2009, and if we take that date, the assessee is entitled to deduction u/s. 54 of the Act because the assessee has sold his residential flat on 24.02.2010. We allow the assessee's claim and order accordingly. (ITA No.2896/Mum/2014, dt. 08.06.2016)(AY. 2010-11)

Bastimal K. Jain v. ITO (Mum.)(Trib.), www.itatonline.org

S. 54 : Capital gains – Profit on sale of property used for residence – Assessee can deposit unutilized capital gains in prescribed bank or institution before due date of filing income tax return as per section 139(1), despite fact that he had already purchased one residential flat. [S. 45, 139(1)] 1079

Tribunal held that there is no bar under section 54(2) on assessee for making deposit of unutilized capital gain in capital gains account with prescribed bank or institution before due date of filing income tax return as per section 139(1), despite fact that assessee had already purchased one residential flat. However, such amount needs to be utilized for purchase or construction of new asset within period specified in sub-section (1) of section 54. (AY. 2008-09)

Suresh Kumar K. Tek v. ITO (2016) 157 ITD 119 (Mum.)(Trib.)

S. 54 : Capital gains – Profit on sale of property used for residence – Gift of property – Entitled to exemption. [S. 45, 47(iii)] 1080

Dismissing the appeal of revenue, the Tribunal held that where assessee had sold his residential property in April, 2010 and invested sale proceeds in August, 2010 in another residential property and in November, 2010 he had settled new property to his daughter out of love and affection, settlement of property was a gift falling under section 47(iii) and assessee was entitled to exemption under section 54 in respect of capital gains arising on sale of property. (AY. 2011-12)

ITO v. Abdul Hameed Khan Mohammed (2016) 156 ITD 778 (Chennai)(Trib.)

1081 **S. 54 : Capital gains – Profit on sale of property used for residence – Deduction allowable on purchase of residential house which could include multiple residential units. [S. 45]**

The assessee sold his tenancy rights and claimed deduction u/s. 54 in respect of purchase of two flats in different locations in different societies. The AO did not allow the deduction on one of the flats. The ITAT held that deduction u/s. 54 could be claimed for a residential house which could include multiple residential units based on the judgment of the Hon'ble Madras High Court in the case of *CIT v. Smt. V. R. Karpagam [2015] 373 ITR 127 (Mad)*. The ITAT observed that the amendment to s. 54F to make it applicable to only one residential house would become effective from 1st April, 2015. (AY. 2009-10)

Nilesh Pravin Vora & Yatin Pravin Vora (Legal heirs of Pravin Laxmidas Vora) v. ITO (2016) 45 ITR 228 (Mum.)(Trib.)

1082 **S. 54 : Capital gains – Profit on sale of property used for residence – Assessee utilising entire capital gains within period of one year in constructing a house which could not be completed due to circumstances beyond assessee's control – Assessee was entitled to exemption.[S.45]**

The AO disallowed the exemption u/s. 54 of the Act on the ground that the assessee had entered into a development agreement with S for construction of an independent house in a gated community in the land but the construction of the house was not completed within the stipulated period. The CIT(A) allowed the exemption. On appeal held that the assessee had utilised the capital gains within the period of one year but due to certain circumstances beyond the control of the assessee, the construction of the house could not be completed within the specified period. Therefore, the assessee was entitled to exemption. (AY. 2009-10)

ITO v. Narayan Rao (2016) 46 ITR 178 (Hyd.)(Trib.)

1083 **S. 54 : Capital gains – Profit on sale of property used for residence – Construction of new residential flat was not completed beyond three years from transfer – No entitled to exemption. [S. 45]**

Dismissing the appeal of assessee, the Tribunal held that where construction of new residential flat was not completed by end of three years from transfer, assessee would not be entitled to exemption under section 54. (AY. 2009-10)

Yashovardhan Sinha v. ITO (2016) 156 ITD 540 (Patna)(Trib.)

S. 54EC. Capital gains not to be charged on investment in certain bonds.

1084 **S. 54EC : Capital gains – Investment in bonds – Depreciable assets – Eligible exemption. [S.45, 50]**

Assessee-company was engaged in business of running a hotel, claimed deduction u/s. 54EC by claiming that sale proceeds of hotel building had been invested in NABARD bonds. The AO. took a view that since hotel building was a depreciable asset, it had to be treated as short term capital asset as per deeming provision of S. 50 and thus capital gains arising from sale of said building was not eligible for deduction u/s. 54EC. Legal

fiction created in s. 50 for deeming a capital gains as short term capital gain does not mean that asset itself is a short-term capital asset and thereby converting a long-term capital asset into short-term capital asset. Therefore, deduction u/s. 54EC could not be denied to assessee by fiction created u/s. 50. (AY. 2004-05)
Travotel (India) (P.) Ltd. v. ITO (2016) 158 ITD 878 (Mum.)(Trib.)

S. 54EC : Capital gains – Investment in bonds – Bonds were not available – Purchased with in the reasonable time of made availability of Bonds – Eligible – Exemption. [S.45] 1085
Where bonds of assessee's choice were not available throughout stipulated period for investment for claiming exemption from capital gains, time limit to invest in bonds would get automatically extended. Where the assessee purchased the Bonds within the time allowable, he is eligible for exemption. (AY. 2006-07)
Sunil Kumar Saha v. ITO (2016) 156 ITD 1 (Kol.)(Trib.)

S. 54EC : Capital gains – Investment in bonds – Payment of cheque dates back to date of presentation and not date of encashment [S.45] 1086
Allowing the appeal of the assessee the Tribunal held that the period of six months available for making investment means six months and not 180 days. Payment by cheque dates back to date of presentation and not date of encashment. (AY. 2005-06) (ITA No. 7548/Mum/2012 dt. 28-8-2015) Bench 'B'.
Neela S. Karyakarte v. ITO (2016) 176 TTJ 52 (URO) / BCAJ–March–P. 30 (Mum.)(Trib.)

S. 54F. Capital gains 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 – Agreement to sell does not amount to transaction of immovable property – Claim for exemption was held to be not allowable. [S.45, Transfer of Property Act, 1882] 1087
Dismissing the appeal of assessee the Court held that there was an agreement for purchase of land which was not carried out and matter was taken to Court, where parties entered into settlement for transfer of plot. Fact remains that no legal document having effect of transfer of immovable property was placed before Appellate Authority. Under the provisions of Transfer of Property Act, 1882 unless a registered sale deed is executed, title of immovable property cannot pass. Agreement to sale is not a transaction of immovable property but only a promise to enter into another agreement relating to sale of immovable property. That is why Tribunal has recorded a finding that from order of Assessing Authority it is evident that there was no sale of property in dispute for the reason that no sale deed was placed before revenue authorities so as to claim capital gain. There is no error in the judgment of Tribunal. (AY. 1995-96)
Shobha Jain (Smt.) v. CIT (2016) 243 Taxman 368 (All.)(HC)

1088 **S. 54F : Capital gains – Investment in a residential house – Relaxation for claiming benefit under section 54F only within time prescribed under that section and that too, if before making such claim, he had complied with required conditions to claim such deduction – Rejection of petition by CBDT was held to be justified. [S.45, 119(2)(c)]**
Dismissing the petition the Court held that; relaxation for claiming benefit under section 54F only within time prescribed under that section and that too, if before making such claim, he had complied with required conditions to claim such deduction - Rejection of petition by CBDT was held to be justified.
Shivinder Singh Brar, Karta HUF v. CBDT (2016) 243 Taxman 176 / 290 CTR 121 / 142 DTR 154 (P&H)(HC)

1089 **S. 54F : Capital gains – Investment in a residential house – Seven flats – Income from property was assessed as income from house property therefore exemption cannot be denied. [S. 22, 14, 45]**
Dismissing the appeal of revenue the Court held that income from these flats was offered to tax under head 'income from house property' in view of specific provisions of section 22, read with section 14. Tribunal held that treatment of income by assessee could not be treated as an act by which assessee had considered seven flats as residential house owned by him and, therefore, denial of claim of assessee for deduction under section 54F was unassailable. (AY. 2009-10)
CIT v. Gregory Mathias (2016) 243 Taxman 25 (Karn.)(HC)

1090 **S. 54F : Capital gains – Investment in a residential house – Exemption could not be denied to the assessee, where he sold a land and purchased another house property. [S. 45]**
Dismissing the appeal of revenue the Court held that where assessee was owner of a residential house and a commercial property and earned income from both the properties. Exemption could not be denied to the assessee, where he sold a land and purchased another house property. (AY. 2009-10)
CIT v. I. Ifthiqar Ashiq (2016) 239 Taxman 443 (Mad.)(HC)

1091 **S. 54F : Capital gains – Investment in a residential house – Failure to deposit the amount of consideration not utilized towards the purchase of new flat in the specified bank account before the due date of filing return of Income u/s. 139(1) is fatal to the claim for exemption. [s. 45, 139(1)]**
Dismissing the appeal of assessee the Court held that, failure to deposit the amount of consideration not utilized towards the purchase of new flat in the specified bank account before the due date of filing return of Income u/s. 139(1) is fatal to the claim for exemption. The fact that the entire amount has been paid to the developer/builder before the last date to file the ROI is irrelevant. Contrary view in K. Ramchandra Rao 277 CTR 0522 (Kar.) is *sub-silentio* and is not good law. (AY. 1996-97)
Humayun Suleman Merchant v. CCIT (2016) 387 ITR 421 / 242 Taxman 189 / 140 DTR 209 / 290 CTR 496 (Bom.)(HC)

S. 54F : Capital gains – Investment in a residential house – Full payment made to builder and residential unit allotted to assessee within three year period – That outer date for completion of construction beyond three year period or builder did not hand over possession within three year period – Not to disentitle assessee of exemption – Utilisation of gains in construction of residential house is material factor. [S. 45, 54] 1092

The assessee effected sale of equity shares on July 7, 2007, which gave rise to long – term capital gains. The assessee invested part of the gains in construction of a residential house and claimed exemption thereof under section 54F of the Income-tax Act, 1961. The assessing authority disallowed the claim on the ground that the construction was not completed within the three year period stipulated in the section. The Commissioner (Appeals) dismissed the assessee's appeal. The Tribunal found that though the agreement for construction entered into by the assessee with the builder gave an outer date which went beyond the three year period from the date of sale of the shares the assessee had done all that he could do for acquiring the villa by paying the whole of the price on July 28, 2007 itself. Following *CIT v. Sambandam Udaykumar [2012] 345 ITR 389 (Karn.)* the Tribunal held that the fact that the builder had not handed over possession would not disentitle the assessee from claiming the benefit under section 54F and that the assessee was entitled to the exemption under section 54F because he had re-invested the entire capital gains by making payment in full to the builder. On appeal by the Department:

Held, dismissing the appeal, that if the Tribunal had followed the decision of the court, no substantial question of law would arise for consideration in the appeal. The Department's contention that since the tax amount was less in the earlier case and the matter had been not carried before the Supreme Court, the efficacy of the decision of the court would be lost was not tenable. When on the same issue a co-ordinate Bench of the court had already taken a view, departure therefrom was not permissible unless there were strong and valid reasons or the Supreme Court had taken a different view. When the issue was covered by the decision of the court, no substantial question of law would arise for consideration. (AY. 2008-09)

PCIT v. C. Gopalaswamy (2016) 384 ITR 307 (Karn.)(HC)

S. 54F : Capital gains – Investment in a residential house – Amount invested in new asset need not be entirely sourced from capital gain. [S.45] 1093

The assessee claimed benefit of section 54F, however, he did not entirely source the amount invested in his new asset from capital gains receipts and therefore the he AO made an addition to the income of the assessee. The CIT(A) upheld the addition made by the AO. The Tribunal reversed order of the CIT(A) holding that section 54F did not put any restriction whether the investment was made out of loan amount or from the sale consideration and, therefore, for availing the benefit of section 54F amount invested in the new asset need not be entirely sourced from capital gain.

The High Court upheld the order of the Tribunal and held that, no provision had been made in the statute that in order to avail benefit of section 54F, the assessee had to utilize the amount received by him on sale of original capital asset for the purposes of meeting the cost of the new asset. Once that is so, the assessee was entitled for benefit under section 54F. (AY. 2009-10)

CIT v. Kapil Kumar Agarwal (2016) 382 ITR 56 / 237 Taxman 555 / 284 CTR 75 / 131 DTR 87 (P&H)(HC)

1094 **S. 54F : Capital gains – Investment in a residential house – Investment of consideration should be in name of the assessee, land bought in name of daughter is not entitled to exemption. [S.45]**

Dismissing the appeal of the assessee the Tribunal held, that the exemption under section 54F of the Act had to be claimed only by the assessee on purchase and construction of new residential property in the assessee's own name and not in that of his unmarried daughter. The exemption was exclusive to be claimed by the assessee which could not be clubbed or applied to the blood relation or family members. (AY. 2011-12)

D. Devadass v. ITO (2016) 48 ITR 613 (Chennai)(Trib.)

1095 **S. 54F : Capital gains – Investment in a residential house – Exemption cannot be denied to assessee when he has invested entire sales consideration in residential property, but is unable to get possession of flat, which is under construction, due to fault of builder. [S.45]**

Allowing the appeal of the assessee, the Tribunal held that when an assessee has invested entire sale consideration of his plot in a residential property within time prescribed u/s. 54F, but he is unable to get possess of flat, which is under construction, due to fault of builder, he cannot be denied deduction u/s. 54F. (AY. 2010-11)

Rajeev B. Shah v. ITO (2016) 159 ITD 964 (Mum.)(Trib.)

1096 **S. 54F : Capital gains – Investment in a residential house – Due date for assessee to invest amount of capital gains in purchase/construction of new residential asset or investment in capital gains scheme u/s. 54F refers to 'extended due date' u/s. 139(4), matter remanded. [S. 45, 139(4)]**

Assessing Officer denied the exemption u/s. 54F on the ground that, the assessee had filed return of income u/s. 139(4) and not u/s. 139(1). Tribunal held that, 'Due date' for assessee to invest amount of capital gains in purchase/construction of new residential asset or investment in capital gains scheme u/s. 54F refers to 'extended due date' u/s. 139(4). However, during intermediary period, i.e., after sale of capital asset till date of investment, a fund has to be deposited in capital gains account scheme as notified by Central Government. In view of aforesaid, the matter was remanded back to AO to examine fulfilment of conditions u/s. 54F through intermediary period, that is, from date of sale of capital asset to date of actual investment in residential house. (AY. 2011-12)

G. Ramesh v. ITO (2016) 159 ITD 633 (Chennai)(Trib.)

1097 **S. 54F : Capital gains – Investment in a residential house – Development rights is a capital asset and sale proceeds is chargeable as capital gains, hence consequential exemption is available. [S. 2(14), 45, 56]**

The AO treated entire consideration as income from other sources and denied the exemption u/s. 54F of the Act. Dismissing the appeal of the revenue, the Tribunal held that gains on sale of development rights over property are capital in nature and comes within definition of capital asset and, therefore, taxable as capital gains. Accordingly consequential exemptions u/s. 54F would be allowable. (AY. 2007-08)

ITO v. Bharat Raojibhai Patel (2016) 159 ITD 473 (Mum.)(Trib.)

S. 54F : Capital gains – Investment in residential house – Family settlement – Transfer of property was made in favour of assessee's son and daughter under a family arrangement within a period of three years from purchase of said property, exemption cannot be denied. [S.45] 1098

AO denied assessee's claim of exemption u/s. 54F on ground that assessee was allotted two flats and one of these flats was transferred within a period of three years to assessee's son and daughter under a family arrangement. Allowing the appeal the Tribunal held that even though two flats were allotted to assessee, they were to be construed as one single unit and since said transfer of one of flats was not by sale and only a transfer in favour of son and daughter under a family arrangement, same would be liable for exemption u/s. 54F. (AY 2006-07)

Rukmani Santhanam (Smt.) v. ITO (2016) 160 ITD 338 / 182 TTJ 388 (Chennai)(Trib.)

S. 54F : Capital gains – Investment in a residential house – Partial in property – Exemption could not be denied on sale of another property. [S. 45] 1099

The assessee claimed exemption u/s. 54F on sale land. AO. disallowed claim on the ground that the assessee owned more than one house on the date of sale of land. Tribunal held that only a partial interest in said property was conveyed to assessee by mother by means of settlement deed and life interest over said property was retained by mother. Since such partial interest could not be considered as full ownership and therefore exemption u/s. 54F could not be denied to the assessee. (AY. 2011-12)

V. R. Usha (Mrs.) v. ITO (2016) 159 ITD 402 (Chennai)(Trib.)

S. 54F : Capital gains – Investment in a residential house – Exemption is available if net consideration is invested even though the stamp duty valuation is more than net consideration. [S. 45, 50C] 1100

Assessee invests net sale consideration for purpose of purchase/construction of new residential house property, then he is eligible for exemption even though full value of consideration as per s. 50C is more than net sale consideration as a result of transfer. (AY. 2007-08)

DCIT v. Chalasani Mallikarjuna Rao (Dr.) (2016) 161 ITD 721 (Visakha)(Trib.)

S. 54F : Capital gains – Investment in a residential house – If the assessee has made full payment to the builder for purchase/construction of a new residential house but is not able to get the title of the flat registered in his name or is unable to get the possession of the flat within the prescribed period due to fault of the builder, the assessee cannot be denied deduction. [S. 45] 1101

Allowing the appeal of the assessee the Tribunal held that we find that so far as the facts in question are not disputed, the only issue is that when the assessee is not able to get the title of the flat registered in his name or unable to get the possession of the flat, which is under construction, due to fault of the Builder, the assessee cannot be denied deduction u/s. 54F of the Act. It is a fact that the assessee has invested this amount of ₹ 18,60,000/- in purchase of residential house within the stipulated period prescribed u/s. 54F of the Act. But, it is not in the assessee's hand to get the flat completed or to get the flat registered in his name, because it was incomplete. The intention of the

assessee is very clear that he has invested almost the entire sale consideration of land in purchase of this residential flat. It is another issue that the flat could not be completed and the matter is pending before the Hon'ble Bombay High Court seeking relief by the assessee by filing suit for direction to the Builder to complete the flat. It is impossible for the assessee to complete other formalities i.e. taking over possession for getting the flat registered in his name and this cannot be the reason for denying the claim of the assessee for deduction u/s. 54F of the Act. In view of the above facts of the case, we are of the view that the assessee is entitled for deduction u/s. 54F of the Act, because the assessee has already invested a sum of ₹ 18.60 lakhs in the residential property under construction within the time limit prescribed u/s. 54F of the Act. Accordingly, this issue of assessee's appeal is allowed. (ITA No.262/Mum/2015, dt. 08.07.2016)(AY. 2010-11)
Rajeev B. Shah v. ITO (Mum.)(Trib.), www.itatonline.org

1102 **S. 54F : Capital gains – Investment in a residential house – Demolition of structure does not amount to transfer – Entitle exemption – CIT(A) is bound to follow the order of Jurisdictional High Court in the case of another Co-owner. [S. 2(47), 45]**
Demolition of structure does not amount to transfer, capital gain exemption cannot be withdrawn. Tribunal also held that judicial discipline and rule of law demand and requires that lower judicial authorities should and must follow the decisions/judgment of higher judicial authorities on identical facts. Thus, the CIT(A) was bound by law to follow the jurisdictional High Court judgment in the case of Mrs. Chhaya B. Parekh. In our considered view that this instant case is squarely covered by the decision of Hon'ble Bombay High Court in the case of Mrs. Chhaya B. Parekh and hence the assessee is entitled for his claim of deduction u/s. 54F of the Act as claimed in the return of income filed with the Revenue. (AY. 2007-08)
Dilip Manhar Parekh v. DCIT (2016) 136 DTR 113 / 178 TTJ 513 (Mum.)(Trib.)

1103 **S. 54F : Capital gains – Investment in a residential house – While allowing exemption deemed consideration u/s. 50C has to be taken into consideration and it cannot be restricted to the consideration mentioned in the sale deed – Funds invested need not be from same source it can be from other source. [S. 45, 50C]**
Dismissing the appeal of revenue the Tribunal held that ;the ultimate object and purpose of section 50C of the I.T. Act is to see that the undisclosed income of capital gains received by the assessee should be taxed and that the law should not encourage and permit the assessee to peg down the market value at their whims and fancy to avoid tax, but when the capital gains is assessed on notional basis, whatever amount is invested in the new residential house within the prescribed period under section 54 of the I.T. Act, the entire amount invested, should get benefit of deduction irrespective of the fact that the funds from other sources are utilised for new residential house. (ITA No. 848/hyd/2015, dt. 13.05.2016)(AY. 2010-11)
ITO v. Kondal Reddy Mandal Reddy (Hyd.)(Trib.); www.itatonline.org

S. 54F : Capital gains – Investment in a residential house – Construction was not completed within three years – Whole of capital gains was liable to be taxed in previous year in which period of three years expired from date of sale of original asset. [S.45, 263] 1104

Assessee sold a property and purchased a vacant site for construction of residential house. She deposited remaining sale consideration in Capital Gain Account Scheme and claimed exemption. AO allowed the exemption. She could not complete construction within period of three years and offered capital gain for tax after three years. Commissioner in revision proceedings held that only unutilized portion of sale consideration was taxable in previous year in which period of three years expired from date of sale of original asset but investment made in vacant site was to be taxed in year in which capital gains arose. Tribunal held that the view of Commissioner was incorrect. Assessee was required to pay tax on whole capital gains in previous year in which period of three years from date of transfer of original asset expired. (AY. 2009-10)

Vegesina Kamala v. ITO (2016) 157 ITD 457 (Visakha)(Trib.)

S. 54F : Capital gains – Investment in a residential house – Property booked by assessee's mother-in-law, payments made and possession of house taken by her – Assessee later applying to add her name – Payments made 17 months prior to date of sale – Assessee not entitled to exemption. [S. 45] 1105

Purchase of a constructed house in a self-financing scheme from any authority would be treated as construction and not purchase of a residential house. However, in the instant case, the possession letter was issued in the name of the mother-in-law, on 7-11-2006 and possession was to be taken by her on or before 14-12-2006, which was taken by her on 15-11-2006. Perpetual lease was executed on 23-6-2007, in which name of the assessee and her mother-in-law had been shown. Accordingly, the order of CIT(A) on the first exemption claim u/s. 54F of the Act was upheld.(AY. 2008-09)

Seema Singh Beniwal v. Dy. CIT (2016) 45 ITR 664 (Jaipur)(Trib.)

S. 54F : Capital gains – Investment in a residential house – Purchase of plot out of sum deposited in capital gains account scheme – Construction within 3 years from the date of sale – Habitable as servant quarters – Entitled to deduction. [S. 45] 1106

The CBDT has clarified that purchase of plot of land is a part of residential house for claiming deduction u/s. 54F of the Act. The assessee sold first flat on 20-10-2007 and second one on 15-3-2008 whereas the assessee constructed a room on the plot up to 15-3-2010 which was within three years from the date of sale of the first flat, 20-10-2007. Thus, the assessee was entitled to deduction u/s. 54F of the Act on second investment at ₹ 29.37 lakhs. (AY. 2008-09)

Seema Singh Beniwal v. Dy. CIT (2016) 45 ITR 664 (Jaipur)(Trib.)

S. 55. Meaning of "adjusted", "cost of improvement" and "cost of acquisition".

S. 55 : Capital gains – Cost of acquisition – Value as on 1-4-1974 – Tribunal was justified in adopting the value as on 1-4-1974 at higher value than the value shown in wealth tax return. [S.45, 260A] 1107

AO and Commissioner (Appeals) determining value at ₹ 2 or 3 per sq. yard based on valuation filed by assessee for wealth-tax purposes. Tribunal determining value at ₹ 50

per sq. yard based on comparable sales. High Court reversed the finding of the Tribunal. Allowing the appeal, the Court held that;a declaration in the return filed by the assessee under the Wealth-tax Act, 1957 would be a relevant fact for determination of the cost of acquisition which under section 55(2) is to be determined by a determination of the fair market value. Equally relevant for the purposes of the determination would be comparable sales though slightly subsequent in point of time for which appropriate adjustments could be made as had been made by the Tribunal (from ₹ 70 per square yard to ₹ 50 per square yard). Comparable sales, if otherwise genuine and proved, could not be shunted out from the process of consideration of relevant materials. They had been taken into account by the Tribunal which is the last fact finding authority under the Act. Unless such cognizance was palpably incorrect and therefore, perverse, the High Court should not have interfered with the order of the Tribunal. That apart, the reference court under the Land Acquisition Act, 1894 had enhanced the compensation to ₹ 40 per square yard. This fact, though subsequent, would not be altogether irrelevant for the purposes of consideration of the entitlement of the assessee. In the facts of the present case the High Court ought not to have interfered with the order of the Tribunal. (AY. 1989-90)

Ashok Sharma v. CIT (2016) 389 ITR 462 / 290 CTR 481 / 144 DTR 137 / 76 taxmann.com 1 (SC)

Editorial: Decision of the Uttaranchal High Court CIT v. Ashok Prapann Sharma ITA No. 67 of 2003 dt 13-07-2006 was reversed.

1108 **S. 55 : Capital gains – Cost of acquisition – In determining the cost of acquisition as on 01.04.1974 (or 01.04.1981), the value declared in the wealth-tax return as well as the comparable sales, even if later in point of time, have to be considered. The High Court should not interfere with findings of fact, unless palpably incorrect. [S. 45, 260A]**

Allowing the appeal the Court held that the assessee was subjected to payment of income-tax on capital gains accruing from land acquisition compensation and sale of land. The dispute arose as to how the cost of acquisition is to be worked out for the purposes of deduction of such cost from the receipts so as to arrive at the correct quantum of capital gains exigible to tax under the Income-Tax Act, 1961 (for short "the Act"). The Assessing Officer as well as the First Appellate Authority took into account the declaration made in the return filed by the assessee under the Wealth Tax Act (₹ 2 per square yard) in respect of the very plot of land as the cost of acquisition. Some instances of comparable sales showing higher value at which such transactions were made (₹ 70/ – per square yard) were also laid by the assessee before the Assessing Officer. The same were not accepted on the ground that such sales were subsequent in point of time i.e. 1978-1979 whereas under Section 55(2) of the Act the crucial date for determination of the cost of acquisition is 1st April, 1974. The Tribunal took the view that the comparable sales cannot altogether be ignored. Therefore, though the comparable sales were at a higher value of ₹ 70/ – per square yard, the learned Tribunal thought it proper to determine the cost of acquisition at ₹ 50/ – per square yard. In Second Appeal, the High Court exercising jurisdiction under Section 260A of the Act reversed the said finding bringing the Assessee to this Court by way of present appeal. On appeal to the Supreme Court HELD reversing the High Court:

(i) A declaration in the return filed by the assessee under the Wealth Tax Act would certainly be a relevant fact for determination of the cost of acquisition which

under Section 55(2) of the Act to be determined by a determination of fair market value. Equally relevant for the purposes of aforesaid determination would be the comparable sales though slightly subsequent in point of time for which appropriate adjustments can be made as had been made by the learned Tribunal (from ₹ 70/- per square yard to ₹ 50/- per square yard). Comparable sales, if otherwise genuine and proved, cannot be shunted out from the process of consideration of relevant materials. The same had been taken into account by the learned Tribunal which is the last fact finding authority under the Act. Unless such cognizance was palpably incorrect and, therefore, perverse, the High Court should not have interfered with the order of the Tribunal. The order of the High Court overlooks the aforesaid severe limitation on the exercise of jurisdiction under Section 260A of the Act.

(ii) That apart, it appears that there was an ongoing process under the Land Acquisition Act, 1894 for determination of compensation for a part of the land belonging to the Assessee which was acquired [39 acres (approx.)]. The Reference Court enhanced the compensation to ₹ 40/- per square yard. The above fact, though subsequent, would not again be altogether irrelevant for the purposes of consideration of the entitlement of the Assessee. However, as the determination of the cost of acquisition by the learned Tribunal was on the basis of the comparable sales and not the compensation awarded under the Land Acquisition Act, 1894 (the order awarding higher compensation was subsequent to the order of the learned Tribunal) and the basis adopted was open for the learned Tribunal to consider, we take the view that in the facts of the present case the High Court ought not to have interfered with the order of the learned Tribunal. Appeal of assessee was allowed. (CA No. 2314/2007, dt. 24.11.2016)(AY.1989-90)

Ashok Prapann Sharma v. CIT (SC), www.itatonline.org

S. 55 : Capital gains – Cost of improvement – Cost of acquisition Expression 'where capital asset became property of assessee before 1-4-1981' as used in section 55(2)(B)(i) of Act cannot be equated to legal ownership, Indexation is eligible from the date of acquisition. [S.45, 263] 1109

In March 1971, State Government assigned a property to assessee for construction of building and errection of machinery. Subsequently, State Government handed over management of said industrial estate to State Small Industries Development Corporation Ltd. State Corporation sold property in question to assessee in year 1994 by executing a sale deed for a consideration already paid by assessee in terms of deed of assignment. Assessee sold said property and computed capital gains on basis of fair market value of land as on 1-4-1981. Assessing Officer accepted capital gain declared by assessee. Commissioner was of view that assessee became owner of property in year 1994 only and, thus, computation of long term capital gain was incorrect. Tribunal held that from records that assessee obtained possession of land and paid entire purchase consideration in terms of deed of assignment much prior to 1-4-1981. It was also undisputed that sale deed merely recognised assessee's ownership with reference to original deed of assignment. Accordingly the assessee was entitled to adopt fair market value of property as on 1-4-1981 as cost of acquisition and, thus, grant of consequent indexation benefit was justified. (AY. 2004-05)

Stewarts & Lloyds of India Ltd. v. CIT (2016) 158 ITD 456 / 178 TTJ 188 (Kol.)(Trib.)

S. 55A. Reference to Valuation Officer.

1110 **S. 55A : Capital gains – Reference to Valuation officer – Reference to DVO unjustified when the valuation of the Government approved valuer was on the higher side as on 1-4-1981. [S.45]**
The High Court held that the reference to the DVO for valuation of the property was unjustified as the valuation done by the Government Approved Valuer appointed by the assessee was on the higher side and therefore, the condition precedent to invoke section 55A was not satisfied. (AY. 2000-01)
Kiritbhai Jayantilal Kundalia (HUF) v. ITO (2016) 242 Taxman 182(Guj.)(HC)

1111 **S. 55A : Capital gains – Cost of acquisition – Fair market value as on 1-4-1981 – Assessee's valuation high in opinion of AO – Reference to District Valuation Officer proper – Within jurisdiction of AO.[S.45]**
The action of the AO in making a reference to the District Valuation Officer was within the parameters of section 55A(b)(ii), which empowered him to make a reference if in his opinion the fair market value estimated by the assessee was not proper. The reference made by the AO to the District Valuation Officer was competent and permissible under law.(AY. 1996-97)
Nirmal Kumar Ravindra Kumar-HUF v. CIT (2016) 386 ITR 10 / 240 Taxman 404 / 288 CTR 710 / 140 DTR 432 (Cal.)(HC)

1112 **S. 55A : Capital gains – Reference to valuation officer – Cost of acquisition – Authorities are not justified in adopting the rate on their own estimation.**
It is incumbent upon the assessing authority to call for report from the Department Valuation Officer for ascertaining the fair market value of the asset. The authorities are not justified in adopting the rate on their own estimation as the assessee had furnished a report from Government approved valuer. (AY. 2008-09, 2009-10)
ACIT v. Synbiotics Ltd. (2016) 48 ITR 210 (Ahd.)(Trib.)

1113 **S. 55A : Capital gains – Reference to Valuation Officer – In the interest of justice to avoid the sending the matter back to the AO, Tribunal arrived at the FMV based on an average rate.**
Tribunal held that it is incumbent upon the assessing authority to call for report from DVO for ascertaining the fair market value of the asset, in the event, if he is not satisfied on the claim of the assessee. On facts it was found that without calling from the DVO's report, the AO has adopted a different rate and the CIT(A) has adopted a different rate, in the interest of justice and considering the fact that there would be further delay in obtaining an expert's report, the Tribunal arrived at the FMV based on an average rate.
DCIT v. Ambalal Sarabhai Enterprises Ltd. (2016) 48 ITR 210 (Ahd.)(Trib.)

S. 56. Income from other sources.

1114 **S. 56 : Income from other sources – Gift – Where assessee was an AOP sum of ₹ 1.60 crore received by it without consideration could not be included in its total income. [S. 56(2)(vi)]**
Assessee was a beneficiary trust assessed in status of AOP. It received a gift from settlor's wife during year towards trust fund which was not included in total income in terms

of S. 56(2)(vi). The AO included said amount in income of trust. The ITAT held that any sum exceeding ₹ 50,000/- can fall within ambit of s. 56(2)(vi) only if it is received by an individual or HUF. Since assessee was an AOP and not any individual or HUF, such a receipt could not be included in its total income within framework of S.56(2)(vi)(AY. 2010-11)
Mridu Hari Dalmia Parivar Trust v. ITO (2016) 158 ITD 521 / 139 DTR 143 / 179 TTJ 577 (Delhi)

S. 56 : Income from other sources – Interest received under the Land Acquisition Act, 1894 is taxable as income from other sources. [S. 2(28A), Land Acquisition Act, 1894, S. 28] 1115
The assessee HUF received interest under section 28 of the Land Acquisition Act, 1894. Section 28 empowers the court to award interest on the excess amount of compensation awarded by it over the amount awarded by the Collector. Assessee contended that the said interest would partake the character of compensation or damage and therefore, would not be liable to tax. High Court held that the interest received u/s. 28 was on account of keeping back the amount payable to the owner and did not form part of the compensation or damages for the loss of right to retain possession. Accordingly it was held that amount received by the assessee was in the nature of interest and was taxable as income from other sources. (AY. 2010-11)
Manjet Singh (HUF) Karta Manjeet Singhv. UOI (2016) 237 Taxman 116 (P&H)(HC)

S. 56 : Income from other sources – Construction activities – Deposited surplus funds in FRDs – Interest earned thereon was to be taxed as 'income from other sources. [S. 4] 1116
Allowing the appeal of revenue the Tribunal held that where assessee, engaged in construction activities, deposited its surplus funds in FDRs, interest earned thereon was to be taxed as 'income from other sources'. (AY. 2007-08 to 2009-10)
ACIT v. Z Square Shopping Mall (P.) Ltd. (2016) 157 ITD 105 (Luck.)(Trib.)

S. 56 : Income from other sources – Income from house property – Let out building with furniture in a composite manner assessable under the head income from other sources. [S. 22] 1117
Tribunal held that where assessee let out his building along with furniture and fixtures and electrical installations and offered rental income under head 'Income from house property', rental income would fall under head 'Income from other sources, as the let out was in a composite manner which were inseparable from each other. (AY. 2010-11)
ACIT v. Ajay Kalia (2016) 157 ITD 187 / 135 DTR 147 / 178 TTJ 507 (Delhi)(Trib.)

S. 56 : Income from other sources – Capital gains – Mere making of payment by assessee to a builder, 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 for construction of same had started – Income accrued to the assessee was held to be assessable as income from other sources. [S. 2(47), 45] 1118
Assessee paid certain amount to a builder for allotment of offices in a building in allotment letter, it was specifically mentioned that after construction of building, offices located in said building could be used only for activities relating to information

technology. Since assessee was not involved in any activity of information technology, it entered into agreement for sale of office premises with builder. Thereupon, builder sold allotment rights of assessee to third parties at a higher amount. Assessee offered the amount as capital gains. AO assessed the gain as income from other sources. On appeal by assessee dismissing the appeal the Tribunal held that mere making of payment by assessee to a builder, even prior to sanction of building plan itself, cannot be said to have yielded in a vested right in assessee to get a property which was neither in existence at that time nor any process for construction of same had started. On facts, it could be concluded that assessee had advanced money to builder to make quick profits either by way of interest or by way of share in profits which builder may gain by selling properties. Therefore, income accrued to assessee relating to aforesaid transaction was to be assessed as income from other sources. (AY. 2009-10)
S. Narendrakumar & Co v. Dy. CIT (2016) 156 ITD 440 / 175 TTJ 113 / 129 DTR 1 (Mum.) (Trib.)

1119 **S. 56 : Income from other sources – Interest income on fixed deposits – Method of accounting – Income was offered on the basis of certificate received from the Bank – Addition was held to be not justified. [S.4]**
Tribunal held that where assessee was following same method of accounting to show interest income on fixed deposits on basis of bank certificates only, no addition could be made on ground that portion of interest was not shown. (AY. 2006-07)
Sunil Kumar Saha v. ITO (2016) 156 ITD 1 (Kol)(Trib)

1120 **S. 56 : Income from other sources – Interest awarded on compensation for personal disability does not have the character of "income" and cannot be taxed. CBDT requested to issue instructions to mitigate hardship of accident victims.[S. 56(2)(vii), 145A]**
The assessee is an unfortunate victim of a motor accident. On 18th May 1990, she was travelling in a car, which met with a serious accident, leaving her permanently disabled, which was termed by the competent authority, at ninety percent level. She claimed a compensation of ₹ 15,00,000 for this tragic loss of her physical abilities. She did eventually get it but she had to knock the doors of Hon'ble Supreme Court, and it was finally on 26th April, 2011 that her claim was upheld. As if this long struggle of 21 years in the judicial process was not enough, the destiny had more in store for her. It is this settlement of the accident compensation claim that has led to a new round of litigation – this time about taxability of a component of compensation, i.e. interest component. Mercifully, there is no, and there cannot be, any dispute about the fact that the compensation for disability cannot be subject to tax, but the stand of the Assessing Officer is that interest component on compensation awarded by Hon'ble Supreme Court is taxable as it is covered under section 145A(b) r.w.s. 56(viii) of the Act. In appeal, learned CIT(A) has confirmed this stand. On appeal by the assessee HELD allowing the appeal:

(i) Section 145A starts with a non obstante clause which restricts the scope of Section 145 dealing with the method of accounting. It is not a charging provision. The only impact it has on taxability of an income is its timing of taxability. What is not taxable is not made taxable under section 145A(b) but what is taxable under the mercantile method of accounting, i.e. on accrual basis, is made taxable on cash basis of accounting, i.e. at the point of time when interest is actually received.

Nothing else needs to read into this provision, and the memorandum explaining the provision of Finance Bill, 2009, as reproduced earlier, makes that amply clear. As for the provisions of Section 56(2)(viii), it is only an enabling provision, as unambiguously made clear in the above memorandum as well, to bring interest income to tax in the year of receipt rather than in the year of accrual. Section 56(2)(viii) provides that……"incomes, shall be chargeable to income tax under the head 'income from other sources', namely ….(viii) income by way of interest received on compensation or enhanced compensation referred to in clause (b) of Section 145A". The starting point of this exercise is income, and it is only when the receipt is in the nature of an income, that the classification of income under a particular category arises. In other words, when interest received by the assessee is in the nature of income, such interest can be taxed under section 56(2)(viii). Section 56(1) makes this aspect even more clear when it states that "Income of every kind, which is not to be excluded from the total income under this Act, shall be chargeable to income tax under the head "income from other sources", if it is not chargeable to income tax under any of the heads specified in Section 14, items A to E", and then, in the subsequent provision, i.e. Section 56(2), proceeds to set out an illustrative, rather than exhaustive list of, such "incomes". Clearly, unless a receipt is not an income, there is no occasion for the provisions of Section 56(1) or 56(2) coming into play. Section 56 does not decide what is an income. What it holds is that if there is an income, which is not taxable under any of the heads under Section 14, i.e. item A to E, it is taxable under the head 'income from other sources'. The receipt being in the nature of income is a condition precedent for Section 56 coming into play, and not vice versa. To suggest that since an item is listed under section 56(2), even without there being anything to show that it is in the nature of income, it can be brought to tax is like putting the cart before the horse. The very approach of the authorities below is devoid of legally sustainable merits. The authorities below were thus completely in error in bringing the interest awarded by Hon'ble Supreme Court to tax. The question of deduction under section 57(iii), given the above conclusion, is wholly irrelevant. We vacate this action of the Assessing Officer, and disapprove the CIT(A)'s action of confirming the same. Grievance of the assessee is thus upheld.

(ii) As we part with the matter, we must say that, as fellow citizens, we are deeply anguished to take note of the long journey that the assessee had to undertake to get her dues and then to fight this unjust income tax demand on her. In order to ensure that others do not have to tread the same arduous path at least with respect to the tax demand, and to bring an element of certainty, we would suggest that the Central Board of Direct Taxes may as well take a conscious call on issuing appropriate administrative instructions in this regard and ensuring that what was brought as a measure of relief to the taxpayers is not used, by the field officers, as a source of taxation. Such a step certainly cannot mitigate the pain of an accident victim but it can probably help in ensuring that hardships of the accident victim are not further compounded, and that's the least that a responsive tax administration, like the one we fortunately have at present, can do. (AY. 2012-13)

Urvi Chirag Sheth v. ITO (2016) 159 ITD 199 / 179 TTJ 245 / 136 DTR 345 / 51 ITR 491 (Ahd.)(Trib.)

1121 **S. 56 : Income from other sources – Gifts – Trust – Beneficiary – Amount received by beneficiary from trusts could not be said to be received without consideration and hence could not be taxed under section 56(2)(vi). [S. 56]**

Allowing the appeal of the assessee, the Tribunal held that, amount received as beneficiary from trusts was nothing but his own income in his status as a beneficiary of said trust character of income in hands of beneficiary would remain same, hence the amount received cannot be sad to be without consideration hence cannot be assessed under section 56(2)(vi). (AY. 2008-09)

Sharon Nayak (Mrs.) v. Dy. CIT (2016) 159 ITD 143 (Bang.)(Trib.)

1122 **S. 56 : Income from other sources – Bonus shares can never considered as received without consideration or for consideration less than fair market value. [S. 56(2)(vi)]**

Dismissing the appeal of the revenue, the Tribunal held that the bonus shares can never be given nil value and its value has to be worked out by the principle of averaging. It is that for every bonus share issued, there is a corresponding reduction in the actual fair market value of the equity share originally held. An assessee who received bonus shares could never be considered as receiving something without consideration or for a consideration less than the fair market value of the property. When bonus shares are received, it is not something which has been received free or for a lesser fair market value. A consideration flows from the holder of the shares, may be unknown to him, which is reflected in the depression in the intrinsic value of the original shares held by him.

Bonus shares can never be considered as received without consideration or for inadequate consideration calling for application of sub-clause (c) of clause (vii) of section 56(2). The order of Commissioner (Appeals) deleting the addition made by the Assessing Officer was justified.

DCIT v. Dr. Rajan Pai (2016) 48 ITR 170 / 143 DTR 20 / 180 TTJ 0714 (Bang.)(Trib.)

1123 **S. 56 : Income from other sources – Deemed – Gift – Group company's shares taken – over by a closely held company, fair market value was not properly applied, matter was set aside. [S. 56(2)(viia) R. 11U, 11UA(c)(b)]**

Allowing the appeal the Tribunal held that the Assessing Officer ought to have computed FMV in accordance with prescribed method under rules and then compared same with consideration paid by assessee and applied provision. Even when transactions were between related parties, provisions of section 56(2)(viia) could be applied only in accordance with prescribed method. Since provisions of section 56(2)(viia) were not properly and correctly applied in assessee's case, matter was to be remanded back for reconsideration. (AY. 2011-12)

Medplus Health Services (P.) Ltd. v. ITO (2016) 158 ITD 105 / 48 ITR 396 (Hyd.)(Trib.)

S. 57. Deductions.

S. 57 : Income from other sources – Deduction – Interest on money borrowed for investment in shares of company, though shares yielded no dividend is held as an allowable deduction 1124

Allowing the appeal the Court held that there was nothing to indicate that the assessee herself or in concert with others intended acquiring control for any reason. The High Court observed it was not held that the reason of the assessee for acquiring the shares was for the purpose of acquiring or even maintaining control. The High Court distinguished the facts in the present case with the Bombay High Court ruling in the case of *CIT v. Amritaben R. Shah (1999) 238 ITR 777 (Bom.)(HC).* The High Court held that it is reasonable to presume that the assessee acquired the shares wholly and exclusively for the purpose of making or earning income and not for the purposes of acquiring controlling interest and allowed entire interest. (AY. 1997-98)

Satish Bala Malhotra (Smt.) v. CIT (2016) 143 DTR 321 (P&H)(HC)

S. 57 : Income from other sources – Write off of interest and lease charges which were earlier offered to tax under section 56 cannot be claimed as a deduction under section 57(iii) or under section 36(1)(vii) [S. 36(1)(vii), 56] 1125

Assessee had given loans to its subsidiary and had also leased out its machineries and was entitled to receive interest on loans and rental income for lease of machines. Interest and rental income which had accrued were shown as income from other sources under Section 56 in the return of income. As the subsidiary was incurring losses, the assessee wrote off the interest and lease charges and claimed the same as deduction. AO denied the claim under section 57(iii). High Court held that where income has been offered to tax under the head income from other sources, the claim for deduction can be considered only under section 57. High Court denied the assessee's claim for write off of interest and lease charges as the requisites under section 57(iii) were not satisfied. High Court further held that deduction cannot also be claimed under section 36(1)(vii) as the same can be availed only where the income is offered under the head profits and gains from business or profession. (AY. 2008-09)

Malankara Plantations Ltd. v. ACIT (2016) 236 Taxman 61 (Ker.)(HC)

S. 57 : Income from other sources – Interest paid could not be allowed to be set off against interest received on income – tax refund; however, restrictive deduction would be granted u/s. 57(iii). [S.57(iii)] 1126

Tribunal held that Interest paid could not be allowed to be set off against interest received on income-tax refund; however, restrictive deduction would be granted u/s. 57(iii). (AY. 2007-08)

Lupin Ltd. v. ACIT (2016) 159 ITD 10 (Mum.)(Trib.)

S. 57 : Income from other sources – Interest paid during period of suspension as a stock broker is allowable as deduction. [S. 57(iii)] 1127

Assessee stockbroker had make deposit with NSE and said deposits were made after taking loan from banks, interest so paid during period of suspension of assessee as a stock broker allowed as deduction u/s. 57(iii). (AY. 2008-09, 2009-10)

Triumph International Finance India Ltd. v. ACIT (2016) 161 ITD 464 (Mum.)(Trib.)

CHAPTER V
INCOME OF OTHER PERSONS, INCLUDED IN ASSESSEE'S TOTAL INCOME

S. 64. Income of individual to include income of spouse, minor child, etc.

1128 **S. 64 : Clubbing of income – Benami property of assessee and income of such unit was rightly clubbed with income of assessee. [S. 143(3), Indian Contract Act, 1872, S.11]**
Dismissing the appeal the Court held that where assessee filed returns of his daughter 'K' declaring income derived from a unit 'P' and stated that said unit belonged to his wife 'S' and 'K' had purchased it from 'S', since it was apparent from record that unit 'P' was neither owned by 'K' nor by 'S', it would have to be held that said unit was benami property of assessee and income of such unit was rightly clubbed with income of assessee. The High Court held that, if 'K' was minor, it is difficult to understand how she earned money to pay the same to her mother. Moreover when she was minor, how she has got capacity to execute promissory note in favour of her mother. The HC further relied on the observations made by the Supreme Court in the case of *Mathai Mathai v. Joseph Mary @ Marykkutty Joseph [2015] 5 SCC 622* to hold that any contract by the minor is void. Thus it concluded that 'K' was not competent to execute any promissory note which is also an agreement between her and her mother, hence such document is void one. Taking into consideration of all these documents and statement of 'K', the Bench was of the considered view that the unit 'P' is not owned by 'K'. Moreover neither the assessee takes the plea nor is document proved to show that the said unit is owned by his wife 'S'. Thus it was held that 'P' is a benami property of the assessee.
Sri Suru Bhaskar Rao v. CIT (2016) 386 ITR 419 / 286 CTR 200 / 239 Taxman 6 / 135 DTR 41 (Orissa)(HC)

1129 **S. 64 : Clubbing of income – Spouse qualified and having expertise in business matters – Remuneration not includible in total income of assessee.**
Assessee's wife was a post-graduate and a director in many companies. She had expertise in business matters also. She was a separate assessee for many years and her income could not be clubbed with that of the assessee. (AY. 1995-96 to 1998-99)
CIT v. O.P. Srivastava (2013) 219 Taxman 133 / (2014) 265 CTR 481 / (2016) 385 ITR 547 (All.)(HC)
CIT v. Subrata Roy (2013) 219 Taxman 133 / (2014) 265 CTR 481 / (2016) 385 ITR 547 (All.)(HC)
Editorial : The decision was recalled by order dt. 21st February, 2014. The Supreme Court set aside the order (CIT v. Subrata Roy (2016) 385 ITR 570 (SC)

1130 **S. 64 : Clubbing of income – Spouse – A property was jointly held by assessee and her husband – Source of funds for investment in said property was made by husband. Property was reflected in husband's balance sheet and short term gain was disclosed in the return of husband, short term gain cannot be assessed in the hands of wife. [S. 45]**
Assessee and her husband were joint owners of a property. On the basis of AIR information, the AO held that since assessee's name appeared in agreement and

assessee's husband had set off short-term capital gain on sale of said property against sale proceeds of some shares, assessee was liable to be taxed for 50 per cent of STCG arising from sale of said property. CIT(A) deleted the addition. Dismissing the appeal of the revenue, the Tribunal held that although assessee was shown as co-owner of said property, in fact, her husband made entire investment in purchase of it and same was reflected in his balance sheet and STCG arising thereon was disclosed in his return of income, therefore entire STCG arising on sale of said property was to be assessed in hands of assessee's husband and not in assessee's hands. (AY. 2009-10)

ITO v. Vandana Bhulchandani (Dr.) (2016) 160 ITD 552 / 180 TTJ 505 (Mum.)(Trib.)

CHAPTER VI
AGGREGATION OF INCOME AND SET OFF OR CARRY FORWARD OF LOSS

S. 68. Cash credits.

1131 **S. 68 : Cash credits – Produced all relevant details in its possession, such as names, permanent account numbers, income-tax returns, and bank statements of all the investors, merely because the summons could not be served, transactions could not be held to be non-genuine, Assessing Officer could have verified from the record. [S. 131]**
Dismissing the appeal of the Revenue, the Court held that PAN and Income tax returns were furnished to the AO and he could have easily verified the same. Therefore, merely because summons could not be served upon some parties or they did not appear before him, transactions could not be held to be non-genuine. (AY. 2006-07, 2007-08)
PCIT v. D & H Enterprises (2016) 241 Taxman 157 (Guj.)(HC)

1132 **S. 68 : Cash credits – Unexplained money – Mere mistake in mention of section 69A as provision under which assessment made instead of section 68 – Assessment not rendered invalid – Creditors were held to be non-genuine, addition was held to be justified. [S. 69A, 143(3)]**
Dismissing the appeal of assessee the Court held that the assessee claimed to have received the amount as a loan. The burden, therefore, was on him to establish that fact in which he failed. This was merely a case of a wrong section being mentioned in the assessment order and in the order of the Commissioner (Appeals). All the jurisdictional facts for invoking section 68 existed. The enquiries made by the AO in the assessment proceedings were not stated to be under any particular provisions. The enquiries were merely factual relating to the source of acquisition of the money. The assessee had not been prejudiced in any manner whatsoever on account of the AO having mentioned the wrong section. The assessment was valid. (AY. 2008-09)
Namdev Arora v. CIT (2016) 389 ITR 434 / 241 Taxman 303 / (2017) 147 DTR 138 (P&H) (HC)

1133 **S. 68 : Cash credits – Share application money – Permanent account numbers, bank details of share applicants and affidavits of directors of share applicant company was furnished, share application money cannot be considered as unexplained cash credits.**
Dismissing the appeal of revenue the Court held that the assessee had provided sufficient indication by way of permanent account numbers, to highlight the identity of the share applicants and produced the affidavits of the directors of the companies. Furthermore, the bank details of the share applicants too had been provided. Thus, the assessee complied with the law spelt out by the Supreme Court in the decision of *CIT v. Lovely Exports P. Ltd. [2008] 319 ITR (St.) 5 (SC).* The share application money of the assessee could not be considered as unexplained cash credit. *CIT v. Lovely Exports P. Ltd. (2009) 319 ITR (St.) 5 (SC)* (AY. 2003-04)
CIT v. Softline Creations P. Ltd. (2016) 387 ITR 636 (Delhi)(HC)

S. 68 : Cash credits – Negative cash balance – Land jointly held by the assessee along with his brother – Deficit amount belonged equally to assessee and his brother, addition was held to be justified. 1134

Dismissing the appeal of the assessee, the Court held that the Tribunal order are based on material on record and hence the order does not call for interference. (AY. 2009-10)

Pavittar Singh v. CIT (2016) 282 CTR 285 (P&H)(HC)

S. 68 : Cash credits – Gifts from NRI brother – Failed to establish the creditworthiness of the brother, addition was held to be justified. 1135

On appeal High Court held that since assessee failed to establish creditworthiness of donor and genuineness of transaction, impugned addition deserved to be upheld. (AY. 2005-06)

E. Ummer Bava v. CIT (2016) 72 taxmann.com 123 (Ker.)(HC)

Editorial: SLP filed against impugned order was to be dismissed E. Ummer Bava v. CIT (2017) 244 Taxman 193 (SC)

S. 68 : Cash credits – Cash deposits – The Special Leave Petition filed against impugned order was dismissed by the Supreme Court. 1136

SLP dismissed against High Court ruling where it was held that where the assessee had failed to give list of persons who advanced cash to him along with their confirmation in respect of huge amount of cash deposited in its bank account, Assessing Officer was justified in adding said amount to assessee's taxable income under section 68.

Sudhir Kumar Sharma (HUF) v. CIT (2016) 239 Taxman 264 (SC)

Editorial: Refer Sudhir Kumar Sharma (HUF) v. CIT (2014) 224 Taxman 178 (P&H)(HC)

S. 68 : Cash credits – Trade creditors – When the facts show that the loan applications of 37 alleged trade creditors were processed and handled by the assessee and that the loan amounts were not reflected in the returns of the alleged creditors, the High Court erred in remanding the matter to the AO on the ground that the AO ought to have given notice to the alleged trade creditors. 1137

Allowing the petition of revenue, the Court held that Both the Assessing Officer and the C.I.T. had recorded findings of fact adverse to the Assessee which has been upheld by the learned single judge of the High Court. The Division Bench of the High Court in the Writ Appeal thought it appropriate to reverse the said findings on the ground that the 37 persons who had advanced the loan to the Assessee ought to have been given notice. The jurisdiction of the Division Bench in a Writ Appeal is primarily one of adjudication of questions of law. Findings of fact recorded concurrently by the authorities under the Act and also in the first round of the writ proceedings by the learned single judge are not to be lightly disturbed.

In the present case, in the face of the clear findings that the loan applications were processed by the Officers of the Assessee and the loan transactions in question of the aforesaid 37 persons were also handled really by the assessee and further in view of the categorical finding that the loan amounts were not reflected in the returns of the 37 persons in question, we do not see how the High Court could have taken the above view and remanded the matter to the Assessing Officer.

It has been pointed out before us that pursuant to the impugned order passed by the Division Bench of the High Court fresh assessment proceedings have been finalized by the Assessing Officer. The said exercise has been done in the absence of any interim order of this Court. However, merely because fresh assessment proceedings have been carried out in the meantime it would certainly not preclude the Court from judging the validity and correctness of the order of the Division Bench of the High Court. For the reasons stated, we cannot uphold the order of the Division Bench passed in the Writ Appeal in question. Consequently, we allow this appeal and set aside the order of the Division Bench and consequently all further orders passed pursuant thereto
CIT v. Karnataka planters Coffee curing Work (P) Ltd. (2016) 387 ITR 1 / 140 DTR 20 / 288 CTR 241 / 243 Taxman 21 (SC)

1138 **S. 68 : cash credits – Increase in opening capital – Gifts – Commissioner (Appeals) deleting additions on basis of explanation given by each donor and documentary evidence – Tribunal restoring additions holding there was no evidence that gifts genuine – Not proper. [S. 254(1)]**
Allowing the appeal the Court held that the Tribunal fell into error in interfering with the order of the Commissioner (Appeals) without first dislodging the reasons given by him. Assuming that another view was possible, that itself would be no ground to interfere with the order of the Commissioner (Appeals) unless it was shown that the appreciation of evidence by the Commissioner (Appeals) was either perverse or untenable and that in holding in favour of the assessee the Commissioner (Appeals) had either ignored material evidence or that the view taken by him was patently untenable. (AY. 1996-97)
Prahlad Bhattacharya v. CIT (2016) 386 ITR 708 / 71 taxmann.com 63 (Cal.)(HC)

1139 **S. 68 : Cash credits – Forfeiture of deposits – Additions to income justified.**
Unexplained amount shown as forfeiture of deposits made by various persons also remained unsubstantiated. The assessee had claimed before the Tribunal that the amount added to its income on this account was relatable to surrender of ₹ 50,00,000 made during the AY 2007-08. The plea was not established and was repelled by the Tribunal. The concurrent findings of fact recorded by the authorities below were based on material on record. The additions to the assessee's income were justified. (AY. 2005-06)
Sharma and Gangadhar Build and Colonziers P. Ltd. v. CIT (2016) 386 ITR 527 (P&H)(HC)

1140 **S. 68 : Cash credits – Share capital – Non-existent shareholders – AO entitled to make enquiry – Matter remanded for consideration in light of decision of Full Bench of Delhi High Court.**
Allowing the appeal of revenue the Court held that Upon enquiry, when it transpired that the so called shareholders were non-existent, the AO was entitled to take the view that the share capital was unexplained cash credits. However, there was substance in the submission of the assessee that if the AO had been in a hurry to complete the assessment he could not have had time to scrutinise the evidence adduced by the assessee, and it could not be said that the assessee had failed to discharge its burden. Therefore, it would be appropriate to remand the matter to the AO to be considered

in the light of the law laid down by the Full Bench of the Delhi High Court in Sophia Finance Ltd. and the decision of the Calcutta High Court. Matter remanded. (AY. 2000-01, 2001-02)
CIT v. Shyam Sel Ltd. (2016) 386 ITR 312 (Cal.)(HC)

S. 68 : Cash credits – Share application – Assessee cannot be held liable if shareholders have acquired money illegally. 1141
The AO was of the view that the share application money was received by the assessee from the shareholders whose sources of income were doubtful. However, it was a finding of fact by the Tribunal and the Commissioner (Appeals) that the money received by the company was credited in the account and that the shares were issued. On appeal: Held, dismissing the appeal, that if the shareholders had acquired the money illegally, the assessee could not be held liable. There was nothing on record to show that the money belonged to the assessee itself and the Department could only proceed against the shareholders. No question of law arose. (AY. 2006-07)
CIT v. K. C. Pipes P. Ltd. (2016) 386 ITR 532 (P&H)(HC)

S. 68 : Cash credits – Genuineness of credits established – No addition to income can be made. 1142
The assessee had received fixed deposits from nine persons. The AO called upon the assessee to prove the genuineness of the transaction of receipt of the fixed deposits from these persons with necessary evidence. The assessee filed some details and also produced one of such depositors. In the absence of the assessee producing the other creditors, the AO held that the deposits amounting to ₹ 44 lakhs received from six persons were bogus. The assessee had also claimed deduction in respect of interest paid on such fixed deposit receipts to its depositors. The AO made further addition of ₹ 1,94,710 representing interest paid in respect of about six credits, making a total addition of ₹ 45.94 lakhs. Held the AO had not given any adverse remarks and the assessee had furnished elaborate details regarding the deposits of such depositors giving their permanent account number and the bank accounts showing all particulars. (AY. 2005-06)
PCIT v. Talbros Engineering Ltd. (2016) 386 ITR 154 (P&H)(HC)

S. 68 : Cash credits – Gift – Gift was not proved by the assessee as close relations with donor were not proved nor donor was produced – Addition was held to be justified. 1143
Assessee had received an alleged gift of ₹ 5,00,000 by demand draft from a donor who was third party. The AO added u/s. 68 of IT Act by not being satisfied with the purported gift of the said amount added ₹ 5,00,000/- on surrendered amount by assessee and taxed same u/s. 68 of IT Act. CIT(A) deleted the addition on the ground that the said surrender was under coercion. On appeal in Tribunal, Tribunal reversed the finding of CIT (A). On further appeal in HC, HC upheld the findings of Tribunal and held that Gift was not proved by the assessee as close relations with donor were not proved nor donor was produced. Assessee had voluntarily surrendered the amount after enquiries by the AO and argument of the assessee that the assessee was pressurized and coerced to surrender is wholly unjustified and on afterthought addition u/s. 68 was sustainable. (AY. 2002-03)
Jyoti Jajoo (Smt.) v. CIT (2016) 139 DTR 129 / 288 CTR 87 (Raj.)(HC)

1144 **S. 68 : Cash credits – Advances taken by the assessee against proper receipt which is adjusted against the full sale price at the time of giving delivery of motorcycles cannot be taxed as cash credit.**

Assessee had taken advances from the buyers of motor cycles which were credited in the books of account. AO held these amounts as bogus liability and added the same as income under section 68. ITAT deleted the addition holding that the advance deposits from customers were on account of sale of motorcycle and as and when the sale took place, within one to two months, these deposits were adjusted against the sale price of the motor cycle. HC held that the question whether the assessee had in fact received the amounts as advances was proved by way of evidence and the ITAT was satisfied that the amounts were not bogus liabilities was a question of fact and no substantial question of law arose from it. (AY. 2010-11)

PCIT v. Dutta Automobiles (P) Ltd. (2016) 287 CTR 684 (Cal.)(HC)

1145 **S. 68 : Cash credits – Where deposits was made with assessee represented booking amount received toward construction and same was done through banking channel and copies of account of depositor were duly filed, section 68 would not apply.**

Dismissing the appeal of revenue the Court held that ;where deposits was made with assessee represented booking amount received toward construction and same was done through banking channel and copies of account of depositor were duly filed, section 68 would not apply. (AY. 2000-01)

ITO v. Shanti Enterprise (2016) 240 taxman 698 (Guj.)(HC)

1146 **S. 68 : Cash credits – Unsecured loan – No documentary evidence furnished by assessee – Concurrent findings recorded by authorities confirming addition – Court will not interfere. [S. 260A]**

A sum of ₹ 25 lakhs claimed by the assessee to be an unsecured loan was treated as unexplained cash credit under section 68 of the Act on the ground that its source was not proved by the assessee with any documentary evidence. The Commissioner (Appeals) held that since the assessee was not able to prove the source of cash credit, the addition was justified. The Tribunal held that the assessee failed to furnish any evidence on the source of the cash deposit and creditworthiness of the creditor and therefore, failed to prove the creditworthiness of the creditor and the genuineness of the transaction. It confirmed the addition on account of the cash credit. On appeal: Held, dismissing the appeal, that the concurrent findings recorded by the authorities below had not been shown to be illegal or perverse by the assessee. No question of law arose. (AY. 2009-10)

Sanjeev Kumar v. CIT (2016) 385 ITR 493 (P&H)(HC)

1147 **S. 68 : Cash credits – Share capital – Denying subscription – Notices were retuned in served – Addition was held to be justified.**

Dismissing the appeal of assessee the Court held that the assessee not producing books of account or bank accounts or shareholders' register. Eight out of fifty six persons from shareholders' list provided by assessee denying subscription. Remaining notices returning with endorsement "not known". Concurrent findings of Commissioner

(Appeals) and Tribunal based on evidence that credits not explained. Unexplained share application money rightly treated as assessee's income. (AY. 1983-84)
Rick Lunsford Trade and Investment Ltd. v. CIT (2016) 385 ITR 399 (Cal.)(HC)
Editorial : SLP of assessee is rejected Rick Lunsford Trade & Investment Ltd. v. CIT (2017) 245 Taxman 43 (SC)

S. 68 : Cash credits – The assessee is bound to be provided with the material used against him apart from being permitted to cross examine the deponents. The denial of such opportunity goes to root of the matter and strikes at the very foundation of the assessment order and renders it vulnerable. [S. 143(3), 147, 148] 1148

(i) On a very fundamental aspect, the revenue was not justified in making addition at the time of reassessment without having first given the assessee an opportunity to cross examine the deponent on the statements relied upon by the ACIT. Quite apart from denial of an opportunity of cross-examination, the revenue did not even provide the material on the basis of which the department sought to conclude that the loan was a bogus transaction.

(ii) In the light of the fact that the monies were advanced apparently by the account payee cheque and was repaid *vide* account payee cheque the least that the revenue should have done was to grant an opportunity to the assessee to meet the case against him by providing the material sought to be used against assessee in arriving before passing the order of reassessment. This not having been done, the denial of such opportunity goes to root of the matter and strikes at the very foundation of the reassessment and therefore renders the orders passed by the CIT(A) and the Tribunal vulnerable. In our view the assessee was bound to be provided with the material used against him apart from being permitted to cross examine the deponents. Despite the request dated 15th February, 1996 seeking an opportunity to cross examine the deponent and furnish the assessee with copies of statement and disclose material, these were denied to him. In this view of the matter we are inclined to allow the appeal (ITA No. 58 of 2001, dt. 30.06.2016) (AY. 1983-84)

H. R. Mehta v. ACIT (2016) 138 DTR 217 (Bom.)(HC); www.itatonline.org

S. 68 : Cash credits – Firm – Partners – In the case of a newly incorporated partnership firm, unexplained source of funds should be considered in the hands of the partners and not the firm. 1149

The assessee, a partnership firm, filed its first return and received additional capital from its partners. The partners got the said additional capital via gifts/loans entirely in cash during the year 1986-87 & 1987-88 and filed their returns up to AY 1991-92, which were summarily assessed u/s. 143(1). The AO assessed the entire income u/s. 68 in the hands of the firm as the partners did not explain the source of the funds. On first appeal, the CIT(A) upheld the order of the AO.

On further appeal, the Tribunal allowed the appeal of the assessee as the said amount should not have been assessed in the hands of the firm but should have been assessed in the hands of the partners.

On Revenue's appeal, the HC held that since it was the first year of the firm, there was no business of the firm to carry forward such income. Therefore, it was for the partners to explain the source of funds and it was not open to the AO to treat the said amount

as income in the hands of the firm. Accordingly, if at all the assessments had to be made, they were to be made in the hands of the partners and not in the hands of the firm. (AY. 1991-92)
CIT v. Anurag Rice Mills (2016) 282 CTR 200 / 129 DTR 157 (Patna)(HC)

1150 **S. 68 : Cash credits – Share capital – Initial burden which lay upon Assessee to establish source of share capital received shall be duly discharged by the Assessee – Without any material to contrary – No addition can be made. [S. 131]**
The High Court held that the Revenue's allegation that the assessee were themselves being used as conduit for routing the 'on-money' or that 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 one hand there was attempt to treat the cash credit found in books of Accounts to be 'undisclosed income' by showing investors to be paper companies. On other hand, the attempt was to show that this money in fact belonged to certain other entities whose source was not explained by assessee. Thus there was no clarity in the stand of the Revenue. During the search proceedings the assessee had produced the books of account and also the source of investments. However the Revenue was unable to produce any further evidence to the dispute. The AO did not appear to have undertaken any particular investigation into the affairs of the Table I, II and III apart from issuing notice under section 131 of the Act which was duly responded. Detailed findings had been given by the Tribunal after thorough examination of the records. Hence there was no reason to differ from the findings of the Tribunal. The High court further held that since the order of the Tribunal was examined in the light of section 68 of the Act, and hence Tribunal was fully justified in coming to the conclusion that there was no evidence to establish that there was any re-routing of the money collected by the assessee companies. Thus the High court dismissed the appeal of the Revenue. (AY. 2003-04 to 2009-10)
CIT v. SVP Builders (India) Ltd. (2016) 238 Taxman 653 (Delhi)(HC)

1151 **S. 68 : Cash credits – Share application money – Identity, genuineness of transaction and creditworthiness of persons from whom assessee received funds – No examination by Tribunal – Matter remanded.**
The Tribunal had not examined the facts relating to the assessee. The Tribunal had simply proceeded on the basis of the facts obtaining in the case of Pranjul Overseas (P.) Ltd.on the statement of the parties that the facts of that case were similar to the facts in the case of the assessee. However, an examination of the documents, it did not appear that the facts in the case of Pranjul Overseas (P.) Ltd, were similar to those obtaining in the present case. In the case of Pranjul Overseas (P.) Ltd., the assessee disputed that any search took place at its registered office but the written submissions filed by the assessee in this case did not indicate that any such dispute was raised. Even before the court it had not been contended that no search took place at the declared registered office of the assessee. Thus, the matter was remanded to the Tribunal to examine the facts relevant to the assessee for determining whether an addition u/s. 68A was sustainable. It would also be open for the Tribunal to remand the matter for further enquiries if it so considered necessary. (AY. 2003-04 to 2009-10)
PCIT v. Matchless Glass Services P. Ltd. (2016) 380 ITR 370 / 237 Taxman 195 / 284 CTR 150 (Delhi)(HC)

S. 68 : Cash credits – Onus on the Assessee is to only prove creditworthiness and genuineness of the source from which it has received loan – No onus to prove genuineness of source. 1152

For the year under consideration, Assessee had received loan from Tom Investments Limited of ₹ 38 lacs. During assessment proceedings of Assessee, authorised representative of Tom Investments Limited attended the proceedings to substantiate the genuineness of loan transaction and Tom Investment Limited intimated that the amount lent to Assessee was had in turn borrowed from M/s. Tuq Credits Limited. The Tom Investments Limited was unable to furnish the information to prove genuineness and credibility of Tuq Credits Limited. Therefore the Assessing Officer concluded that Tuq Credits Limited is not a genuine party and the entire chain of lending and borrowing was bogus. Hence the loan received was treated as unexplained income and entire interest expenditure was disallowed to the Assessee.

High Court while deciding the case in favour of the Assessee, relied on Gauhati High Court decision in case of *Nemi Chand Kothari v. CIT (2003) 264 ITR 254 (Gauhati) (HC)*, wherein it was held that it is not the burden of the Assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor it is the burden of the Assessee to prove that the sub-creditor had the creditworthiness to advance the cash credit to the creditor form whom the cash credit has been, eventually, received by the Assessee. In the present case the Assessee has indeed discharged its onus of proving the creditworthiness and gaminess of the lender (TIL), hence the HC held that no disallowance or addition could be made under section 68 of the Act. (AY. 1994-95)

CIT v. Shiv Dhoot Pearls & Investment Limited (2016) 237 Taxman 104 (Delhi)(HC)

Editorial: Amendment in Section 68 of the Act in Finance Act, 2012]

S. 68 : Cash credits – Gift – Identity of the donor and capacity of the donor to gift the sum established – Assessee not under obligation to provide the business dealings of the donor to the Assessing Officer. 1153

Addition was made under section 68 in respect of gift received from the donor through M/s. Blackfin Development Company Inc., USA. The addition on account of the same was made by the Assessing Officer under section 68 of the Act due to certain discrepancies noticed by the Assessing Officer between the statement of the donor and the assessee and that the donor did not provide the details pertaining to its business transactions, agreement with Blackfin, details of bank accounts etc. and that the existence of the agreement between the assessee and Blackfin casts certain doubt in the nature of the transaction. The Tribunal, on going through various explanations filed by the donor, assessee and also by Blackfin and also evidence substantiating the same, held that the gift received by the assessee was genuine and therefore, no addition could have been made under section 68. On appeal by the Revenue, it was held by the High Court that the apart from doubting and questioning the material produced by the assessee, the Assessing Officer had not produced any positive evidence which could lead to the inference that the amount received by the assessee was not gift and therefore, dismissed the appeal of the revenue.

CIT v. Sudhir Budharaja (2016) 236 Taxman 50 (Delhi)(HC)

1154 **S. 68 : Cash credits – Gift – In a case where the assessee did not prove the financial capacity of the donors or the fact that the assessee had close relations with the donors, the gifts could not be treated as genuine.**

The assessee had received gifts during the year which were introduced as capital in his proprietary concern. During the course of assessment, details were sought by the AO in respect of these gifts. Assessee produced two persons and filed declaration of gift from the others. AO held that the persons making the gift did not have the capacity of making such gifts and further had no relations with the assessee and there was no natural love and affection between the parties. AO held that the assessee had not proved identity of certain persons making the gift and creditworthiness and genuineness of all of them. AO, therefore, added the amount of gift as an unexplained cash credit under section 68. CIT(A) set aside the addition. CIT(A)'s order was reversed by the Tribunal. High Court observed that the income tax returns of the persons making the gift showed that the donors did not have the financial capacity to make gifts. Therefore, the assessee did not prove the creditworthiness of the donors. Assessee did not bring any evidence to show whether the alleged donors had adequate funds or that they had the financial capacity to make such gifts. High Court observed that it could not be held that gifts were genuine. (AY. 2002-03)

Laxmandas Sujandas Dalpat v. ITO (2016) 381 ITR 283 / 236 Taxman 372 / 134 DTR 351 / 287 CTR 666 (Guj.)(HC)

1155 **S. 68 : Cash credits – Gift – Where the assessee received a gift from NRE account through banking channels, however was not able to demonstrate close relationship nor did it submit affidavit from donor, the said gift was taxable as unexplained cash credits.**

The assessee shown credit of certain amount in the capital account as "Gift". The AO treated the said gift as unexplained cash credit u/s. 68 on the ground that the assessee had failed to prove genuineness of the gift. However, the order of the AO was reversed by the CIT(A). The Revenue preferred an appeal before the Tribunal wherein the findings of the AO were restored.

The assessee preferred an appeal before the HC. The HC concurred with the findings of Tribunal that the assessee has failed to prove her relationship with the donor and genuineness of the gift. The factum that the transaction was out of love and affection, is a sine qua non to establish a genuine gift and therefore, the said amount was correctly held to be taxable u/s. 68. (AY. 1994-95)

Sarita Aggarwal v. ITO (2016) 131 DTR 103 / (2017) 294 CTR 71 (Delhi)(HC)

1156 **S. 68 : Cash credits – Bogus share capital – Amendment to S. 68 casting onus on assessee and requiring it to explain source of source of share subscription is clarificatory and retrospective – Burden is on the assessee to prove the creditworthiness of the shareholder – As the assessee has failed to prove the genuineness of the transaction addition was held to be justified. [S. 56(2) (viib)]**

Dismissing the appeal of assessee the Tribunal held that amendment to S. 68 casting onus on assessee and requiring it to explain source of source of share subscription is clarificatory and retrospective. Burden is on the assessee to prove the creditworthiness

of the shareholder. As the assessee has failed to prove the genuineness of the transaction addition was held to be justified. (ITA No. 1835 & 1836 /Mum/2014, dt. 24.08.2016)(AY. 2006-07, 2007-08)
Royal Rich Developers Pvt. Ltd. v. DCIT (Mum.)(Trib); www.itatonline.org

S. 68 : Cash credits – Wrong credit entry by payer – client in Form 26AS, Assessing Officer had to examine its genuineness,matter was set aside. [Form, 26AS] 1157
Allowing the appeal of the assessee, the Tribunal held that wrong credit entry by payer-client in Form 26AS, Assessing Officer had to examine its genuineness, matter was set aside. Tribunal held that the Assessing Officer was equally responsible to find out whether credit entry was genuine or not. Assessing Officer is conferred with power of civil court to examine and find out real nature of transaction Assessing Officer could not take advantage of ignorance or handicap of assessee and say that there was undisclosed receipt. Matter remanded. (AY. 2011-12)
P.K. Rajasekar v. ITO (2016) 161 ITD 189 (Chennai)(Trib.)

S. 68 : Cash credits – Sundry creditors denied transaction – Matter remanded to verify genuineness of creditors. 1158
AO enquired regarding the claim of two sundry creditors who had denied to acknowledge credit given to the assessee. Subsequent to failure of assessee to provide any explanation for the same, the AO made an addition of sundry creditors u/s. 68 (unexplained cash credits). The Tribunal restored the issue of the sundry creditors to the AO to provide/deny relief to the assessee subject to the verification of genuineness of the sundry creditors. (AY. 2010-11)
B. Banamber and Co. v. ITO (2016) 48 ITR 41 (Cuttack)(Trib.)

S.68 : Cash credits – Survey – Debentures and fixed deposit from investors – Additions made only on basis of surrender made at time of survey was not justified. [S.133A] 1159
Assessee-company claimed to have raised funds through debentures and fixed deposits from its investors. During survey assessee was unable to provide necessary evidence of genuineness of these debentures and full details of transactions and surrendered relevant amount. After ten months assessee retracted from its surrender and filed return of income with voluminous details and evidences. AO made addition as unexplained cash credit. CIT(A) deleted the addition. Dismissing the appeal of the revenue, the Tribunal held that; since no material was collected during course of survey which could establish that credit was non-genuine, additions made only on basis of surrender made at time of survey was not justified.
Dy.CIT v. Bansal Credits Ltd. (2016) 51 ITR 44 (Delhi)(Trib.)

S. 68 : Cash credits – Search and seizure – Buy back of shares – genuineness of transactions and creditworthiness of shareholders doubted – Additional ground was raised challenging the assessment – Matter was remanded to CIT(A) for fresh adjudication. [S. 153A, 153C] 1160
Assessee has raised additional ground challenging the assessment, first time before the Tribunal. Tribunal allowed the additional ground being pure question of law which

goes to root of matter and remanded to CIT(A) for fresh adjudication. (AY. 2004-05 to 2009-10)
Rite Pack Industries P. Ltd. v. Dy. CIT (2016) 48 ITR 555 / (2017) 145 DTR 41 (Delhi)(Trib.)
Kiwi Foods India P. Ltd. v. Dy. CIT (2016) 48 ITR 555 / (2017) 145 DTR 41 (Delhi)(Trib.)

1161 **S. 68 : Cash credits – Once transaction is confirmed and explanation provided assessee cannot be compelled to explain source in hands of creditors beyond certain point matter remanded.**
Allowing the appeal the Tribunal held that; the Revenue was not able to point out any discrepancy or defect therein. It was also noted that there was no adverse material in possession of the lower authorities to controvert the evidence. Once a transaction stands confirmed and the assessee has explained source of amount received in its possession, then the assessee cannot be compelled to explain the source in the hands of the creditors beyond a particular point. (AY. 2006-07)
Genius Printers P. Ltd. v. ACIT (2016) 48 ITR 588 (Mum.)(Trib.)

1162 **S. 68 : Cash credits – Listed Company sold shares through registered brokers at prevalent market rate, addition cannot be made as cash credits only because buyers had not shown such purchase in their balance-sheet. [S.10(38)]**
Dismissing the appeal of the Revenue, the Tribunal held that listed Company sold shares through registered brokers at prevalent market rate, addition cannot be made as cash credits only because buyers had not shown such purchase in their balance-sheet. (AY. 2011-12)
ACIT v. Pardeep Kumar Aggarwal (2016) 159 ITD 54 (Chd.)(Trib.)

1163 **S. 68 : Cash credits – Loan received from husband – Addition was held to be not justified.**
Allowing the appeal of the assessee the Tribunal held that just because description was wrongly stated in the balance sheet of the husband, addition was held to be not justified. (AY 2007-08)
Anita Raj Hingorani v. ITO (2016) 46 CCH 715 / 50 ITR 63 (Mum.)(Trib.)

1164 **S. 68 : Cash credits – Cash receipts was assessed as income from other sources and the business loss was allowed to be set of. [S. 56, 71, 115BBE]**
Allowing the appeal of the assessee the Tribunal held that where, cash receipts was assessed as income from other sources and the business loss was allowed to be set of. (AY. 2010-11)
Satish Kumar Goyal v. JCIT (2016) 159 ITD 393 (Agra)(Trib.)

1165 **S. 68 : Cash credits – Bank deposits – Bank Pass Book could not be construed to be a book maintained by assessee for any previous year hence additions cannot be made as cash credits. [S.145]**
The AO examined bank Pass Book of assessee and treated cash deposits in bank account as unexplained cash credit within meaning of s. 68 and added same in income of assessee. Allowing the appeal of the assessee Tribunal held that since assessee was

not maintaining any accounts books and bank Passbook or bank statement could not be construed to be a book maintained by assessee for any previous year, addition was unsustainable on account of inapplicability of S. 68. (AY. 2011-12)
Manasi Mahendra Pitkar (Smt.) v. ITO (2016) 160 ITD 605 (Mum.)(Trib.)

S. 68 : Cash credits – Confirmation was filed – Addition was held to be not justified. 1166
Allowing the appeal of assessee the Tribunal held that Onus laid on department to show that explanation offered by assessee should not be accepted. Assessee has filed the confirmation and the lender is assessed to tax. In this view of matter, no addition of ₹ 20 lakhs could be made against assessee only because there was some time gap between amount advanced by Shri Manjit Singh and used by assessee for purchase of property. Considering totality of facts and circumstances and above discussion, any justification to sustain addition of ₹ 20 lakhs wasn't found. Orders of authorities below was set aside and deleted addition of ₹ 20 lakhs. Appeal of assessee was allowed. (AY. 2006-07)
Pritam Singh v. ITO (2016) 139 DTR 28/179 TTJ 776 (Chd.)(Trib.)

S. 68 : Cash credits – Share application money – Loans – Investment in plot and construction – Addition was held to be not justified. [S. 69] 1167
Tribunal held that the assessee having produced PAN card, bank statements and confirmation of the individual shareholders, it has discharged the onus cast upon it and therefore, AO was not justified in making the addition under section 68 in respect of the share application money received by the assessee.
Tribunal held that the assessee has filed the names, addresses, details, etc. of all loan creditors and even filed their confirmations. Therefore, the assessee had discharged the onus cast upon him and there is no infirmity in the order of CIT(A), hence, the same is upheld.
The Tribunal held that the assessee having made the investments in the plot and construction through banking channel as is evident from its bank statements, the impugned addition under section 69 cannot be sustained.
The Tribunal held that the assessee having paid the installments for purchase of plots through DD, no addition could be made under section 69 simply because the assessee was unable to produce its books of accounts which were in the custody of the CBI. (AY. 2007-08)
ITO v. A. I. Developer (P) Ltd. (2016) 178 TTJ 332 / 46 ITR 321 (Delhi)(Trib.)

S. 68 : Cash credits – Foreign gifts from son's friend – Addition confirmed. 1168
The assessee received a sum of ₹ 15 lakhs as gift by way of demand draft from his son's friend, who was residing at the United Arab Emirates. Since there was no sufficient evidence to prove the creditworthiness of the gift, the Assessing Officer added the sum as unexplained cash credits under section 68 of the Income tax Act, 1961. The Commissioner (Appeals) deleted the addition. The Tribunal held that the assessee was in no way related to the donor and there was no corresponding channel in the gift instrument linking the assessee's amount credit to the donor's account. The assessee had only proved the identity of the creditor along with capacity to gift. But the assessee had neither produced his son had very good relations with the donor nor the donor himself

for necessary deposition right from scrutiny till date. The assessee had failed to prove any love and affection with the donor. There was to be some reasonable element in an explanation offered by the assessee so as to shift the onus on the Revenue. The gift amount was rightly treated as unexplained cash credit. (AY. 2004-05)
DCIT v. Bhanuprasad O. Trivedi (2016) 46 ITR 307 (Ahd.)(Trib.)
DCIT v. Balaben B. Trivedi (Smt.) (2016) 46 ITR 307(Ahd.)(Trib.)

1169 **S. 68 : Cash credits – When the details of the parties along with bank details were submitted by the assessee, no addition can be made by the AO.**
The assessee had unsecured loans from various parties. The AO made an addition u/s. 68 on account the loans were unexplained. The ITAT deleted the addition since the Assessee had submitted the details of the parties along with bank statements to prove the genuineness of the transaction. The ITAT held that initial burden was discharged by the assessee and there was no basis for making the addition u/s. 68. (AY. 2007-08)
ACIT v. Vikrant Puri (2016) 47 ITR 708 (Delhi)(Trib.)

1170 **S. 68 : Cash credits – Loan from parties who are not income tax assessees – No addition in case the assessee had submitted bank passbook to prove the financial capacity and identity of the party from which loan was taken.**
During the course of assessment it was noticed that the assessee received loans from various parties. To prove the genuineness, the assessee submitted the copy of bank passbook to support the financial capacity and identity of the party. The AO made an addition u/s. 68 on the ground that the lenders did not file PAN details as they were not income tax assessees. The ITAT deleted the addition on the basis that the assessee had discharged its onus and the AO had not found any incriminating material. (AY. 2003-04, 2005-06 to 2008-09)
Chhaya P. Gangar (Ms.) v. DCIT (2016) 47 ITR 328 (Mum.)(Trib.)

1171 **S. 68 : Cash credits – Onus is on AO to establish that cash withdrawn from bank is utilized elsewhere – No unexplained cash credits in hands of assessee**
During the year under consideration, the AO added ₹ 20,65,000/- as unexplained cash credits. The AO held that the assessee could not establish that the cash withdrawn had not been used anywhere else. On appeal to Tribunal, it was held that the assessee submitted detailed cash summary showing inflow and outflow of the cash for the entire year. Onus was upon the AO to prove that cash had been utilized elsewhere by the assessee before he rejected the claim of the prove assessee. Unless any such contrary material was brought on record by him to that cash had been utilized elsewhere by the assessee, he should get benefit of cash withdrawn by the assessee from the bank account against the amount of cash deposit into the bank account of the assessee, especially when the cash had been withdrawn and deposited in the same financial year, even if the bank from where cash was withdrawn and bank where the cash was deposited were different. The disallowance had been made by the lower authorities under wrong assumption of facts. (AY. 2009-10)
Jaspal Singh Sehgal v. ITO (2016) 47 ITR 193 (Mum.)(Trib.)

S. 68 : Cash credits – Shares – Long-term capital gains arising from transfer of penny stocks cannot be treated as bogus merely because SEBI has initiated an inquiry with regard to the Company & the broker if the shares are purchased from the exchange, payment is by cheque and delivery of shares is taken & given. [S.45] 1172

Dismissing the appeal of the revenue , the Tribunal held that the AO has treated the share transaction as bogus on the plea that SEBI has initiated investigation in respect of Ramkrishna Fincap Pvt. Ltd. The AO further stated that investigation revealed that transaction through M/s. Basant Periwal and Co. on the floor of stock exchange was more than 83%. We found that as far as initiation of investigation of broker is concerned, the assessee is no way concerned with the activity of the broker. Detailed finding has been recorded by CIT(A) to the effect that assessee has made investment in shares which was purchased on the floor of stock exchange and not from M/s. Basant Periwal and Co. Against purchases payment has been made by account payee cheque, delivery of shares were taken, contract of sale was also complete as per the Contract Act, therefore, the assessee is not concerned in any way with the broker. Nowhere the AO has alleged that the transaction by the assessee with these particular brokers or shares was bogus, merely because the investigation was done by SEBI against broker or his activity, assessee cannot be said to have entered into ingenuine transaction, insofar as assessee is not concerned with the activity of the broker and have no control over the same. We found that M/s Basant Periwal and Co. never stated any of the authority that transaction in M/s Ramkrishna Fincap Pvt. Ltd. on the floor of the stock exchange are ingenuine or mere accommodation entries. The CIT(A) after relying on the various decision of the co-ordinate Bench, wherein on similar facts and circumstances, issue was decided in favour of the assessee, came to the conclusion that transaction entered by the assessee was genuine. Detailed finding recorded by CIT(A) at para 3 to 5 has not been controverted by the department by brining any positive material on record. Accordingly, we do not find any reason to interfere in the findings of CIT(A). Moreover, issue is also covered by the decision of jurisdictional High Court in the case of *CIT v. Shyam R. Pawar (2015) 229 Taxman 256 (Bom)*, wherein under similar facts and circumstances, transactions in shares were held to be genuine and addition made by AO was deleted. Respectfully following the same *vis-à-vis* findings recorded by CIT(A) which are as per material on record, we do not find any reason to interfere in the order of CIT(A). (ITA No. 4861/Mum/2014, dt. 27.05.2016)(AY. 2005-06)

ITO v. Indravadan Jain (HUF) (Mum.)(Trib.), www.itatonline.org

S. 68 : Cash credits – Long-term capital gains on sale of "penny" stocks cannot be treated as bogus & unexplained cash credit if the documentation is in order & there is no allegation of manipulation by SEBI or the BSE – Denial of right of cross – examination is a fatal flaw which renders the assessment order a nullity. [S.45, 143(3)] 1173

Allowing the appeal of assessee the Tribunal held that long-term capital gains on sale of "penny" stocks cannot be treated as bogus & unexplained cash credit if the documentation is in order & there is no allegation of manipulation by SEBI or the BSE-Denial of right of cross-examination is a fatal flaw which renders the assessment order a nullity. (ITA No. 3801/mum/2011, dt. 27.04.2016)(AY. 2005-06)

Farrah Marker v. ITO (Mum.)(Trib.), www.itatonline.org

1174 **S. 68 : Cash credits – Share application money – Assessee had given complete details about share applicants clearly establishing their identity and creditworthiness – addition could not be made.**

Where assessee had furnished name, address, PAN No. details of share applicants, income-tax returns, bank statements of assessee-company, balance sheet of share applicants and confirmed that all payments were received through regular banking channels, obligation of assessee to prove existence of share applicants and source of share application money stood duly discharged and no addition could be made in its hand u/s. 68 on account of share application money. (AY. 2006-07)

Dy. CIT v. Global Mercantiles (P.) Ltd. (2016) 157 ITD 924 (Kol.)(Trib.)

1175 **S. 68 : Cash credits – Sundry creditors – Merely because non-verifiability of sundry creditors but there being no dispute as regards purchases and trading results having been accepted, addition as cash credits was not sustainable.**

AO has drawn an adverse conclusion only on account of non-verifiability of sundry creditors but there being no dispute as regards purchases, and trading results having been accepted, addition as cash credits was not sustainable. (AY. 2005-06)

ITO v. Zazsons Exports Ltd. (2015) 153 ITD 1 (2016) 158 ITD 1 (TM)(Luck)(Trib.)

1176 **S. 68 : Cash credits – Agricultural income – Credit worthiness is not established – Addition was held to be justified.**

Creditor stated that amount of loan given to assessee was out of savings of seven-eight years of agricultural income but did not produce proof of any agricultural activity, creditworthiness of such creditor was not established. Addition was held to be justified. (AY. 2005-06)

Mahendrabhai B. Shrivastav v. ITO (2016) 158 ITD 755 / 181 TTJ 713 (2017) 152 DTR 72 (Ahd.)(Trib.)

Chandrakant R. Shrivastav v. ITO (2016) 158 ITD 755 / 181 TTJ 713 / (2017) 152 DTR 72 (Ahd.)(Trib.)

1177 **S. 68 : Cash credits – Shares – Demat – Consideration was received through banking channel – Addition was held to be not justified. [S. 143(3)]**

During the year, the assessee sold shares through a stock broker M/s. Hem Securities Limited and treated the gains as exempt long term capital gains. The AO treated the sale as bogus on the ground that certain information was received from the Investigation Wing as a consequence of a search and seizure action carried out under section 132 of the Act in the case of M/s. Alliance Intermediaries & Network Pvt. Ltd., through which the assessee had effected purchase of the impugned shares in the immediately preceding year. As a result, the sale consideration has been treated as income from undisclosed sources on the ground that there was no real sale and purchase of shares.

Held, the purchase of shares in the immediately preceding year was accepted by the Department in an order u/s. 147 r.w.s 143(3) of the Act. The shares were evidenced by entries in the demat statement and consideration was received through banking channel. There was no clinching material to say that the impugned transaction was bogus. Also, the statement recorded during the search on M/s Alliance Intermediaries & Network

Pvt. Ltd. does not contain any infirmity *qua* the impugned transaction. Therefore, the addition as income from undisclosed income was liable to be deleted. (ITA No. 2799/ Mum/2015, dt. 29.02.2016)(AY. 2009-10)
Arvind Asmal Mehta v. ITO (Mum.)(Trib.), www.itatonline.org

S. 68 : Cash credits – Share capital – Identity, genuineness and creditworthiness of the shareholder companies was furnished – Addition was held to be not justified. 1178
Assessee company having produced copies of share applications, confirmations of the shareholders, copies of their PANs, board resolutions, directors reports, auditors reports, balance sheets, P & L A/c and bank accounts in all the cases to prove the identity, genuineness and creditworthiness of the shareholder companies and AO having not clarified what enquiry was conducted and what evidences have been collected to draw adverse conclusion against the assessee, impugned addition made by the AO cannot be sustained. (AY. 2008-09)
Jadau Jewellers & Manufacturers (P) Ltd. v. ACIT (2016) 130 DTR 17 / 175 TTJ 344 (Jaipur)(Trib.)

S. 68 : Cash credits – Addition cannot be made for loans taken in the period prior to the commencement of business as well as in the initial period of business. No addition in respect of parties against whom summons for examination was not issued by the AO. 1179
The Assessee obtained unsecured loans from numerous parties, while installing its plant and machinery and also for 6 months after commencement of manufacturing. Confirmation of majority of the parties was submitted by the assessee and were even produced before the AO. However, addition u/s. 68 was made by the AO for want for creditworthiness of the parties. The ITAT deleted the addition made by the AO and held that receipts during the pre-commencement period and during the initial duration of operations could be assumed to be capital receipts since the Assessee could not have earned huge income / profits during the pre-commencement and initial period of business. Further, the ITAT also held the addition could not be made on the parties who were not presented by the assessee, since no summons for their examination was issued by the AO. (AY. 2006-07, 2007-08)
Kundles Loh Udyog v. ITO (2016) 45 ITR 11 (Chd.)(Trib.)

S. 68 : Cash credits – Advance received against sale of accommodations in name of close family members of assessee – Matter remanded. 1180
The accommodations were already stated to be acquired out of undisclosed income of the assessee which was brought to tax as undisclosed income in the hands of the assessee by a block assessment order and orders of the Settlement Commission were framed against the assessee with taxes paid to the department. Hence, the capital gains arising on sale of these accommodations owned and held by the assessee in the name of close family members were chargeable to tax in the hands of the assessee. The AO was directed to compute capital gains arising out of these two accommodations in the hands of the assessee after duly verifying and authenticating the claim of the assessee with respect to acquisition and ownership of the above accommodations. Matter remanded. (AY. 2007-08)
Vishwanath Acharya v. ACIT (2016) 157 ITD 1032 / 45 ITR 554 (Mum.)(Trib.)

1181 **S. 68 : Cash credits – Cash deposits – Additional evidence – Matter remanded.**
There was sufficient cause shown by the assessee which prevented the assessee from producing the additional evidence during the assessment proceedings. Therefore, the AO was to admit the additional evidence and decide the issue afresh on the merits after giving sufficient opportunity of being heard to the assessee. Matter remanded. (AY. 2007-08)
Vishwanath Acharya v. ACIT (2016) 157 ITD 1032 / 45 ITR 554 (Mum.)(Trib.)

1182 **S. 68 : Cash credits – Memorandum of Understanding – Cash returned to assessee and surrendered the property as part of total surrender – Credit cannot be treated as unexplained.**
Tribunal held that the cash was returned as per the Memorandum of Understanding hence addition cannot be made as cash credits. (AY. 2006-07)
Today Homes and Infrastructure Pvt. Ltd. v. Dy. CIT (2016) 46 ITR 586 (Delhi)(Trib.)

1183 **S. 68 : Cash credits – Share capital – Cross examination of witness was not given – Addition was held to be not justified. [S.133(6)]**
On appeal, the Tribunal held that the AO neither provided opportunity of cross-examination of his witness as demanded by the assessee nor brought any material on record to controvert the material placed on record by the assessee. The AO made direct enquiries with company C u/s. 133(6) of the Act, in response to which confirmation was filed by that company. But the AO preferred to rely upon the statement of the Director and disregarded all the other evidence. Therefore, the addition made by the AO was not sustainable. (AY. 2007-08)
Vitrag Metal Pvt. Ltd. v. ITO (2016) 46 ITR 201 (Mum.)(Trib.)

1184 **S. 68 : Cash credits – Accommodation entries – No addition could be made in hands of assessee on account of unexplained cash credit.**
Tribunal held that on appeal the High Court had held that the order of the Commission was final and conclusive as to the matters stated therein for the AY decided by the Commission. The order of the Commission showed that all the relevant material including the seized material was duly considered by the Commission. Moreover, the jurisdictional High Court had held that even if some material had been suppressed from the Commission, the only course available to the Revenue was to approach the Commission for declaring its order a nullity. The order of the Commission was binding on the Department and the logical consequences of the order had to be given effect. Thus, the addition u/s.68 could not be made in the case of the conduit companies. (AY. 2008-09)
Omni Farms Pvt. Ltd. v. Dy. CIT (2016) 46 ITR 505 (Delhi)(Trib.)

1185 **S. 68 : Cash credits – Share transactions – General statement of director of another company before Investigating wing and not providing assessee opportunity to confront director in relation to transactions related to assessee – Additions was held to be not justified. [S. 132]**
Tribunal held that the AO made additions on the basis of a general statement of the director of the company. The name of the assessee did not appear specifically in any

of the statement of the director. Merely because the assessee could not produce the director before the AO that itself was not a sufficient ground for the confrontation of the additions. Even the AO, in his remand report, did not controvert the evidence filed by the assessee. Therefore, the additions made by the AO were not warranted. (AY. 2003-04)
Yamuna Estate P. Ltd. v. ITO (2016) 45 ITR 517 (Mum.)(Trib.)

S. 68 : Cash credits – Share application – Addition can be made in the hands of alleged bogus share holders and not in the recipient company. 1186
Dismissing the appeal of revenue the Tribunal held that in case of receipt of share application money from the alleged bogus shareholders, addition can be made in the hands of the alleged share holders and not in the income of the recipient company. (ITA No 3645/ Mum/ 2014 Bench A dt. 30-11-2015 (AY. 2007-08)
ITO v. Superline Construction Pvt. Ltd. (2016) BCAJ-January-P. 18(Mum.)(Trib.)

S. 68 : Cash credits – Share application money received from an associate concern cannot be assessed as cash credits if assessee has discharged its initial onus to prove the identity, creditworthiness and genuineness of the transaction. 1187
Dismissing the appeal of revenue; the Tribunal held that the CIT(A) has dealt with issue all the objections raised by the AO and after considering the documents placed on record, recorded a categorical finding to the effect that amount payable and receivable by the assessee was squared off which was in accordance with the provisions of Companies Act. Further finding was recorded to the effect that these companies were assessed with I.T. Department for several years. The identity and genuineness of the transaction was duly accepted. The detailed finding recorded by CIT(A) are as per material on record. (ITA no. 1470/Mum/2011, dt. 30.03.2016)(AY. 2007-08)
DCIT v. Overseas Infrastructures (Mum.)(Trib.); www.itatonline.org

S. 68 : Cash credits – Confirmation was filed – Burden was discharged – Addition was deleted. 1188
The assessee filed the confirmation letters and other evidences, Tribunal by following the ratio laid down in *CIT v. Orissa Corporation (1986) 159 ITR 78 (SC),* held that addition was not justified. (ITA No. 5500/Del/2013, dt. 24.02.2016)(AY. 2009-10)
Hitender Pal Singh v. ITO (Delhi)(Trib.); www.itatonline.org

S. 68 : Cash credits – Share application and share premium from private companies cannot be treated as bogus and assessed as cash credits merely on the basis of report of Inspector. 1189
Dismissing the appeal of revenue the Tribunal held that share application and share premium from private companies cannot be treated as bogus and assessed as cash credits merely on the basis of report of Inspector. (ITA No. 1103/JP/2011, dt. 21.03.2016) (AY. 2008-09)
ACIT v. Dhanlaxmi Equipment Pvt. Ltd. (Jaipur)(Trib.); www.itatonline.org

S. 69. Unexplained investments.

1190 **S. 69 : Unexplained investments – Capital gains – Sale of property – Photocopy of cash receipt duly signed and witnessed by assessees – Corroborated by assessees' statements – No evidence produced by assessee rebutting contents of receipt or statements or to show signatures thereon forged – Assessment of capital gains on basis thereof proper. [S.45, 143(3)]**

The assessee, with his mother and brother, co-owned a property, which they sold for a consideration as shown in the registered sale deed of ₹ 39 lakhs. The Investigation Wing of the Department received a tax evasion petition and enquiries were initiated against the three. During the course of the investigation they were confronted with a photocopy of a receipt for ₹ 55 lakhs in cash as part payment for the sale, signed by the mother with the assessee and his brother signing as witnesses. The AO issued a notice under section 148 for initiation of reassessment proceedings. The assessees' written pleadings denying their signatures on the receipt and contending that they were either forged or morphed were not accepted by the AO who determined the long – term capital gains. The Commissioner (Appeals) dismissed the assessees' appeals. The Tribunal held that the value of the photocopy of a document as material evidence for the purpose of assessment depended upon the nature and contents of the document and the surrounding facts. It dismissed the assessee's appeal and held that the AO had rightly assessed based on the contents of the receipt which was duly corroborated by the assessees in their respective statements. On appeals :

Held, dismissing the appeals, that the findings recorded by the authorities below were findings of fact which were not shown to be illegal or perverse calling for interference. No question of law arose. (AY. 2001-02)

Vikrant Dutt Chaudhary v. CIT (2016) 389 ITR 411 (P&H)(HC)

Editorial : The Supreme Court has dismissed the special leave petition filed by the assessee against this judgment Vikrant Dutt Chaudhary v. CIT (2016) 384 ITR 124 (St.)]

1191 **S. 69 : Unexplained investments – Investment in House was disclosed under VDIS, addition cannot be made – Addition cannot be made on the basis of stamp valuation as unexplained investment – No substantial question of law. [S. 260A]**

Dismissing the appeal of the revenue, the Court held that investment is house was disclosed in VDIS and only on the basis of stamp valuation addition cannot be made unless some evidence was found. No substantial question of law.

CIT v. Suresh Jain (2016) 242 Taxman 460 (Karn.)(HC)

1192 **S. 69 : Unexplained investments – Bogus purchases – Profit embedded in such transactions can be added to total income – Disallowance of 25% of the cost of such purchases was held to be proper. [S. 143(3)]**

During the course of assessment proceedings, the Assessing Officer called upon the assessee to prove the genuineness of purchases of varied amounts for various assessment years. The assessee furnished material in respect of the purchases but the Assessing Officer rejected it and made additions of various amounts as bogus purchases. The assessee preferred appeals before the Commissioner (Appeals). The Commissioner

(Appeals) partly allowed the appeals. The Appellate Tribunal reversed the finding of the Commissioner (Appeals) and confirmed the entire additions made by the Assessing Officer. On appeals:
Held, that it was not the entire amount covered by such purchase, but the profit element embedded therein which would be subject to tax. It would be appropriate to restrict the disallowance made in this regard to 25 per cent of the cost of such purchases in each year. (AY 1993-94 to 1996-97)
Vijay Trading Co. v. ITO (2016) 388 ITR 377 (Guj.)(HC)

S. 69 : Unexplained investments – In absence of any independent material to come to conclusion that assessee has paid extra consideration for purchase of property over and above what was stated in sale deed of property – mere report of DVO cannot form sale basis to make addition under section 69 of the Act 1193
Allowing the appeal of assessee the court held that the basis of the addition is only valuation report of the District Registrar under the Stamp Act and the Departmental valuer. As such, there is no independent material which had come on record for such purpose. The payment of additional stamp duty may be on the basis of the valuation of the valuer of the Stamp Act authority but same *ipso facto* cannot be said to be a valid ground to initiate the proceedings under section 69 of the Act. Under such circumstances, the addition made by the AO and further upheld by the CIT(A) as well as by the Tribunal, cannot be sustained. Hence the High Court ruled in favour of the assessee. (AY. 2006-07)
S. S. Jyothi Prakash v. ACIT (2016) 240 Taxman 741 (Karn.)(HC)

S. 69 : Unexplained investments – Income from undisclosed sources – Bogus purchases – Excess of sales over purchases – Satisfactory evidence not adduced despite being given opportunity – Addition proper. 1194
Dismissing the appeal of the assessee the Court held that Since the view taken by the authorities below that the purchase was bogus was not an impossible view in the absence of production of necessary documents by the assessee to prove the genuineness of the purchase, addition was to be upheld. If the assessee withheld the best evidence and relied upon secondary evidence even assuming that any secondary piece of evidence had been adduced, the presumption in law would be against the assessee. The question of any lapse on the part of the Tribunal in accepting the sum of sales did not arise because the figure had been furnished and admitted by the assessee. When the assessee had not been able to prove the purchase, the amount of its profit had increased which led to an addition in its income. The Tribunal was justified in confirming the addition
Kalyani Medical Stores v. CIT (2016) 386 ITR 387 (Cal.)(HC)

S. 69 : Unexplained investments – Income from undisclosed sources – Nexus between investment and unaccounted profit – Commissioner (Appeals) giving benefit of telescoping and Tribunal confirming order without giving valid reasons – Order unsustainable. [S. 132, 153C] 1195
Allowing the appeal of revenue the Court held that there has to be nexus between investment and unaccounted profit. Commissioner (Appeals) giving benefit of telescoping

and Tribunal confirming order without giving valid reasons. Order unsustainable. Matter was remanded. (AY. 2001-02 to 2007-08)
CIT v. Promy Kuriakose (2016) 386 ITR 597 /(2017) 148 DTR 287 / 293 CTR 440 (Ker.)(HC)

1196 **S. 69 : Unexplained investments – Loose sheets – Presumption u/s. 132(4A) can also be applied to person whose premises are not searched – Reassessment was held to be valid. [S. 132(4A), 147]**
On appeal to High Court, substantial question of law which was raised is whether presumption u/s. 132(4A) can be raised only against the person whose premises were searched i.e. assessee's father or also against the assessee in the present case. High Court held that the AO's reliance on sec. 132(4A) provisions being applicable to assessee even though assessee's place was not searched will not change the nature of order. High Court further held that the principle of natural justice was complied with as opportunity was given to the assessee to explain the entries in loose sheet but it was assessee which chose not to answer. High Court further held that the AO has formed his opinion on a reasonable basis as he had a reason to believe that income added u/s. 69 has escaped assessment based on the material / loose sheet. Thus, the order of Tribunal was upheld by High Court. (AY. 1987-88)
Ashok Kumar v. CIT (2016) 386 ITR 342 / 239 Taxman 436 / 290 CTR 450 (Patna)(HC)

1197 **S. 69 : Unexplained investments – Search and Seizure – It was not open for AO to draw an inference on the basis of projection of document which was 'dumb' document – When the Assessee offered a plausible explanation for the document,the burden shifted on Revenue and hence the addition made was unjustified. [S. 132, 158BB, 158BC]**
Dismissing the appeal of the revenue, the Court held that it was not open for AO to draw an inference on the basis of projection of document which was 'dumb' document-when the assessee offered a plausible explanation for the document, the burden shifted on revenue and hence the addition made was unjustified. Thus the High Court was of the view that Tribunal was justified in deleting the addition made by the AO. (AY. 2002-03)
CIT v. Vatika Landbase Pvt. Ltd. (2016) 383 ITR 320 / 238 Taxman 448 / 136 DTR 262 (Delhi)(HC)

1198 **S. 69 : Unexplained investments – Capital gains – "penny" stocks gave rise to huge capital gains in a short period does not mean that the transaction is "bogus" if the documentation and evidences cannot be faulted – Addition cannot be made as unexplained investments – Off market transaction not unlawful. [S.10(38), 45]**
On appeal by the Department to the High Court HELD dismissing the appeal: The ITAT allowed the claim of the assessee by recording that the purchase of shares were duly recorded in the books maintained by the assessee. The ITAT has recorded a finding that the source of funds for acquisition of the shares was the agricultural income which was duly offered and assessed to tax in those Assessment Years. The Assessee has produced certificates from the aforesaid four companies to the effect that the shares were infact transferred to the name of the assessee. In these circumstances, the decision of the ITAT in holding that the assessee had purchased shares out of the funds duly

disclosed by the assessee cannot be faulted. Similarly, the sale of the said shares for ₹ 1,41,08,484 through two Brokers namely, M/s. Richmond Securities Pvt. Ltd. and M/s. Scorpio Management Consultants Pvt. Ltd. cannot be disputed, because the fact that the assessee has received the said amount is not in dispute. It is neither the case of the Revenue that the shares in question are still lying with the assessee nor it is the case of the Revenue that the amounts received by the assessee on sale of the shares is more than what is declared by the assessee. Though there is some discrepancy in the statement of the Director of M/s. Richmand Securities Pvt. Ltd. regarding the sale transaction, the Tribunal relying on the statement of the employee of M/s. Richmand Securities Pvt. Ltd. held that the sale transaction was genuine. (ITA No. 456 of 2007, dt. 07.09.2011)(AY. 2011-02)

CIT v. Mukesh Ratilal Marolia (Bom.)(HC), www.itatonline.org

Editorial: Judgement of Tribunal in Mukesh R.Marolia v. Add.CIT (2006) SOT 247 (Mum) (Trib.) is affirmed. SLP of revenue was dismissed by Supreme Court. SLP No 20146/ 2012 dt 27-1-2014

S. 69 : Unexplained investments – Search carried on at the premises of third party – Merely on the basis of third party statement addition cannot be made. [S. 131, 132] 1199

A search was conducted upon one 'S' and certain agreements to sell were seized from his possession, which indicated that the assessee had entered into agreement with 'S' to purchase various plots of land. Further, statement of 'S' was also recorded u/s. 131. 'S' clarified that the plots referred to in the agreement to sell were disputed and could not be transferred due to pending civil suits. In place of those plots, other plots which were in the same vicinity were transferred to the person specified by the assessee and the entire consideration in terms of the agreement to sell had been paid by a person/ representative of the assessee. Thereupon the Assessing Officer made additions in crores of rupees under section 69 to the income of the assessee in relation to the assessment years 2005-06 to 2008-09. The Tribunal upon appreciation of the evidence on record held that insofar as assessment year 2005-06 was concerned, the agreement proved that ₹ 11 lakhs had been paid by the assessee. It, accordingly, partly allowed the appeal in relation to assessment year 2005-06 by upholding the addition to the extent of ₹ 11 lakhs and allowed the assessee's appeals in relation to assessment years 2006-07 and 2007-08. On analysis of the various documents, the High Court held that revenue had failed to bring on record any reliable material to prove that the assessee had made actual investment in crores in the previous years relevant to assessment years 2005-06, 2006-07 and 2007-08 except for the payment of ₹ 11 lakh. Held no addition u/s 69 justified. (AY. 2005-06 to 2007-08)

PCIT v. Vivek Prahladbhai Patel (2016) 237 Taxman 331 / 138 DTR 158 (Guj.)(HC)

S. 69 : Unexplained investments – Bank deposits – Cash received was recorded in the books of account hence addition cannot be made. 1200

Dismissing the appeal of the Revenue, the Tribunal held that addition cannot be made on account of cash deposited in bank where assessee had clearly shown that such deposit was out of cash received on sale of land which was duly recorded in cash book. (AY. 2011-12)

ACIT v. Pardeep Kumar Aggarwal (2016) 159 ITD 54 (Chd.)(Trib.)

1201 **S. 69 : Unexplained investments – Unaccounted sales – Amount deducted from export price on account of buying agent's commission is not part of export sales, and it cannot be added to exports.**

Allowing the appeal of the assessee, the Tribunal held that as a commercial practice, buying agent's commission is also borne by seller in sense that it is reduced from selling price and, thus, effectively, selling price of exporter is gross invoice amount minus buyer's agency commission. When services were rendered by agent to buyer, there could not be any question of evidence of services having been rendered by agent to assessee or a charge, on that account, to profits of assessee and, therefore, AO was in error in making the addition. (AY. 2005-06)

Manish H. Agarwal v. ACIT (2016) 159 ITD 287 (Ahd.)(Trib.)

1202 **S. 69 : Unexplained investments – Estimate of stock given to bank – Addition was held to be not justified.**

Dismissing the appeal of the revenue since assessee had merely given statements of monthly stock on basis of a rough estimate by incorporating monthly purchases and sales, statements could not be made basis of addition. (AY. 2008-09)

ITO v. Triple V Timber Sales Corpn. (2015) 70 SOT 811/40 ITR 204 (Chd.)(Trib.)

1203 **S. 69 : Unexplained investments – Payment made by cheque to travel companies – Amount not assessable as unexplained expenditure**

During the year under consideration, the AO added ₹ 4,91,120/- as unexplained expenditure on account of foreign travel. It was held that the assessee had given item wise details and particulars of cheque no. of various amounts paid by the assessee for meeting the expenditure incurred on foreign travel. These details clearly reflected that the assessee had made payment by cheque to two travel companies for foreign currency. The disallowance had been made by the lower authorities under wrong assumption of facts. (AY. 2009-10)

Jaspal Singh Sehgal v. ITO (2016) 47 ITR 193 (Mum.)(Trib.)

1204 **S. 69 : Unexplained investments – Survey – Letter found for cessation of liability – accepted in statement – Retraction thereof – Addition deleted.**

Dismissing the appeal of the Revenue, the Court held that the seized paper was not reliable since it had not shown the correct state of affairs and it was also not corroborated by any independent evidence. There was interpolation of the date and the language contained therein clearly showed that the letter was not disclosing correct facts. It was also not explained why the original letter remained with the assessee and how the payment of ₹ 90 lakhs had been verified and P had not confirmed the payment. Hence, the assessee had a justification to retract from the earlier statement making surrender of ₹ 90 lakhs. The Commissioner (Appeals) and Tribunal on proper appreciation of facts and material on record, correctly deleted the addition. (AY. 2009-10)

DCIT v. Vipin Aggarwal (2016) 46 ITR 367 (Chd.)(Trib.)

S. 69 : Unexplained investments – Bogus purchases – Sales was accepted as genuine – Purchase cannot be assessed as bogus. 1205

Dismissing the appeal of revenue the Tribunal held that assessee has furnished quantitative reconciliation, gross profit rate is comparable to earlier and subsequent years, suppliers are income tax assessee and their sales have not been treated as bogus by their Assessing Officer, payments are by account payee cheques and other evidence was available , hence the purchases cannot be treated as bogus purchases. (ITA No. 5163/Mum/ 2013 dt. 24-02-2016 (AY. 2010-11)

ACIT v. Jaybharat Textiles & Real Estate Ltd (Mum)(Trib.) www.itatonline.org

S. 69 : Unexplained investments – Discrepancy in Stock – Assessee's bank had taken insurance policy for stocks to protect cash credit facility provided–Inference of AO that the same meant to be declaration made by assessee – Letters issued by bank and policy document,stock reconciliation statement proves no quantity difference – Addition towards suppression of closing stock cannot be sustained. 1206

The assessee's bank had taken an insurance policy of stocks of ₹ 1.5 crore in order to protect its cash credit facility advanced to the assessee. In the insurance policy, it was mentioned that the property insured was 'on stock of cement manufacturing'. The closing stock of finished goods declared by assessee was to the tune of ₹ 33,895 in its balance sheet. The AO inferred that the insured amount of stock is the stock declared to bank for finished goods alone and added the differential amount under section 69. On appeal to Tribunal, it was held that the clarificatory letter issued by bank, insurance policy document and stock reconciliation statement showed that the amount insured was for raw materials and finished goods both and that there was no quantity difference between what was submitted to bank *vis-à-vis* the audited balance sheet filed with return. No addition was to be made towards suppression of closing stock. (AY 2008-09)

ACIT v. Bharat Hi-Tech (Cement) P. Ltd. (2016) 176 TTJ 166 (Kol.)(Trib.)

S.69 : Unexplained investments – Genuineness of Transaction – Lease Deed properly registered and stamp duty was paid – Approved by BMC and State Government – Transactions cannot be held to be sham on basis of doubts and apprehensions. 1207

Held that CIT(A) has recorded detailed findings that the transaction was of lease only. CIT(A) held that lease deed was properly registered and stamp duty was paid as per Bombay Stamp Act. Further, lease deed was approved by BMC and State Government. Title of the property continued in the name of assessee. Transactions cannot be held to be sham merely on basis of doubts and apprehensions. Documents cannot be brushed aside or rewritten without any contrary material on record. Thereby, no inference is called for. (AY. 2003-04, 2006-07, 2007-08)

Kamala Brothers v. ITO (2016) 176 TTJ 178 / 131 DTR 106 (Mum.)(Trib.)

S. 69 : Unexplained investments – Details mentioned in pocket diary related to the items traded by the assessee – Only addition of gross profit was held to be justified. 1208

Consequent to a search in the business premises of the Assessee, a pocket diary containing details of cash, 50 chains and 28H set was found. The Director was questioned only regarding the cash mentioned in the diary. The AO aggregated all the three items as unexplained investment in the hands of the assessee. During the course

of assessment, the Director disowned the diary. The ITAT held that assessee did not discharge the burden upon him to disprove the documents obtained during the course of the search. Since the items mentioned in the diary related to the business of the assessee, it could have been unaccounted for in its books. Since, the assessee had furnished the gross profit earned from sale of jewellery, the ITAT held that the addition was to be restricted to the amount of gross profit on that sum. (AY. 2009-10, 2010-11)
Tribhovandas Bhimji Zaveri (Delhi) P. Ltd. v. ACIT (2016) 45 ITR 636 (Mum.)(Trib.)

1209 **S. 69 : Unexplained investments – Books of account having been accepted no addition can be made in respect of suppressed sales of scrap. [S. 145]**
The Tribunal held that assessee's books of account having been accepted and there being no evidence whatsoever of suppression of sales of scrap, addition was not justified. (AY. 2007-08)
Gillette India Ltd. v. ACIT (2015) 70 SOT 289 / (2016) 175 TTJ 35 (UO)(Jaipur)(Trib.)

1210 **S. 69 : Unexplained investments – Addition or disallowance can be set off – Telescoping of amount surrendered.**
The Tribunal held that addition or disallowance made by the AO can be set off against the amount surrendered during the search proceedings when no other undisclosed income has been discovered during the assessment proceedings. (AY. 2012-13)
Gillco Developers & Builders (P) Ltd. v. Dy. CIT (2016) 175 TTJ 81 (UO)(Chd.)(Trib.)

1211 **S. 69 : Unexplained investments – Bogus purchases – An addition on account of bogus purchases cannot be made only on the basis of information received from the MVAT department. [S.143(3)]**
Allowing the appeal of assessee the Tribunal held that; we have carefully considered the rival submissions. The entire discussion in the assessment order reveals that purchases from four parties namely Dhruv sales Corporation – ₹ 13,67,640/-; Subhlaxmi Sales Corp. – ₹ 20,20,800/-; Dharshan Sales Corporation - ₹ 9,64,656/-; and Paras (India)- ₹ 33,98,400, totalling to ₹ 77,51,496/- have been treated to be bogus based on the purported enquiries conducted by the Sales Tax Department of the Government of Maharashtra. Ostensibly, the Assessing Officer ought to have brought on record material which is relevant to the transactions of the assessee with the aforesaid four parties instead of making a general observation about the information received from the Sales Tax Department of the Government of Maharashtra. Quite clearly, the Assessing Officer as well as CIT (Appeals) have taken note of the fact that no sales could have been effected by the assessee without purchases. In the present case, assessee has explained that all its sales are by way of exports. The books of account maintained by the assessee show payment for effecting such purchases by account payee cheques and also the vouchers for sale and purchase of goods, etc. Notably, no independent enquiries have been conducted by the Assessing Officer. Under identical circumstances, our Co-ordinate Benches in the cases of Deepak Popatwala Gal, Shri Rajeev G. Kalathil and Ramesh Kumar and Co. have held that the Assessing Officer was not justified in making additions merely on the basis of information obtained from the Sales Tax Department of the Government of Maharashtra without conducting any independent enquiries. Before the CIT (Appeals), one of the points raised by the assessee was with respect to

an opportunity to cross-examine the four parties, but we find that no such opportunity have been allowed. Considering the entirety of facts and circumstances of the case and the aforesaid precedents, which have been rendered under identical circumstances, in our view, the CIT (Appeals) erred in sustaining the addition to the extent of ₹ 4,19,356/- instead of deleting the entire addition of ₹ 9,68,937/- made by the Assessing Officer. We direct accordingly. (ITA No. 5427/Mum/2015, dt. 18.03.2016)(AY. 2009-10)
Imperial Imp & Exp. v. ITO (Mum.)(Trib.); www.itatonline.org

S. 69 : Unexplained investments – Bogus purchases – Theory that transaction "defies human probabilities" cannot be applied to purchases in isolation but has to be applied to the entire transaction in the light of documentary evidence produced by the assessee – Sales are accepted as genuine – Purchases cannot be disallowed. Addition was deleted. [S.143(3)] 1212

Allowing the appeal of assessee following the ratio of decision in *CIT v. Nikunj Eximp Enterprises Pvt. Ltd. (2015) 372 ITR 619 (Bom.)(HC),* the Tribunal held that there cannot be sales without purchases and the fact that the assessee has exported the goods was not controverted. It is a known fact that the claim of export cannot be considered to be not-genuine, since the export cannot take place without clearance from Customs Authorities, another arm of Government of India. Hence, the claim of export has to be necessarily accepted on the basis of relevant documents. In the instant case also, the assessee has furnished the copies of purchase invoices, confirmation letters, copies of ledger accounts, copies of export bills, the details of re-import of the same and details of payment of customs duty on reimport, the details of purchase return. All these chronological events have not been disproved by the tax authorities. Therefore the theory of human probability has been applied to only part of transactions and not to the whole round of transactions. In any case, it cannot be said that the claim of the assessee defies the human probabilities, when one examines the documents furnished by the assessee. Accordingly, we are of the view that the Ld CIT(A) was not justified in confirming the addition made by the AO. Accordingly, we set aside the order of Ld CIT(A) on this issue and direct the AO to delete the impugned addition. (ITA no. 3823/Mum/2014, dt. 09.03.2016)(AY 2009-10)
Maruti Impex v. JCIT (Mum.)(Trib.); www.itatonline.org

S. 69 : Unexplained investments – Additions confirmed by the CIT(A) was deleted by considering the details submitted by the assessee. 1213

Assessing Officer made the addition which was confirmed by the CIT(A) without considering the various submissions and details filed by the assessee. On appeal tribunal held that we have considered the rival contentions of the parties and perused the material available before us. We have also perused various certificates and bank statements which were brought to our notice during the course of hearing from page nos. 13 to 42 of the paper book. As discussed above we find it is a classical case where various additions have been made by the AO without proper application of mind and has no distant connection with the material on record. We find that the third party transactions were added in the hands of the assessee without any basis or material and thus, the AO framed the assessment in a hypothetical way putting the assessee to enormous harassment and inconvenience. Similarly, the ld. CIT(A) confirmed the

addition without looking into the merits and facts of the cases which are very clear and apparent from the records produced. Therefore, in view of these facts, the additions of ₹ 1,40,43,154/- in ground No.1, ₹ 10 lakhs in ground No. 2 and ₹ 26 lakhs in ground No.3 on account of unexplained/undisclosed income are ordered to be deleted by reversing the order of First Appellate Authority. AO is directed accordingly. (ITA No. 5302/mum/2012, dt. 15.03.2016) (AY. 2007-08)
Mintu Sayermal Jain (Mrs) v. ITO (Mum.)(Trib.); www.itatonline.org

S. 69A. Unexplained money, etc.

1214 **S. 69A : Unexplained money – Gifts – Associates residing abroad – Not required to prove the source of the money of the donor – Large amount received gift cannot be he basis to treat the amount as deemed income of the assessee – Deletion of addition by the Tribunal was held to be justified. [S.68]**
Dismissing the appeal of revenue, the Court held that gifts received from abroad from donors who are total strangers to the assessee and not related by relationship, business or friendship – Deletion of addition was held to be justified. Suspicion and doubt may be the starting point of an investigation but cannot, at the final stage of assessment, take the place of relevant facts, particularly where a deeming provision is sought to be invoked. The principle that governs a deeming provision is that the initial onus lies upon the revenue to raise a *prima facie* doubt on the basis of credible material. The onus, thereafter, shifts to the assessee to prove that the gift is genuine and if the assessee is unable to proffer a credible explanation, the Assessing Officer may legitimately raise an inference against the assessee. If, however, the assessee furnishes all relevant facts within his knowledge and offers a credible explanation, the onus reverts to the revenue to prove that these facts are not correct. The revenue cannot draw an inference based upon suspicion or doubt or perceptions of culpability or on the quantum of the amount, involved. Any ambiguity or any if and buts in the material collected by the Assessing Officer must necessarily be read in favour of the assessee, particularly when the question is one of taxation, under a deeming provision. Thus, neither suspicion/doubt, nor the quantum shall determine the exercise of jurisdiction by the Assessing Officer. The above exposition shall not be misconstrued to restrict the power of the revenue to raise an inference as to the efficacy of material produced by or before the Assessing Officer. The Assessing Officer proceeded as if the entire onus lay upon the assessee, ignored the material received from the Central Board of Direct Taxes from the Inland Revenue Service, Great Britain and failed to follow the matter any further with respect to Varinder Sharma and on the basis of suspicion, held that gifts are not genuine. Accordingly the Court held that,it was for the revenue to proceed to investigate the matter further hence no error in the opinion recorded by the Tribunal and consequently, the substantial question of law is answered against the revenue.
CIT v. Jawahar Lal Oswal (FB) (2016) 382 ITR 453 / 133 DTR 15 / 284 CTR 188 238 Taxman 225 (P&H)(HC)
CIT v. Monica Oswal (Ms)(FB) (2016) 382 ITR 453 / 133 DTR 15 / 284 CTR 188 (P&H)(HC)
CIT v. Ruchika Oswal (Ms)(2016) 382 ITR 453 / 133 DTR 15 / 284 CTR 188 (FB)(P&H)(HC)
CIT v. Jawahal Lal Oswal (FB) (2016) 382 ITR 453 / 133 DTR 15 / 284 CTR 188 (P&H)(HC)
Editorial : CIT v. Jawahar Lal Oswal (2004) 190 CTR 56 (P&H)(HC)

S. 69A : Unexplained money – Bank deposits – Amount deposited in assessee's savings bank account was sales of partnership firm in which assessee was partner and same was duly accounted for by said firm, said amount could not be treated as undisclosed income of assessee. 1215

Dismissing the appeal of the revenue the Tribunal held that cash deposited in assessee's saving bank account was sales of partnership firm in which assessee was partner and same was duly explained with help of sales receipt recorded in books of account of partnership firm, said amount could not be added in assessee's hands as unexplained money. (AY. 2009-10)

ITO v. Vinod Chadha (2016) 160 ITD 558 / 50 ITR 119 / (2017) 183 TTJ 380 / 145 DTR 169 (Delhi)(Trib.)

S. 69A : Unexplained money – Unexplained cash deposits – Failure by Department to produce documents to establish whether assessee opened account with her signature – No liability could be fastened on assessee for deposits made in account 1216

The Department received a complaint that the assessee owned an illegal saving bank account. The AO, having reason to believe that income had escaped assessment initiated proceedings under section 147. The CIT u/s. 263 set aside the assessment framed under Section 147 and directed the AO to make assessment afresh. AO thereafter made an addition on account of unexplained cash deposit in the hands of assessee and completed assessment. Before CIT(A), the assessee contended that the matter be referred to the Government examiner to examine the handwriting in the matter to verify the correctness of the signature of the assessee whether she had opened the bank account or not. However no steps were taken by him. On appeal to Tribunal, it was held that the branch manager of the bank reported that the account had no concern with the assessee. Further since the relevant documents for opening of a new bank account were not brought on record and no comparison was made with them, the AO had failed to bring sufficient evidence on record to justify the findings that the assessee opened the bank account under her signature. Therefore no liability could be fastened on the assessee for the deposits made. (AY. 2000-01)

Subhra Agrawal (Mrs) v. DCIT (2016) 47 ITR 283 (Agra)(Trib.)

S. 69A : Unexplained money – Pay order – On the basis of evidence found in the course of search addition was made, since assessee had not established that amount mentioned in pay order was not in nature of income, impugned addition deserved to be upheld. [S. 292C] 1217

On 5-1-2007, Authorised Officer conducted a search under section 132 upon assessee and one 'K', who was colleague of assessee, and seized various documents including a letter dated 12-4-1999, bearing seal of UBS-AG (Union Bank of Switzerland), from residence of 'K'. In said letter, it was stated that pay order in favour of assessee payable in India had expired its encashment period and fresh pay order was in process of being issued. Said letter was written by Chief Manager UBS-AG to assessee. Assessing Officer assessed assessee for Assessment Year 2000-01 and on basis of said letter made a certain addition to his income on account of income from undisclosed sources by way of pay order. Assessee denied any knowledge of aforesaid letter. On appeal the Tribunal held

that the onus to establish nature of money/receipt as being not in nature of income was on assessee and which he had clearly not established, under circumstances, there was no basis to consider amount mentioned in pay order as not received by assessee during relevant assessment year and being not in nature of income therefore, impugned addition deserved to be upheld. (AY. 2000-01)
Hassan Ali Khan v. Dy. CIT (2016) 157 ITD 529 / 180 TTJ 209 (Mum.)(Trib.)

1218 **S. 69A : Unexplained money – Jewellery given to daughter at the time of marriage as per Will – No addition could be made merely on ground that 'Will' was not registered and no probate or letter of Administration had been obtained.**
Allowing the appeal of assessee the Tribunal held that Assessing Officer could not make addition to assessee's income in respect of jewellery given to his daughter at time of marriage as per 'Will' of assessee's mother merely on ground that 'Will' was not registered and no probate or letter of Administration had been obtained. (AY. 2006-07)
Subhash Chander Goel v. ITO (2016) 156 ITD 808 (Chd.)(Trib.)

1219 **S. 69A : Unexplained money – No addition if the difference in stock of gold was reconciled by the Assessee as it had received gold on sale or return basis which was not included in its books as stock.**
During the course of search, there was a difference in the physical stock of gold as against the book stock. The shortage in stock was treated as unaccounted sales by the AO and added to the income of the assessee. Before the CIT(A), the Assessee submitted that the difference in stock was because it had given certain stock to karigars and it had also received certain stock on sale or return basis. While, the CIT(A) accepted that certain stock was kept with karigars, he did not accept that some gold was received on sale or return basis. The ITAT held that the CIT(A) had adopted a pick and choose method and the Director need not have all the minutest details of the stock of gold. The addition was deleted on the basis of the documentary evidence filed by the Assessee which was not controverted by the Department. (AY. 2009-10, 2010-11)
Tribhovandas Bhimji Zaveri (Delhi) P. Ltd. v. ACIT (2016) 45 ITR 636 (Mum.)(Trib.)

1220 **S. 69A : Unexplained money – Negative cash balance was added as unexplained money in the absence of any explanation by the assessee.**
The AO noticed negative cash balance on certain dates, and peak of this negative balance was added and unexplained income. The assessee alleged that the entries were recorded in the books of account on the wrong dates which led to the negative cash balance. The ITAT held that the AO had found specific defects in the cash book which could not be controverted by the Assessee and the addition was upheld. (AY. 2008-09)
Brothers Pharma P. Ltd. v. ITO (2016) 45 ITR 154 (Jaipur)(Trib.)

S.69B. Amount of investments, etc., not fully disclosed in books of account.

S. 69B : Amounts of investments not fully disclosed in books of account – Cost of construction – On the basis of estimate by valuation officer, addition cannot be made – Excess stock of jewellery – Reconciliation filed – Addition was not justified. [S. 132, 158B] 1221

Dismissing the appeal of the revenue the Court held that in the absence of any material document recovered during search, no addition could be made on the basis of valuation report of the Valuation officer. When the assessee has filed the reconciliation statement of jewellary seized, addition was held to be not justified.(AY 1990-91 to 2000-01)

CIT v. S. Jayalakshmi Ammal (2016) 242 Taxman 449 / (2017) 390 ITR 189 (Mad.)(HC)

S. 69B : Amounts of investments not fully disclosed in books of account – Addition deleted if it was merely based on the fact that the Assessee could not submit itemwise details of the seized jewellery. 1222

During the course of search, the AO seized diamond jewellery. The Assessee claimed that the entire jewellery was included in the income declared by it. The AO treated it as unexplained investment u/s. 69B since the assessee could not submit itemwise details of the jewellery. The ITAT deleted the addition and held that the Assessee had included the said diamond jewellery in the declaration by it. (AY. 2003-04, 2005-06 to 2008-09)

Chhaya P. Gangar (Ms.) v. DCIT (2016) 47 ITR 328 (Mum.)(Trib.)

S. 69B : Amounts of investments not fully disclosed in books of account – Substitution of 'full value of consideration received' with 'stamp value' in terms of section 50C, is applicable in hands of seller of property who has to compute capital gains u/s. 48 pursuant to transfer of a capital asset in nature of land or building or both; same cannot be extended in case of purchaser to estimate undisclosed investment. [S.48, 50C, 56(2)(vii)] 1223

The assessee purchased a property for a consideration of ₹ 48 lakhs. The AO observed that the value determined by the stamp valuation authority for the said property was ₹ 1.05 crores and, accordingly treating the same to be the fair market value of the properties. AO. made an addition of ₹ 57.13 lakhs as unexplained investment u/s. 69B. The ITAT held that substitution of 'full value of consideration received' with 'stamp value' in terms of s. 50C, is applicable only in hands of seller of property who has to compute capital gain u/s. 48 pursuant to transfer of a capital asset in nature of land or building or both and same cannot be extended in case of purchaser to estimate undisclosed investment. Where there was nothing on record to show that assessee had made any additional investment in property in addition to what had been stated in books of account, no addition could be made in its hands on basis of stamp duty charged by sub-registrar. S. 56(2)(vii) which provides for substitution of 'stamp value' with 'actual purchase price, in excess of ₹ 50,000' in hands of buyer is applicable only where any immovable property is purchased after 1-10-2009 and since in instant case property had been purchased by assessee in AY. 2006-07, S. 56(2)(vii) could not apply retrospectively. (AY. 2006-07)

Dy. CIT v. Global Mercantiles (P.) Ltd. (2016) 157 ITD 924 (Kol.)(Trib.)

1224 **S. 69B : Amounts of investments not fully disclosed in books of account – Ornaments, watches, cash was found in the course of search – Since income returned by assessee for preceding nine years was meager, impugned addition deserved to be confirmed.**
Assessing Officer on basis of various documents seized on search from assessee made certain addition to his income on account of unexplained ornaments, watches and cash in hand. Assessee stated that he had shown said assets in account books for current assessment year 2000-01 as opening capital carried over from generations as part of family heirlooms. On appeal Tribunal held that since income returned by assessee for nine years preceding current year was meager, being not sufficient for family even to meet two ends, impugned addition deserved to be confirmed. (AY. 2000-01)
Hassan Ali Khan v. Dy. CIT (2016) 157 ITD 529 / 180 TTJ 209 (Mum.)(Trib.)

S. 69C. Unexplained expenditure, etc.

1225 **S. 69C : Unexplained expenditure – Estimation of commission at 5% of receipt by the Assessing Officer was held to be justified.**
Assessee was running a hospital. Statement of assessee's accountant was recorded under section 131 wherein he admitted that assessee had been paying commission to various Doctors for referring patients to hospital. It was further stated that said payments were made in cash and records pertaining to same were not produced for examination of Assessing Officer. In such a situation, Assessing Officer estimated payments of commission at rate of 5 per cent of total receipts. Accordingly, an addition of ₹ 21 lakh was made to assessee's income. On appeal Tribunal restricted said addition to ₹ 5 lakh. On appeal by Revenue allowing the appeal of revenue, the Court held that it was found that normal practice in profession was to give a commission of 10 per cent of billed amount to Doctor referring patients but it was possible that some patients came without reference and that some Doctors did not take such commission. Whether in aforesaid circumstances, estimated addition made by Assessing Officer at rate of 5 per cent was justified and, same was to be restored. (AY. 2005-06)
CIT v. International Institute of Neuro Sciences & Oncology Ltd. (2016) 243 Taxman 364 (P&H)(HC)

1226 **S. 69C : Unexplained expenditure – Payment of commission – Refusal of cross examination of the agents – Natural justice was not vilated – Addition was held to be justified. [S.131, S.148, Evidence Act, 133]**
Assessee claimed deduction of payment of certain commission to three companies which was accepted in the original assessment. Thereafter, a search was conducted on the entities to whom commission was paid and during the search, managing director of the said three payee companies admitted in a statement that the transactions with the assessee were hawala entries. Thereafter the assessment of the assessee was reopened. During the reassessment proceedings, assessee was offered an opportunity to cross-examine but assessee expressed its inability to cross-examine at a short notice of two working days and assessment was finalized. Tribunal restored the matter back to the AO for cross examination. Assessee was asked to cross-examine 'but it refused to cross-examine him on the ground of his being stranger to the transaction. AO finalized the

assessment after making the addition. High Court held that, *de hors* the evidence was, by itself, sufficient to draw an adverse inference against the assessee that the payments of the commission were fictitious. It was further held that, since the assessee chose not to cross examine that means, they have admitted the said statement. High Court also held that there was no violation of principles of natural justice and the uncontroverted statements were sufficient to substantiate the case of the revenue against the assessee. (AY. 1981-82, 1983-84)
Roger Enterprises (P.) Ltd. v. CIT (2016) 382 ITR 639 / 238 Taxman 434 / 134 DTR 337 (Delhi)(HC)

S. 69C : Unexplained expenditure – Birthday expenses – Addition was reduced to half – Held to be justified. 1227
AO has made addition to the income of the assessee on account of expenses incurred on birthday party of his grand son. On appeal Tribunal reduced the addition to half holding that the invitation to birth day party was from son and daughter-in-law of assessee. On appeal the High Court affirmed the view of the Tribunal. (AY. 2007-08)
Vijay Agarwal v. CIT (2016) 236 Taxman 542 (P& H)(HC)

S. 69C : Unexplained expenditure – Investments – Explanation regarding amounts in the name of sundry creditors – Amounts representing credits can be added to total income – Matter remanded to permit parties to prove genuineness of creditors. [S. 68, 69] 1228
Allowing the appeal of assessee, the Court held that; If sundry credits are not proved by the assessee addition can be made by the Assessing Officer by resorting to section 69C. Held, that the Tribunal had found on factual scrutiny that the sundry creditors indicated in the books of account of the assessee were not proved in their entirety and the genuineness of the sundry creditors being a question of fact it was required to be examined by the Assessing Officer. It remitted the matter to the Assessing Officer reserving liberty to the Revenue as well as the assessee to prove the genuineness of sundry creditors. This was justified. (AY. 2003-04, 2004-05)
P. M. Abdulla v. ITO (2015) 60 taxmann.com 52 / (2016) 380 ITR 125 / 139 DTR 124 (Karn.)(HC)

S. 69C : Unexplained expenditure – Bogus purchases – Estimation of 25 % of purchases was held to be justified. [S. 158BC] 1229
Dismissing the appeal of the assessee the Court held that the Tribunal was justified in estimating 25% of alleged bogus purchases.
N. K. Industries Ltd. v. Dy. CIT (2016) 142 DTR 162 / 72 taxmann.com 289 / (2017) 292 CTR 354 (Guj.)(HC)

S. 69C : Unexplained expenditure – Bogus purchases – Estimation of GP at the rate of 12.5% was held to justified. [S. 133(6)] 1230
Tribunal held that though S. 133(6) notices were returned unserved and the assessee could not produce the alleged bogus hawala suppliers, the entire purchases cannot be added as undisclosed income. The addition has to be restricted by estimating Gross

profit ratio on the purchases from the alleged accommodation entry providers. (ITA No. 4736 & 52047/Mum/2014, dt. 14.12.2016)(AY. 2010-11)
Ashwin Purshotam Bajaj v. ITO (Mum.)(Trib.); www.itatonline.org

1231 **S. 69C : Unexplained expenditure – License fee – Stamp duty charges – Additions were made on presumptions, matter was remanded.**
The Assessing Officer has made the addition on the presumption that the assessee might have paid the licence fee and not debited to P&L, account. Tribunal remanded the matter by observing that since neither the assessee provided any evidence to support nor his stand or revenue disproved by assessee. Matter remanded for fresh consideration. (AY. 2005-06)
Ramesh D. Murpana v. ACIT (2016) 159 ITD 1019 (Mum.)(Trib.)

1232 **S. 69C : Unexplained expenditure – Bogus purchases – The AO cannot treat purchases as bogus (accommodation entries) merely on the basis of information received from the sales – tax department and without conducting independent inquires. [S. 37(1)]**
Dismissing the appeal of revenue ; the Tribunal held that The AO cannot treat purchases as bogus (accommodation entries) merely on the basis of information received from the sales-tax department and without conducting independent inquires especially when the assessee has discharged its primary onus of showing books of account, payment by way of account payee cheque and producing bills for purchase of goods. (ITA No. 5149/Mum/2014, & ITA No. 4260/mum/2015 dt. 16.09. 2016)(AY. 2011-12 & 2010-11)
DCIT v. Shivshankar R. Sharma (Mum.)(Trib.), www.itatonline.org

1233 **S. 69C : Unexplained expenditure – Addition based on entry in diary maintained by college accountant cannot be upheld without any corroborative evidence.**
A search was conducted in the premises of the institution to whom the Assessee had given donation/capitation fee for admission of her son in a medical college. The AO reopened the assessment of the assessee. The assessee was unable to provide satisfactory explanation as to the source of the capitation fee / donation and hence addition u/s. 69C was made by the AO. The ITAT deleted the addition and held that the same was based on the diary maintained by the accountant of the college and not supported by any other corroborative evidence. ((AY. 2001-02)
Huseina Dawoodi (Dr.) v. ITO (2016) 47 ITR 735 (Mum.)(Trib.)

1234 **S. 69C : Unexplained expenditure – Bribe – VCD – Best Bakery case – Supreme Court in criminal proceedings – Addition cannot be made without corroborating it with any other evidence. [S. 69A]**
AO added an amount as unexplained payment made by assessee on basis of a VCD found in famous 'Best Bakery case' without corroborating it with any other evidence. Tribunal held that action of AO was held to be not justified. Merely on the basis of observation of Supreme Court in criminal proceedings additions cannot be made.(AY. 2005-06)
Mahendrabhai B. Shrivastav v. ITO (2016) 158 ITD 755 / 181 TTJ 713 / (2017) 152 DTR 72 (Ahd.)(Trib.)
Chandrakant R. Shrivastav v. ITO (2016) 158 ITD 755 / 181 TTJ 713 / (2017) 152 DTR 72 (Ahd.)(Trib.)

S. 69C : Unexplained expenditure – Personal expenditure – Addition of ₹ 7.50 lakhs was confirmed as against addition of ₹ 28.50 lakhs to income of assessee on account of life style other expenditure, 1235

Assessing Officer made an addition of ₹ 28.50 lakhs to income of assessee on account of life style other expenditure. Tribunal held that said estimate of ₹ 28.50 lakhs, to be valid in law, had to be an informed one, taking into account different variables or attributes on which it depended. Since no such exercise had been attempted by revenue, addition on account of lifestyle required to be made on basis of assessee's own estimate at ₹ 7.50 lakhs. (AY. 2000-01)

Hassan Ali Khan v. Dy. CIT (2016) 157 ITD 529 / 180 TTJ 209 (Mum.)(Trib.)

S. 69C : Unexplained expenditure – Addition on account of marriage expenses of daughter on basis of surmises and conjectures was deleted. 1236

Allowing the appeal of assessee the Tribunal held that Assessing Officer without making a reasonable estimate of expenses incurred by assessee on marriage of his daughter on basis of material on record, could not make addition under section 69C merely on basis of surmises and conjectures. (AY. 2006-07)

Subhash Chander Goel v. ITO (2016) 156 ITD 808 (Chd.)(Trib.)

S. 69C : Unexplained expenditure – Assessment – Bogus Sales and purchases – Addition solely on the basis of information received from the sales – tax department is not sustainable. Suspicion of the highest degree cannot take the place of evidence. [S.143(3)] 1237

Allowing the appeal of assessee the Tribunal held that the AO had made the addition on the basis of information received from the Sales tax department, but, he did not make any independent inquiry. He did not follow the principles of natural justice before making the addition. The First Appellate Authority had reduced the addition to 20%, but he has not given any justification except stating that same was done to plug the probable leakage revenue. Considering the peculiar facts and circumstances of the case, we are reversing the order of the First Appellate Authority. (ITA No. 4547/2545/1275/ Mum/2014, dt. 01.01.2016)(AY. 2009-10)

Hiralal Chunilal Jain v. ITO (Mum.)(Trib.); www.itatonline.org

S. 70. Set off of loss from one source against income from another source under the same head of income.

S. 70 : Set off of loss – One source against income from another source – Same head of income – Losses in Futures & Option derivative trading business could be set off against short-term capital gains from sale of shares and other income earned by assessee except salary income; unless return is filed within due date unadjusted loss could not be carried forward. [S. 71, 73, 80, 139(1)] 1238

Tribunal held that losses in Futures & Option derivative trading business which are non-speculative business losses, would be set off against capital gains on sale of shares and other income earned by assessee; however, same would not be set off against salary income by virtue of section 71(2A) debarring such adjustment. Since assessee did not

file return of income within due date as prescribed under section 139(1), he would not be allowed to carry forward unadjusted business loss arising from Futures & Option derivative trading business chargeable to tax under head 'Profits and gains of business or profession' which remained unadjusted. (AY. 2008-09)
Deepak Sogani v. DCIT (2016) 158 ITD 533 (Mum.)(Trib.)

1239 **S. 70 : Set off of loss – One source against income from another source – Same head of income – Loss of 10A eligible unit allowed to be set off against profit of non-10A unit. [S. 10A, 72]**
The Assessee had two units one eligible for deduction u/s. 10A which had incurred a loss and another non-eligible unit. The assessee set-off the loss from the eligible unit against the profit of the non-eligible unit. The ITAT allowed the claim of the Assessee based on the circular of the CBDT, which stated that loss of eligible units would be allowed for carry forward and set off u/s. 72. (AY. 2008-09)
NEC HCL System Technologies Ltd. v. ACIT (2016) 176 TTJ 436 (Delhi)(Trib.)

S. 71. Set-off of loss from one head against income from another.

1240 **S. 71 : Set off of loss – One head against income from another – Free trade zone – Loss suffered by assessee in a unit entitled for exemption under section 10A cannot be set off against income from any other unit not eligible for such exemption. [S.10A]**
Tribunal held that loss suffered by assessee in a unit entitled for exemption under section 10A cannot be set off against income from other unit which is not eligible for such exemption. (AY. 2008-09)
Super Auto Forge (P.) Ltd. v. ACIT (2016) 157 ITD 467 (Chennai)(Trib.)

S. 72. Carry forward and set off of business losses.

1241 **S. 72 : Carry forward and set off of business losses – Cash credits – As income not classifiable under any heads of income as per section 14, such income not eligible to set off brought forward business losses and unabsorbed depreciation. [S.14, 68]**
A sum of ₹ 5,13,55,093/- was found credited in the books of account of the assessee as commodity trading profit, said income was set off by the assessee against business losses for the year. AO during assessment proceedings found that assessee was not a client of any member on the Exchange and concluded that the transactions showing generation of commodity trading profit was bogus. CIT(A) upheld the order of AO in totality, but the Tribunal in assessee's appeal, held in favour of assessee so far as set off of losses & unabsorbed depreciation against the unexplained cash credit income was concerned. High Court held that once the income was treated as non-genuine and addition under section 68 was confirmed by the Tribunal, Tribunal was not justified in allowing the set off of loss against it and thereby set aside the order of Tribunal to that extent. (AY. 2010-11)
CIT v. Kerala Sponge Iron Ltd. (2016) 133 DTR 265 (Ker.)(HC)

S. 72A. Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc.

S. 72A : Carry forward and set off of accumulated loss and unabsorbed depreciation – Amalgamation. 1242

The High Court held that 'commencement of business' is different from 'engaged in business'. It is the latter phrase which has been used in Section 72A(2)(a). 'Commencement of business' may be from the date when production may start but to say that a party would be 'engaged in business' only from the date it commences production, would not be correct. A party engages itself in a particular business from the day when it gets involved in setting up of the business. The Court further held that, a perusal of Sub-section (2) of Section 72A of the Act would go to show that it is the loss of the amalgamating company as a whole, which is set off or carried forward, and not of a particular unit or division of that amalgamating Company. It is the amalgamating company, which should be in business for three years or more, prior to the date of amalgamation, and not a particular unit or division of that amalgamating company. (AY 2005-06)

CIT v. KBD Sugars & Distilleries Ltd. (2016) 129 DTR 227 (Karn.)(HC)

S. 73. Losses in speculation business.

S. 73 : Losses in speculation business – Speculation business – Allotment of shares cannot be termed as purchase, then the assessee cannot be said to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares. 1243

Assessee, a dealer in chemicals, applied in public issue of certain companies and was allotted shares which it sold and suffered loss. Assessee claimed that application of shares from primary market and loss incurred on sale of such shares would not fall within purview of being categorized as speculation loss under Explanation to section 73. Assessing Officer has held that that the loss was speculative nature, which was confirmed by the Tribunal. On appeal by assessee, allowing the appeal of assessee the Court held that the allotment of shares cannot be termed as purchase, then the assessee cannot be said to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares. Thus, it shall not be covered under Explanation to Section 73 and therefore the sale of such shares would not become the speculation business under the said Explanation. (AY. 2001-02)

AMP Spinning & Weaving Mills (P.) Ltd. v. ITO (2016) 243 Taxman 1 / (2017) 393 ITR 349 / 150 DTR 390 (Guj.)(HC)

S. 73 : Losses in speculation business – Sale of shares of sister concern – Assessee – company had properly delivered shares at time of selling, transaction would not come under provisions of section 43(5) of the Act and hence case of assessee would not be covered under Explanation to section 73 of the Act. [S. 2(13), 43(5)] 1244

On appeal by the assessee, the High Court held that in the present case, as the main activity is only in manufacture and sale of yarn, the purchase of shares, having not

been regular, should be construed only as an investment. The High Court further held that since there is no systematic or organised course of activity, no regularity in the transaction and since the purchase is only a one-time activity, it cannot be construed as a speculative transaction. When the purchase of shares cannot come within the definition of business, under section 2(13) of the Act, there is no point in contending that the assessee is engaged in the business much less in a speculative business. Thus, the High Court held that the AO ought to have allowed the loss, as short-term capital loss and set off against the other business income of the assessee-company. When the provisions of section 43(5) of the Act is not applicable, the contention of the revenue that the case of the assessee-company would be covered under explanation to section 73 of the Act, cannot be accepted. In the result, the appeal filed by the assessee is allowed and the order passed by the Tribunal is set aside (AY. 1990-91)
Rajapalayam Mills Ltd. v. DCIT (2016) 241 Taxman 50 / 293 CTR 518 (Mad.)(HC)

1245 **S. 73 : Losses in speculation business – Derivatives – Losses incurred on account of derivatives will be deemed to be business loss in view of proviso to section 43(5) and not speculation loss. [S.43(5), 70]**
The assessee-company was dealing in settlement of future and option/derivatives and suffered loss. AO treated the said loss as speculation loss by applying provision of Explanation to section 73. Department tried to argue that provision of section 73 are more specific as compared to general provisions of section 43(5). High Court held that, it cannot be said that section 43(5) is a general provision and the provision contained in section 73 is specific in nature. On the contrary, the object of sub-section (5) of section 43 is to define 'speculative business'. It was held that once the transaction forms part of a deemed business under relevant clauses of section 43(5), then the losses of such business can be set off against income of any other business. In so far as Explanation to section 73 is concerned, the Court held that, it does not apply to derivatives, on the contrary applies to shares and that derivatives cannot be treated at par with shares. Accordingly, the Court held that, loss from derivatives is a business loss and not a speculative loss. (AY. 2009-10)
Asian Financial Services Ltd. v. CIT (2016) 240 Taxman 192 / (2017) 148 DTR 105 / 293 CTR 240 (Cal.)(HC)
Editorial: SLP of revenue was admitted CIT v. Asian Financial Services Ltd. (2016) 243 Taxman 147 (SC)

1246 **S. 73 : Losses in speculation business – Loss arising on dealing in units of mutual funds/bonds would not be considered as loss in speculation business.**
Dismissing the appeal of revenue, the Court held that Loss arising on dealing in units of mutual funds/bonds would not be considered as loss in speculation business. (AY. 2004-05)
CIT v. Hertz Chemicals Ltd. (2016) 386 ITR 39 / 239 Taxman 431 (Bom.)(HC)
Editorial : SLP of revenue is admitted CIT v. Hertz Chemicals Ltd. (2017) 245 Taxman 272 (SC)

S. 73 : Losses in speculation business – Principal business is trading of shares, loss incurred in share trading will not be treated as speculation business loss – Amendment inserted in Explanation to S. 73 by Finance (No. 2) Act, 2014 w.e.f. 1-4-2015 is clarificatory in nature. 1247

Allowing the appeal of the assessee, the Tribunal held that if principal business is trading of shares, loss incurred in share trading will not be treated as speculation business loss. Amendment inserted in Explanation to S. 73 by Finance (No. 2) Act, 2014 w.e.f. 1-4-2015 is clarificatory in nature and would therefore operate retrospectively from 1-4-1977 from which date Explanation to S. 73 was placed on statute. (AY. 2009-10)

Fiduciary Shares & Stock (P.) Ltd. v. ACIT (2016) 159 ITD 554) / 181 TTJ 750 (Mum.)(Trib.)

S. 73 : Losses in speculation business – If the assessee manages his transactions of sale and purchase of shares in cash segment and in future segment as a composite business, the transactions cannot be segregated to arrive at profit or loss in each segment separately. The provisions of the Income-tax Act cannot be interpreted to the disadvantage of the assessee and to segregate the transactions in cash and future segment which will be against the spirit of the taxation law. 1248

Dismissing the appeal of the revenue the Tribunal held that the peculiarity of the business of the assessee is such that the transactions carried out by the assessee in cash segment and in future segment cannot be segregated. The business of the assessee survives on the ultimate resultant figure arrived at after setting off/adjusting of the profit and loss from each segment. It cannot be said that the transactions in each segment done by the assessee are independent of each other. Before parting we would like to further add that certain exceptions have been carved out under section 43(5) *vide* which certain transactions in derivative named as 'eligible transactions,' done on a recognized stock exchange, subject to fulfilment of certain requirements, are deemed to be non-speculative. The said provisions have been inserted in the Act for the benefit of the assessees keeping in view the fact that in such type transactions on recognized stock exchange, the chance of manipulating and thereby adjusting the business profits towards speculative losses by the assessee is negligible because such transactions are done on recognized stock exchange and there are less chances of manipulation of figures of profits and losses. These provisions have been inserted for the benefit of the assessee so that the assessee may be able to set off and adjust his profit and losses from derivatives in commodities against the normal business losses. These provisions are intended to ease out the assessee from the difficulties faced due to the stringent provisions separating the speculative transactions from the normal transactions. However, these exclusions given to the assessee cannot be allowed to be so interpreted to the disadvantage of an assessee so as to give it a different meaning and thereby denying the assessee the set off of otherwise eligible business loss from one segment as against the other segment, especially when the activity done by the assessee is a composite activity and profit and loss in one segment not only depends but the very transaction is done taking into consideration not 'expected' but certain future profit or loss in other segment. (ITA No. 3654 & 3660/M/2014, dt. 28.12.2016)(AY. 2009-10)

J. M. Financial Service Ltd. v. JCIT (Mum.)(Trib.); www.itatonline.org

1249 **S. 73 : Losses in speculation business – Shares – Since assessee was a non-banking finance company engaged in principal business of granting loans and advances, Explanation to section 73 would not apply to its case. [S. 43(5)]**

Assessee-company was engaged in trading of shares, securities and derivatives. Assessee filed its return claiming set off of share trading loss against profit derived from derivative trading. Assessing Officer took a view that loss in question was speculation loss and in view of Explanation to section 73, same could not be allowed to be set off against other business profits. Since assessee was a non-banking finance company engaged in principal business of granting loans and advances, Explanation to section 73 would not apply to its case, therefore, assessee's claim for set off of loss was to be allowed. (AY 2008-09)

ITO v. Snowtex Investment Ltd. (2015) 174 TTJ 875 (Kol.)(Trib.)

1250 **S. 73 : Losses in speculation business – The amendment to Explanation to s. 73 by Finance (No. 2) Act, 2014 w.e.f. 01.04.2015 is clarificatory in nature and operates retrospectively from 01.04.1977, being the date the Explanation to s. 73 was placed on the statute. Therefore, the loss incurred in share trading business by companies whose principal business is trading in shares will not be treated as speculation loss but as normal business loss and the same can be adjusted against income from business or other sources. [S. 28(i), 56]**

Allowing the appeal of assessee the Tribunal held that;

(1) The intention of the Legislature, from a perusal of the Wanchoo Committee Report and CBDT Circular No. 204 dated 24.07.1976, was not to treat purchase and sale of shares by companies whose main business is trading in shares as speculative business and therefore the Explanation to section 73 of the Act should be read only to the extent of the purpose for which it was inserted. The subsequent amendment made by Finance (No.2) Act, 2014 in the Explanation to section 73 of the Act appears to be made in order to clarify the real intention behind the insertion thereof, by removing the obvious hardship caused to various assessees whose main business is trading in shares. The amendment has removed the anomaly and brought the ambit of the Explanation to section 73 of the Act in line with the intention of the Legislature by placing the companies whose principal business is trading in shares as part of the exception to Explanation to section 73 of the Act, because such companies were not the companies for whom the Explanation was inserted.

(ii) The insertion of the amendment in the Explanation to section 73 of the Act by the Finance (No. 2) Act, 2014, in our view, is curative and classificatory in nature. If the amendment is applied prospectively from A.Y. 2015-16, a piquant situation would arise that an assessee who has earned profit from purchase and sale of shares in A.Y. 2015-16 would be treated as normal business profit and not speculation business profit in view of the exception carried out by the amendment in Explanation to section 73 of the Act. In these circumstances, speculation business loss incurred by trading in shares in earlier years will not be allowed to be set off against such profit from purchase and sale of shares to such companies in A.Y. 2015-16. For this reason also, the amendment inserted to Explanation to

section 73 of the Act by Finance (No. 2) Act, 2014 is to be applied retrospectively from the date of the insertion to Explanation to section 73 of the Act. (ITA No. 321/Mum/2013, dt. 13.05.2016)(AY. 2009-10)

Fiduciary Share & Stock P. Ltd. v. ACIT (Mum)(Trib.); www.itatonline.org

S. 73 : Losses in speculation business – Neither trading in shares done by taking delivery, nor derivative transaction (Future and options) in shares are speculative transaction; loss from one can be set off from profit from other. [S. 43(5)] 1251

The assessee is engaged in broking business and also in hedging and arbitrage business. The assessee incurred loss in dealing in shares which was claimed as regular business of assessee. In respect of non-delivery based transactions, the assessee had profit on futures and option dealings while incurred loss on NSE and BSE capital market. AO treated losses on both delivery and non-delivery based share transactions as speculation loss hereby making the assessee ineligible to set off the same against the regular business profit derived from derived transaction. On appeal CIT(A) upheld the order of AO. On second appeal Tribunal held that 'Trading of shares which is done by taking delivery does not come under purview of section 43(5); similarly, as per sub-clause (d) of section 43(5), derivative transaction in shares is also not speculation transaction as defined in section 43(5); and therefore, both profit/loss from all share delivery transactions and derivative transactions have same meaning as far as section 43(5) is concerned loss from share dealing should be allowed to be set off from profits from F & O in share transactions. Thus, before application of Explanation to section 73, aggregation of business profit or loss from these transactions is to be worked out irrespective of fact whether it is from share delivery transaction or derivative transactions. (AY. 2008-09)

Lohia Securities Ltd. v. Dy. CIT (2016) 157 ITD 265 (Kol.)(Trib.)

S. 73 : Losses in speculation business – Dividend and interest income entitled to set off the loss arising out of trading in futures and options/derivatives against other income. [S. 56, 72] 1252

During year the assessee earned dividend income and interest income and it claimed set off of loss arising out of trading in Futures and Options/derivatives against other income. Lower authorities disallowed the claim. On appeal the Tribunal held that; assessee's case would fall within purview of exception carved out in Explanation to section 73, and, therefore, it was entitled to set off of loss against other income (AY. 2006-07)

A. K. Capital Markets Ltd. v. Dy. CIT (2016) 156 ITD 528 (Delhi)(Trib.)

S. 73 : Losses in speculation business – Where the assessee is a dealer in shares, the entire business of share trading and derivatives should be treated as a composite business and aggregated before applying Explanation to S. 73. [S. 43(5)] 1253

Allowing the appeal of assessee the Tribunal held that; The assessee was a member of two recognized Stock Exchanges – BSE & NSE. Both Exchanges had two separate segments i.e. Capital Market Segment and Derivative Segment. In Capital market segment, assessee made trading of equity shares whereas in Derivative segment, future and options. The AO held that the transactions done by the assessee which were not covered u/s. 43(5) shall be hit by explanation to section 73 and shall be

treated as speculative in nature and accordingly he disallowed a sum of ₹ 56,94,166/- as deemed speculative loss, applying Explanation to section 73. CIT(A) held that derivative transactions were covered by sec. 43(5)(d) and therefore, could not be held as speculative transactions. On the other hand, share trading done in the cash market is hit by explanation to section 73, and therefore, any loss/profit arising therefrom shall be deemed to be speculative, and could only be set off against income of subsequent years. Held, by the Tribunal, where the assessee is a dealer in shares, the entire business consists in sale purchase of shares, then, it should be treated as composite business. Also, assessee's stand of treating the whole business as composite business has always been accepted by the revenue in earlier as well as subsequent years. Accordingly, whole of assessee's business was treated as speculative and loss of current year was allowed to be set off against profits of the current year. (ITA NO.4053/Mum/2013, dt. 16.03.2016) (AY. 2009-10)
J.G.A. Shah Brokers P. Ltd. v. DCIT (Mum.)(Trib.); www.itatonline.org

S. 74. Losses under the head "Capital gains".

1254 **S. 74 : Losses – Capital gains – Deemed short term capital gains under section 50 can be set off against brought forward long term capital gains, if character of such gain is on account of sale of long term capital asset. [S. 50]**
The assessee had set off brought forward long term capital losses against the deemed short term capital gains which arose on account of the sale of depreciable asset. The AO disallowed the set off of brought forward long term losses as the same were not permitted under section 74 of the Act. On appeal the CIT(A) and Tribunal ruled in favour of the assessee by following decision in case of *CIT v. ACE Builders (2006) 281 ITR 210 (Bom.)(HC)* and *Komac Investments and Finance Pvt. Ltd. (2011) 132 ITD 290 (Mum.)(Trib)*. Aggrieved by the Tribunal's decision the Revenue was in appeal before the High Court.
High Court after placing reliance on the above decisions held that the deeming fiction under section 50 is restricted only to the mode of computation of capital gains contained under sections 48 and 49 of the Act. It does not change the character of the capital gain from long term gain to short term gain for purpose other than section 50 of the Act. Thus for the purpose of section 74 of the Act, the deemed short term capital gain continues to be long term capital gain. As a result the Revenue's appeal was dismissed by the High Court. (AY. 2005-06)
CIT v. Parrys (Eastern) (P) Ltd. (2016) 384 ITR 264 / 238 Taxman 14 (Bom.)(HC)

1255 **S. 74 : Losses – Capital gains-loss arising from transfer of short-term capital asset, which are brought forward from earlier years, can be set-off against capital gain assessable for subsequent assessment year in respect of any other capital asset. [S. 70]**
Allowing the appeal of assessee the Tribunal held that in view of provisions of section 74(1)(a) loss arising from transfer of short-term capital asset, which are brought forward from earlier years, can be set-off against capital gain assessable for subsequent assessment year in respect of any other capital asset which could be either long-term capital gain and short-term capital gain. (AY. 2010-11)
GSB Capital Markets Ltd. v. Dy. CIT (2016) 156 ITD 770 (Mum.)(Trib.)

S. 79. Carry forward and set-off of losses in the case of certain companies.

S. 79 : Carry forward and set off of losses – Change of hundred per cent shareholding and beneficial ownership of shares in assessee – No question of piercing veil at instance of assessee to show ultimate beneficial ownership with parent company arises – Loss was not allowed to be set off. 1256

Dismissing the appeal of assessee the Court held that having examined the facts as well as the concurrent orders of the AO and the ITAT, the Court finds that there was indeed a change of ownership of 100% shares of Yum India from Yum Asia to Yum Singapore, both of which were distinct entities. Although they might be AEs of Yum USA, there is nothing to show that there was any agreement or arrangement that the beneficial owner of such shares would be the holding company, Yum USA. The question of 'piercing the veil' at the instance of Yum India does not arise. In the circumstances, it was rightly concluded by the ITAT that in terms of Section 79 of the Act, Yum India cannot be permitted to set off the carry forward accumulated business losses of the earlier years. (AY. 2009-10)

ITO v. Yum Restaurants (I) P. Ltd. (2016) 380 ITR 637 / 131 DTR 23 / 237 Taxman 652 / 283 CTR 129 (Delhi)(HC)

S. 80C : Deduction in resect of life insurance premia, deferred annuity, contribution to provident fund, subscription to certain equity shares or debentures, etc.

S. 80C : Deduction – Deduction for repayment of loan is not available when loan was taken after acquisition of the house property. [S. 24, 80C(2)(xviii)] 1257

Assessee, an individual, filed return of income claiming deduction for repayment of loan under section 80C(2)(xviii) of the Act. The Assessing Officer denied the deduction on the ground that the property was purchased in November 2005 and loan was taken only in December 2005. The CIT(A) and Tribunal upheld the order of the Assessing Officer. On appeal, the High Court held that deduction under section 80C(2)(xviii) is available only if loan was utilized for acquisition of the property therefore, assessee was not entitled to claim the deduction under section 80C. (AY. 2007-08)

Vijay Aggarwal v. CIT (2016) 236 Taxman 542 / 286 CTR 452 (P&H)(HC)

S. 80C : Deduction – Repayment of loan acquired for the property income from which is chargeable under 'income from house property" – Deduction is allowable. [S. 22, 24] 1258

Assessee was joint owner of farm land that was acquired by raising a house loan from a bank. The owners entered into a development agreement for construction of farm house on property. The developer was entitled to 70% of the rent and joint owners were entitled to 30% of the rent received from the farm house. AO rejected deduction claimed u/s. 80C on the ground that loan amount was not spend on construction of farm house. CIT(A) upheld order of AO. On Appeal, the Tribunal held that Explanation to the proviso to section 24 clarifies that the property can either be acquired or constructed with borrowed capital, no requirement/condition that property must be acquired as well as constructed with borrowed capital. Assessee borrowed the amount for acquiring the property, income from which was assessed under the head

"Income from house property" and made the repayment of the loan. Hence deduction u/s. 80C allowed. (AY. 2010-11)
Samiksha Mahajan (Mrs.) v. ACIT (2016) 47 ITR 59 (Delhi)(Trib.)
Anita Rani (Mrs.) v. ACIT (2016) 47 ITR 59 (Delhi)(Trib.)

S. 80G. Deduction in respect of donations to certain funds, charitable institutions, etc.

1259 **S. 80G : Donation – Refusal to renew approval without assigning reasons was held to be not valid. [S. 2(15)]**
Dismissing the appeal of revenue the Court held that the order of the DIT(E) had been passed without specifying which of the objects were not charitable in nature and in what way. The proviso to section 2(15) was inserted with effect from April 1, 2009. It had also not been mentioned or clarified in the order why on the same objects the trust had been granted exemption under section 80G earlier. Moreover construction of a prayer hall or encouraging meditation yoga, etc., would not be religious activities. The Tribunal was justified in setting aside the order of the DIT(E).
CIT v. Shree Public Charitable Trust (2016) 388 ITR 222 (Karn.)(HC)

1260 **S. 80G : Donation – Renewal of registration – Non-maintenance of accounts pertaining to grant received from Government – Matter remanded to ITAT to re-examine the facts and re-consider the grant of renewal of registration under section 80G. [S. 80G(5)(i)]**
The assessee-society had filed an application for renewal of registration granted under section 80G. The Commissioner rejected the application on the ground that the receipt of grant from the Government towards vermiculture project and expenditure incurred from the same were not accounted for in the books of the society. On appeal before the Tribunal, the Tribunal held that the assessee is entitled to renewal of registration under section 80G of the Act. On further appeal before the High Court by the Revenue, the matter was remanded back to the Tribunal to re-decide the matter on merits as the Tribunal, in the earlier occasion, overturned the findings of the Commissioner without appreciating the facts and unsupported by reasons substantiating the same.
CIT v. Vijaya Mahantesh Vidyavardak Sangha (2016) 236 Taxman 414 (Karn.)(HC)

1261 **S. 80G : Donation – Once registration u/s. 12AA has been granted to a company incorporated u/s. 25 of Companies Act, 1956, it cannot be denied approval u/s. 80G(5)(vi) unless there is non-fulfilment of conditions specified in S. 80G(5). [S. 12AA]**
Allowing the appeal of the assessee the Tribunal held that Once registration u/s. 12AA has been granted to a company incorporated u/s. 25 of Companies Act, 1956, it cannot be denied approval u/s. 80G(5)(vi) unless there is non-fulfilment of conditions specified in s. 80G(5).
Hemdha Medi Resources (P.) Ltd. v. CIT (2016) 159 ITD 627 (Jaipur)(Trib.)

1262 **S. 80G : Donation – Rule 11AA(6) – Failure by authorities to pass order within prescribed time of six months as per rule – Order rejecting approval barred by limitation – Registration granted under Section 12A still subsisting**
The assessee submitted an application dated April 23, 2011 for grant of approval under Section 80G(5)(vi) of the Act. The AO rejected the application by an order dated May

31, 2012 which was beyond the prescribed limit of six months as mandated by rule 11AA sub-rule (6) of the Income-tax Rules, 1962. On appeal to Tribunal, it was held that since the registration granted to the assessee under Section 12A of the Act as charitable association was existing and had not been withdrawn or cancelled till date, grant of approval under Section 80G could not be denied or rejected. The assessee had done what was expected from it under the relevant provisions of the Act and the rules made thereunder. It further held that the authority had failed to take appropriate action within the prescribed limit under rule 11AA(6) and hence the order was barred by limitation and not sustainable in law. The assessee was therefore entitled to approval under Section 80G of the Act.
S.J.A Alumi Association v. CIT (2016) 47 ITR 274 (Mum.)(Trib.)

S. 80G : Donation – Approval of institution – Disqualification of religious trusts – Trust registered as religious trust – Not spending any amount for religious purposes or activities – Trust entitled for registration. [S. 80G(5)] 1263
On appeal, the Tribunal held that though the assessee was registered as a religious trust its income and expenditure account showed that it had spent amount on education, medical relief and relief to the poor. Hence, it was eligible for the benefits of section 80G(5B). The Commissioner was directed to grant section 80G(5) registration to the assessee. (AY. 2015-16)
Yamunaji Mandir Trust v. CIT (2016) 46 ITR 283 (Rajkot)(Trib.)

S. 80HH. Deduction in respect of profits and gains from newly established industrial undertakings or hotel business in backward areas.

S. 80HH : New industrial undertakings – Not necessary that setting up of industry and manufacturing activity should take place simultaneously – Undertaking set up in accounting year relevant to AY. 1980-81 – Manufacturing activity started in accounting year relevant to AY. 1985-86 – Entitled to deduction. [S. 80I] 1264
Court held that, since the assessee's industry was already in existence prior to insertion of section 80-I of the Act, the benefit of the provisions of section 80-I could not be given. As regards claim under section 80HH is concerned, it is not necessary that setting up of industry and manufacturing activity should take place simultaneously. Undertaking set up in accounting year relevant to AY. 1980-81 and Manufacturing activity started in accounting year relevant to AY 1985-86. Assessee is entitled to deduction for the AYs. 1985-86 and 1987-88. (AY. 1985-86 to 1990-91)
U.P. Transformers (I) P. Ltd. v. CIT (2016) 382 ITR 66 / 137 DTR 273 / 287 CTR 450 (All.)(HC)

S.80HHB: Deduction in respect of profits and gains from projects outside India.

S. 80HHB : Foreign projects – Transfer from general reserve account after specified period of five years – Not entitle to deduction. 1265
Assessee transferring from general reserve account after period of five years hence held to be not eligible for deduction. (AY. 1983-84)
Reliance Infrastructure Ltd. v. CIT (2016) 76 taxmann.com 257 / (2017) 390 ITR 271 (Bom.)(HC)

S. 80HHC. Deduction in respect of profits retained for export business.

1266 **S. 80HHC : Export business – Netting of interest for computing deduction was held to be justified.**

The issue in the appeal was whether the Tribunal was correct in law in directing the AO to allow netting of interest for computing deduction under section 80HHC of the Act. In this regard, the Supreme Court placed reliance in the case of *ACG Associated Capsules (P) Ltd v. CIT (2012) 343 ITR 89 (SC).* However the Revenue had argued the correctness of the order of the High Court and contended that the High Court had made an error in framing the question and answering the same. In this regard, the Supreme Court held that in the present appeal the issue was the correctness of the opinion of the High Court and if the Revenue had any grievance with regard to the question framed and the relevance thereof, the Revenue could take out remedies available to it under law including moving to High Court by way of review. Thus the appeal of the Revenue was disposed of by the Supreme Court.

Liberty Footwear Co. v. CIT (2016) 383 ITR 195 / 238 Taxman 89 / 286 CTR 369 / 136 DTR 31 (SC)

1267 **S. 80HHC : Export business – Commission – Deduction of 90% has to be on net commission and not on gross commission.**

Following the ratio in *ACG Associated Capsules Pvt. Ltd. v. CIT (2012) 343 ITR 89 (SC)*, the Apex Court held that the deduction of 90% has to be on net commission not on gross commission. Order of High Court was set aside and remanded the matter to the Assessing Officer for afresh consideration. (AY 1993-94, 1994-95)

Veejay Marketing v. CIT (2016) 382 ITR 395 / 239 Taxman 392 / 243 Taxman 232 (SC)

1268 **S. 80HHC : Export business – Industrial undertaking – Whether the assessee is entitled deductions under all three sections, i.e., 80HHC, 80-IA, 80-IB, matter referred to larger Bench. [S. 80IA(9), 80IB]**

Controversy on whether S. 801A(9) mandates that the amount of profits allowed as deduction u/s. 801A(1) has to be reduced from the profits of the business of the undertaking while computing deduction under any another provisions under heading "C" in Chapter VI-A of the Income-tax Act, 1961 is referred to larger Bench. While Hon'ble Mr. Justice Anil R. Dave took the view that the judgement of the Delhi High Court in *Great Eastern Exports v. CIT (2011) 332 ITR 14 (Delhi)* lays down the correct position in law and allowed the appeals of the Revenue, Hon'ble Mr. Justice Dipak Misra dissented and held that the law laid down by the Bombay High Court had in *Associated Capsules Private Limited v. Dy. CIT (2011) 332 ITR 42 (Bom.)* lays down the correct position in law and dismissed the appeals of the Revenue. In view of difference of opinion, the matters have been referred to a larger Bench in terms of signed reportable judgment. The Registry has been directed to place the matters before the Hon'ble the Chief Justice of India.

ACIT v. Micro Labs Ltd. (2016) 380 ITR 1 / 283 CTR 9 / 237 Taxman 74 / 130 DTR 113 (SC)

S. 80HHC : Export business – Total turnover – Sale proceeds of scrap cannot be included in total turnover. 1269

The issue in these appeals pertains to the question whether the proceeds generated from the sale of scrap would be included in the total turnover. In the recent decision of this Court in *CIT v. Punjab Stainless Steel Industries & Ors. reported in (2014) 364 ITR 144 (SC)* it has been held that sale proceeds generated from the sale of scrap would not be included in the total turnover for the purpose of deduction under Section 80HHC of the Income Tax Act, 1961. (AY. 1989-90 to 1991-92)

Jagraon Export v. CIT (2016) 132 DTR 86 / 284 CTR 209 / 238 Taxman 88 (SC)

Editorial : Judgement inCIT v. Bicycle Wheels (India) (2011) 335 ITR 384 / 244 CTR 453 / 61 DTR 243 (P&H)(HC) is reversed.

S. 80HHC : Export business – Export turnover – Export through export house and receipt of sum in Indian currency – Sum constitute export turnover eligible for deduction. 1270

High Court held that; where the assessee exported marine products through an export house and received 3.5 percent of freight on board value of the goods exported in Indian currency the sum received could not be considered as export turnover as it had not been received in convertible foreign exchange and part of the sum was not eligible for the benefit granted under section 80HHC. On appeal allowing the appeal the Court held that the assessee was entitled to the deduction. (AY. 1994-95, 1995-96, 1996-97)

Southern Sea Foods Ltd. v. JCIT (2016) 382 ITR 306 / 243 Taxman 231 / 137 DTR 192 / 287 CTR 108 (SC)

Editorial : Decision in Southern Sea Foods Ltd v. JCIT (2007) 288 ITR 151 (Mad.)(HC) is reversed.

S. 80HHC : Export business – Earning of interest on advancing surplus funds does not come within the purview of business income or as profits from business. 1271

The issue before the High Court was whether the assessee is entitled to deduction under section 80HHC in respect of interest earned by it by employing the surplus funds locally. Allowing the appeal of the revenue, the Court held that It was not established by the Assessees that the business of export carried on by them was connected with or dependent upon such advances or loan given by it and hence it could not be termed that earning of interest on such loans was incidental to business of export. Accordingly, the High Court ruled in favour of the Department. (AY. 1989-90, 1991-92)

CIT v. Vimal Chand Surana (2016) 137 DTR 131 (Raj.)(HC)

S. 80HHC : Export business – Turnover of all businesses to be clubbed together. 1272

Dismissing the appeal of the assessee the Court held that in order to compute the special deduction under section 80HHC the turnover of all independent businesses are to be clubbed together. (AY. 2000-01, 2001-02)

Devraj R. Agarwal v. ACIT (2016) 389 ITR 642 (Guj.)(HC)

1273 **S. 80HHC : Export business – Industrial undertaking – Gains due to fluctuations in rate of foreign exchange to be taken into consideration – Duty drawback is not to be taken into consideration for the purpose of deduction. [S. 80-I, 80-IA]**
Gains on fluctuation in foreign exchange rates had to be taken into account for computing deduction under sections 80HHC, 80I and 80-IA. Duty drawback is not to be taken into consideration for the deduction. (AY. 1994-95, 1996-97, 1997-98)
CIT v. Metrochem Industries Ltd. (2016) 389 ITR 181 (Guj.)(HC)

1274 **S. 80HHC : Export business – Profits should be derived from business – Interest on fixed deposits pledged with FCI and Sales Tax Department – Not profits derived from business – Not includible in business profits. [S. 56]**
Dismissing the appeal the Court held that; the Tribunal had concluded that interest on fixed deposits had accrued on the fixed deposits pledged with the FCI and also with the Sales Tax Department. The interest on fixed deposits did not have an immediate nexus with the export business and, therefore, had to be necessarily treated as income from other sources and not business income derived from export business activity. (AY. 2004-05)
Shiv Shakti Rice Mills v. ACIT (2016) 389 ITR 255 (P&H)(HC)

1275 **S. 80HHC : Export business – Interest from fixed deposits with bank out of compulsory retention and transfer of export earnings – Income from other sources and not business income – Amount not includible for computing deduction. [S. 56]**
Dismissing the appeal the Court held that; after considering the letter of the bank produced by the assessee and thereafter held that interest income earned on deposits made by the assessee for availing of credit facilities was not deductible, as it was income earned from other sources. Hence it was not includible for computing the special deduction under section 80HHC. (AY. 1999-2000)
Gerard Perira v. ITO (2016) 389 ITR 547 (Mad.)(HC)

1276 **S. 80HHC : Export business – Waiver of interest – Entire income chargeable to tax under section 41(1) was to be excluded under Explanation (baa) to section 80HHC for the purposes of computing the deduction allowable to the assessee under that section. [S. 41(1)]**
Dismissing the appeal of revenue, the Court held that, in terms of judgment of Supreme Court rendered in case of *ACG Associated Capsules (P.) Ltd. v. CIT (2012) 343 ITR 89 (SC)* benefit would only be available on net interest and that alone was to be excluded under Explanation (baa) of section 80HHC for purposes of computing deduction allowable to assessee. Entire income chargeable to tax under section 41(1) was to be excluded under Explanation (baa) to section 80HHC for the purposes of computing the deduction allowable to the assessee under that section. (AY. 2001-02)
CIT v. Purewal and Associates Ltd. (2016) 243 Taxman 392 / 286 CTR 297 (HP)(HC)

S. 80HHC : Export business – Hotel – Foreign exchange receipts entitled to deduction on both – Total turnover for computation of deduction of profits from exports to be taken excluding foreign exchange receipts from hotel business. [S. 80HHD] 1277

Assessee was entitled to deductions both under section 80HHC and section 80HHD. The assessee had income in convertible foreign exchange which arose from its hotel business in India and income from its export business. It was not the legislative intent that the benefit under section 80HHC was to be regulated by the turnover of the hotel business to which section 80HHD was applicable. Appeal of revenue was dismissed. (AY. 2004-05)

CIT v. ITC Ltd. (2016) 386 ITR 487 (Cal.)(HC)

S. 80HHC : Export business – Gain arising out of Exchange rate fluctuation is to be included in the profits for the purpose of computation of deduction under section 80HHC. [S. 80IA] 1278

It was held that the gains arising out of exchange rate fluctuation is to be included in the profits for the purpose of computation of deduction under section 80HHC. (AY. 2000-01)

PCIT v. Sun Pharmaceutical Industries Ltd. (2016) 240 Taxman 686 / (2017) 148 DTR 332 / 293 CTR 489 (Guj.)(HC)

S. 80HHC : Export business – Receipt of sale proceeds in India within stipulated time or within extended time allowed by competent authority – Grant of extension of time should be clear and unambiguous – Denial of deduction was held to be justified. 1279

The assessee had applied to the Reserve Bank of India for extension of time till December 1, 2001. The Reserve Bank of India in its reply dated December 28, 2001 advised that as the date, that is, December 1, 2001, till which extension was sought for, had already expired, the assessee should apply for further extension. Incidentally the amount was received on November 26, 2001. The letter of the Reserve Bank of India requesting the assessee to apply for further extension could not be taken as an approval in any manner whatsoever. The Assessing Officer was right in denying the special deduction under section 80HHC. (AY. 2001-02)

CIT v. Asha Trading Co. (2016) 382 ITR 438 (Cal.)(HC)

S. 80HHC : Export business – While computing profits eligible for deduction u/s. 80HHC, entire amount of deemed income u/s. 41 would be taken in consideration, even if it is in the nature of interest, commission, etc. However, while computing interest, only the net interest, i.e. gross interest as reduced by the expenditure incurred for earning such income, is to be taken into consideration [S. 41(1)] 1280

The assessee received a waiver of interest payable as a result of one-time settlement with the bank. The same was offered as deemed income u/s. 41(1) and was fully claimed as a deduction u/s. 80HHC. The AO denied the exemption to the extent of ninety per cent of the deemed income u/s. 41(1) as the same was not derived from the exports of the assessee. On appeal, the CIT(A) confirmed the AO's order. The Tribunal, however, allowed the claim.

On Revenue's appeal, the HC held that S. 41(1) creates a legal fiction and can be extended for the purpose of deduction u/s. 80HHC. Further, the liability incurred by

the assessee in respect of the interest, earlier allowed as a deduction while computing the profits of the export business will not undergo a change in its nature and become an independent income. However, while calculating the interest under clause (baa) of the explanation, only the net interest i.e. gross interest as reduced by the expenditure incurred for earning such interest will be used for the purpose of allowing deduction u/s. 80HHC. (AY. 2001-02)
CIT v. Purewal & Associates Ltd. (2016) 131 DTR 63 / 286 CTR 297 / 243 Taxman 392 (HP) (HC)
Editorial : SLP of revenue is dismissed, CIT v. Purewal & Associates Ltd. (2016) 242 Taxman 507 (SC)

S. 80HHD. Deduction in respect of earnings in convertible foreign exchange.

1281 **S. 80HHD : Convertible foreign exchange – Hotel – Reserve utilised in subscribing to share capital of company running hotel – Amount utilised in expansion of hotel business is entitled to deduction. [S. 80HHD(4)]**
Court held that Reserve utilised in subscribing to share capital of company running hotel, as the amount was utilised in expansion of hotel business, is entitled to deduction. (AY. 2003-04)
New Kenilworth Hotel P. Ltd v. CIT (2016) 387 ITR 201 / (2017) 292 CTR 336 (Cal.)(HC)

S. 80-IA. Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.

1282 **S. 80-IA : Industrial undertakings – Wind mills – Initial assessment year – Assessee had the option to choose its first/initial assessment year for claiming deduction and the said year need not be the year of commencement of eligible business.**
Dismissing the appeal of the revenue, the Court held that the assessee had the option to choose its initial assessment year and the said initial assessment year u/s. 80IA(5) would only mean the year of claim of deduction and not the year of commencement of eligible business. (AY. 2011-12)
CIT v. Defree Engineering (P.) Ltd. (2016) 76 taxmann.com 11 (Mad.)(HC)
Editorial : SLP of revenue is dismissed CIT v. Defree Engineering (P.) Ltd (2017) 244 Taxman 217 (SC)

1283 **S. 80-IA : Industrial undertakings – Set of its losses against other income of business enterprises – Entitled to claim deduction.**
Assessee, an industrial undertaking, had already set off its losses against other income of business enterprise. It exercised option and claimed deduction under section 80-IA, in view of decision in case of *Velayudhaswamy Spg. Mills (P.) Ltd. v. ACIT (2012) 340 ITR 477 (Mad.)(HC)* assessee was entitled to claim deduction. (AY. 2012-13)
CIT v. Sri Renganathar Industries (P.) Ltd. (2016) 242 Taxman 427 (Mad.)(HC)
Editorial : SLP of revenue was admitted, CIT v. Sri Ranganathar Industries (P.) Ltd. (2016) 242 Taxman 102 (SC)

S. 80-IA : Industrial undertakings – Loss in trading activities – AO accepting loss on basis of books of account – Different yardsticks cannot be applied for claims under sections 80IA and 80HHC – Matter remanded to AO for recalculating deduction by the Tribunal was held to be justified. [S. 80HHC] 1284

Dismissing the appeal of the revenue, the Court held that the finding of the Commissioner (Appeals) which was essentially one of fact and the analysis of fact was neither perverse nor absurd. The Appellate Tribunal was right in remanding the matter to the AO to recalculate the deduction under section 80-IA. No question of law arose.(AY. 1998-99)

CIT v. Nahar Export Ltd. (2016) 389 ITR 33 / 76 taxmann.com 146 (P&H)(HC)

S. 80-IA : Industrial undertakings – Wind mill – Entitled to deduction without setting off losses/unabsorbed depreciation pertaining to wind mill, which were set off in earlier year against other business income of assessee. 1285

Assessee claimed deduction under section 80IA. Tribunal, following decision of Madras High Court in case of *Velayudhaswamy Spinning Mills (P.) Ltd. v. Asstt. CIT (2012) 340 ITR 477* held that assessee was entitled to deduction under section 80IA without setting off losses/unabsorbed depreciation pertaining to wind mill, which were set off in earlier year against other business income of assessee. It further held that initial assessment year in section 80-IA(5) would only mean year of claim of deduction under section 80IA and not year of commencement of eligible business. Appeal of revenue is dismissed by the Court. (AY. 2010-11)

CIT v. P. S. Velusamy (2016) 243 Taxman 408 (Mad.)(HC)

Editorial : SLP filed against order of High Court by the revenue was dismissed, CIT v. P. S. Velusamy (2016) 243 Taxman 149 (SC)

S. 80-IA : Industrial undertakings – Wind mill – Entitled to deduction without setting off losses/unabsorbed depreciation pertaining to wind mill, which were set off in earlier year against other business income of assessee. 1286

Assessee claimed deduction under section 80IA. Tribunal, following decision of Madras High Court in case of *Velayudhaswamy Spinning Mills (P.) Ltd. v. Asstt. CIT (2012) 340 ITR 477* held that assessee was entitled to deduction under section 80IA without setting off losses/unabsorbed depreciation pertaining to wind mill, which were set off in earlier year against other business income of assessee. It further held that initial assessment year in section 80IA(5) would only mean year of claim of deduction under section 80IA and not year of commencement of eligible business. Appeal of revenue is dismissed by the Court. (AY. 2011-12)

PCIT v. Prabhu Spinning Mills (P.) Ltd. (2016) 243 Taxman 462 (Mad.)(HC)

Editorial : SLP of revenue was dismissed, PCIT v. Cheran Spinning Mills (P.) Ltd. (2016) 243 Taxman 438 (SC)

S. 80-IA : Industrial undertakings – Wind mills – Option to choose Initial assessment year – Entitled to deduction without setting off losses/unabsorbed depreciation pertaining to wind mill, which were set off in earlier year against other business income. [S. 32, 72] 1287

Dismissing the appeal of the Revenue, the Court held that, the assesse had the option to choose Initial assessment year and also entitled to deduction without setting off losses/

unabsorbed depreciation pertaining to wind mill, which were set off in earlier year against other business income. Followed, *Velayudhaswamy Spinning Mills (P.) Ltd. v. A CIT (2012) 340 ITR 477*. (AY. 2011-12)
CIT v. Best Corporation Ltd. (2016) 76 taxmann.com. 286 (Mad.)(HC)
Editorial : SLP of revenue is dismissed, CIT v. Best Corporation Ltd. (2017) 244 Taxman 151 (SC)

1288 **S. 80-IA : Industrial undertakings – Infrastructure development – Completion certificate of local authority not provided – Rejection of application set aside – CBDT directed to consider certificate from State Government which had granted subsidy to assessee. [S. 80IA(4), 119]**
The assessee applied for approval for setting up an industrial park at a village, which would enable it to claim deduction under section 80IA(4) of the Income-tax Act, 1961. The certificate was denied by the CBDT. On writ allowing the petition the Court held that the order of the Central Board of Direct Taxes had principally two elements. One was the objection of the Central Board of Direct Taxes that no completion certificate was issued by the local authority, one of the requirements under the Industrial Development Scheme of 2008. The second and the factual aspect of the matter was regarding the availability of evidence that the assessee's project was completed before March 31, 2011. This latter element could be further sub-divided into two parts: (a) with respect to the evidence produced by the assessee and (b) with respect to the question of establishment of industrial units on the plots for infrastructural project development by the assessee. The State Level Approval Committee had agreed to grant subsidy to the assessee. The Central Board of Direct Taxes insisted that the project completion certificate must be obtained from the Ahmedabad Urban Development Authority. At the request of the assessee, the Ahmedabad Urban Development Authority on May 8, 2013, certified that the assessee had carried out and completed the work of infrastructure development and construction work in accordance with the rules and regulations of the Ahmedabad Urban Development Authority. The Central Board of Direct Taxes had brought in the element of completion of industrial units on the proposed industrial park instead of completion of the project. There was voluminous evidence on record to suggest that the project was completed before March 31, 2011. In a strict sense of the term, perhaps the assessee did not fulfil this requirement. However, a more liberal or practical approach could be that when M was appointed by the GIDC and had certified that the project was completed before March 31, 2011 and when the State Government had acted on such report and approved the subsidy, this should have been seen as a substantial compliance with such requirement. However, to put the issue beyond any controversy, the assessee was to be permitted to produce such certificate from the GIDC, a local authority, before the Central Board of Direct Taxes latest by September 30, 2016. If such certificate showing that the project of the assessee was completed before March 31, 2011, was issued, the Central Board of Direct Taxes shall approve the assessee for grant of deduction under section 80-IA(4) of the Act and issue the necessary notification in this respect, within three months from the date of receipt of such certificate. The order dated November 5, 2014 was to be set aside.
Devraj Infrastructures Ltd. v. Chairman/Member (Industrial Park) CIT (2016) 388 ITR 99 / (2017) 145 DTR 131 / 292 CTR 58 (Guj.)(HC)

S. 80-IA : Industrial undertakings – Telecommunication services – Derived from – Refund from universal service fund, interest from others, liquidated damages, excess provision written back and others including sale of directories, publications, forms, waster papers was held to be eligible deduction. [S. 80IA(2A)] 1289

The Assessing Officer held that the six items of income, i.e., extraordinary items, refund from universal service fund, interest from others, liquidated damages, excess provision written back and others including sale of directories, publications, forms, waster papers, etc. could not be said to be derived from the business of the assessee and added the income therefrom to the returned income of the assessee. The Commissioner (Appeals) confirmed the order with regard to three items and with regard to the other three, held that the income was derived from the business. The Tribunal held that the orders of the Assessing Officer and the Commissioner (Appeals) to the extent they denied the assessee, which was in the business of providing telecommunication services, deduction in respect of the items in terms of section 80IA(2A) of the Income-tax Act, 1961 were unsustainable. On appeals:

Held, dismissing the appeals, that section 80IA(2A) treats an undertaking providing telecommunication services as a separate species warranting a separate treatment. Such an undertaking would be entitled to take the benefit of deduction in terms of section 80IA(2A), notwithstanding that the enterprise of which it formed part might have other eligible businesses for which the deduction would have to be calculated in terms of section 80IA(1) of the Act. The Tribunal rightly allowed the income from all other items as business income. (AY. 2004-05)

PCIT v. Bharat Sanchar Nigam Ltd. (2016) 388 ITR 371 / 289 CTR 198 / 141 DTR 16 (Delhi)(HC)

Editorial : Order of Tribunal in Bharat Sanchar Nigam Ltd. v. Dy. CIT (2016) 156 ITD 847 / 175 TTJ 369 / 130 DTR 161 (Delhi)(Trib.) is affirmed

S. 80-IA : Industrial undertakings – Generation of power – Computation of quantum of benefit – Assessing Officer directed to compute deduction on basis of market rate at which distribution licensee of a generating company sells. 1290

The Tribunal held that deduction under section 80IA of the Income-tax Act, 1961 claimed by the assessee on the profit from the captive power unit was allowable while the Department was of the view that the power generated by the assessee was consumed by the other units of the assessee itself and that there was no sale to any outside party and no real profit and therefore, the claim for deduction was not allowable. On appeals:

Held, partly allowing the appeals, that the Assessing Officer was to compute the deduction based on the evidence that was to be adduced by the assessee as regards the market value at which cost electricity was sold to a distribution licensee by a generating company. (AY. 2003-04, 2004-05)

CIT v. Tata Metaliks Ltd. (2016) 387 ITR 411 (Cal.)(HC)

S. 80-IA : Industrial undertakings – Generation of power – Wind mills – Losses incurred in the eligible unit were adjusted against profits of ineligible unit – Appeal not projecting grievance that decision of Special Bench of Tribunal misapplied or not applied – Tribunal's conclusion not made subject matter of challenge – Appeal not maintainable. [S. 260A] 1291

The assessee was engaged in the business of manufacture of material handling equipment and generation of power. It had installed wind mills and that was a unit

eligible for deduction under section 80IA. The other unit of the assessee was not entitled to deduction. The assessee claimed loss on account of the eligible unit for AYs, viz. 2005-06 to 2008-09. These losses incurred in the eligible unit were adjusted against profits of ineligible unit, i.e. the manufacturing unit in the respective years. After adjusting these losses, positive income was determined and tax was paid. For these years in which the eligible unit incurred losses, there was no claim for deduction under section 80IA by the assessee. The AO disallowed this claim of set off of loss of eligible units against the income of ineligible units in the same year. The losses were, therefore, added in the income of the assessee. The Commissioner (Appeals) granted partial relief. The Tribunal held that loss incurred in business of power generation which was entitled to deduction under section 80IA could be set off against business income from the manufacturing unit. On appeal projecting the applicability of section 80IA(5) of the Act. Held, that this was not an appeal projecting a grievance that the Special Bench decision in *CIT v. Goldmine Shares and Finance Pvt. Ltd. (2008) 302 ITR 208(AT)(SB) (Ahd.)(Trib.)* was mis-applied or not applied or incorrectly applied. Once the statement of facts about which there was no dispute showed that there was no deduction claimed under section 80IA for the AYs in question, there was no occasion for the Tribunal to have gone into these questions. Merely because the Tribunal had gone into and considered them, the court was not obliged to go into them given the admitted factual background. The Department's question projected the applicability of section 80IA(5) of the Act. The Tribunal`s conclusion was thus not made subject matter of challenge in this appeal by the Department. (AY. 2005-06 to 2008-09)
CIT v. Hercules Hoists Ltd. (2016) 386 ITR 698 (Bom.)(HC)
Editorial : Order in Hercules Hoists Ltd. v. Asst. CIT [2013] 22 ITR (Trib) 527 (Mumbai) affirmed. SLP is granted the Department, CIT v. Hercules Hoists Ltd. (2016) 380 ITR 7 (St.)

1292 **S. 80-IA : Industrial undertakings – Development of infrastructure – Assessee engaged in generation of power – Losses set off – Assessee entitled to special deduction.**
Dismissing the appeal of revenue the Court held, that the assessee was an individual having income from salary, business and other sources and was generating power through windmills and had claimed the benefit of deduction under section 80IA of the for the assessment year 2011-12 and for the subsequent years as well. Having exercised his option and his losses having been set off already against other income of the business enterprise, the assessee fell within the parameters of section 80IA of the Act. He was entitled to special deduction under section 80IA of the Act. (AY. 2011-12)
CIT v. P.V. Chandran (2016) 385 ITR 479 (Mad.)(HC)

1293 **S. 80-IA : Industrial undertaking – Losses and depreciation set off against other profits and gains of earlier years – Assessee entitled to deduction.**
Assessee was entitled to deduction under section 80IA of the Act without setting off the losses and unabsorbed depreciation pertaining to the wind mill. (AY. 2003-04, 2004-05, 2005-06)
CIT v. SAS Hotels and Enterprises Ltd. (2016) 385 ITR 324 (Mad.)(HC)
Editorial : The Supreme Court has granted special leave to the Department to appeal against this judgment CIT v. SAS Hotels and Enterprises Ltd. (2016) 383 ITR 18 (St.)

S. 80-IA : Industrial undertakings – Wind mills – Losses already set off against other business income – Not to be notionally brought forward for computation of profits in assessment year – Assessee is entitled to deduction. 1294

The Department appealed against the order of the Tribunal holding that the assessees, which were infrastructure business undertakings, were entitled to claim deduction under section 80IA of the Income-tax Act, 1961, for the assessment year 2001-02 and the subsequent years as well. On appeals:

Held, dismissing the appeals, that having exercised their option and their losses having been set off already against other income of the business enterprise, the assessee in each of the appeals fell within the parameters of section 80IA of the Income-tax Act, 1961 and was entitled to deduction. The order of the Tribunal was proper. (AY. 2001-02)

CIT v. Pondicherry Chlorate Ltd. (2016) 384 ITR 371 (Mad.)(HC)

Editorial : The Supreme Court has granted special leave to the Department to appeal against this judgment CIT v. Pondicherry Chlorate Ltd. (2016) 383 ITR 5 (St.)

S. 80-IA : Industrial undertakings – Losses set off against other income of business enterprise in earlier years – Assessee is entitled to deduction. 1295

Assessee for the business of wind mill, claimed the benefit of deduction under section 80IA of the Income-tax Act, 1961. The Tribunal allowed the deduction. On appeal: Held, dismissing the appeal, that since the assessee exercised its option and its losses were set off already against other income of the business enterprise, the assessee fell within the parameters of section 80IA of the Act. The assessee was entitled to deduction under section 80IA of the Act. (AY. 2010-11)

CIT v. Sangeeth Textiles Ltd. (2016) 384 ITR 218 (Mad.)(HC)

Editorial : The Supreme Court has granted special leave to the Department to appeal against this judgment, CIT v. Sangeeth Textiles Ltd. (2016) 380 ITR 7 (St.)

S. 80-IA : Industrial undertakings – High profit – Deduction is allowable. [S. 10A(7), 80IA(10)] 1296

On appeal on the questions whether the Tribunal was justified in holding that there was nothing to show that the abnormally high profits of the unit were due to an extraordinary arrangement between the assessee and the German company entered into only with a view to boost the profits of the assessee and that there was no material available with the Assessing Officer to estimate the profits of the unit eligible for deduction invoking the provisions of section 80IA(10) read with section 10A(7) of the Income-tax Act, 1961: Held, dismissing the appeal, that the Appellate Tribunal had followed its own order in respect of the assessee for the assessment year 2004-05 which was upheld by the High Court. No substantial question of law arose for consideration. (AY. 2005-06)

CIT v. Schmetz India P. Ltd. (2016) 384 ITR 140 (Bom.)(HC)

Editorial: The Supreme Court has dismissed special leave petition filed by the Department against this judgment CIT v. Schmetz India P. Ltd. (2016) 382 ITR 3 (St.)

1297 **S. 80-IA : Industrial undertakings – Infrastructure development – As the words "derived from" are absent, there is no requirement to prove "first degree nexus" of the receipts with the eligible business. All receipts of the undertaking are eligible for 100% deduction. [S. 80IA(2A)]**

Dismissing the appeal of revenue the Court held that; As the words "derived from" are absent there is no requirement to prove "first degree nexus" of the receipts with the eligible business. All receipts of the undertaking are eligible for 100% deduction. (AY. 2005-06 2008-09)

PCIT v. Bharat Sanchar Nigam Ltd. (2016) 141 DTR 16 (Delhi)(HC)

1298 **S. 80-IA : Industrial undertakings – Infrastructure facility – Inland port – Container freight stations are inland ports hence entitled to benefit. [S. 80IA(4)(i)]**

The assessee, a clearing and forwarding agent, claimed deduction under section 80IA of the Income-tax Act, 1961, on the container freight station. The Assessing Officer disallowed the claim holding that the container freight station could not be classified as an inland port for the purpose of section 80IA(4)(i) of the Act and that the facility of a container freight station would not constitute an infrastructure facility as defined in Explanation to section 80IA(4)(i) of the Act. The Commissioner (Appeals) allowed deduction under section 80IA holding that the container freight station was an inland port for the purpose of Explanation to section 80IA(4)(i) of the Act. The Tribunal confirmed this. On appeal:

Held, dismissing the appeal, that the office memorandum of the Ministry of Commerce and Industry dated May 21, 2009 clarified the status of the container freight stations as inland ports and the Chennai Port Trust had issued a certificate stating that the container freight station of the assessee might be considered an extended arm of the port in accordance with the Central Board of Direct Taxes Circular No. 793, dated June 23, 2000* read with Circular No. 133 of 1995 dated December 22, 1995 of the Central Board of Excise and Customs. The assessee was entitled to the benefit under section 80IA of the Act. (AY. 2009-10)

CIT v. Kailash Shipping Services P. Ltd. (2016) 383 ITR 630 (Mad.)(HC)

Editorial : The Supreme Court has granted special leave to the Department to appeal against this judgment CIT v. Kailash Shipping Services P. Ltd. (2016) 380 ITR (St.) 65

1299 **S. 80-IA : Industrial undertakings – Excess expenses of product development – Precedent – Decision of High Court in earlier case allowing deduction followed by Commissioner (Appeals) and order of Commissioner (Appeals) upheld by Appellate Tribunal – Decision of High Court binding. [S. 143, 147, 148]**

Held, dismissing the appeal, that the facts and circumstances based on which the appeal had arisen were similar to those cases which had already been decided by the court in favour of the assessee and against the Department. Therefore, no interference was called for. (AY. 2006-07)

CIT v. Ucal Fuel Systems Ltd. (2016) 383 ITR 15 (Mad.)(HC)

Editorial : Order of the Appellate Tribunal in Deputy CIT v. Ucal Fuel Systems Ltd. (2015) 42 ITR 51 (Chennai)(Trib.) is affirmed.

S. 80-IA : Industrial undertakings – Deduction is allowable without setting off losses/ unabsorbed depreciation which were set off earlier years against other business income. [S. 32(2), 72] 1300

The High Court had to consider whether the assessee is entitled to deduction under Section 80IA without setting off the losses/unabsorbed depreciation pertaining to the windmill, which were set off in the earlier year against other business income of the assessee following the decision of the jurisdictional High Court in the case of M/s. Velayudhaswamy Spinning Mills (340 ITR 477), when the same is pending appeal before the Supreme Court in SLP. Civil No. 33475 of 2012. Held by the High Court dismissing the appeal:

(i) On the basis of the decision in Velayudhaswamy Spinning Mills (340 ITR 477), the Central Board of Direct Taxes has issued Circular No. 1/2016 dated 15.2.2016. The CBDT has clarified that an assessee who is eligible to claim deduction u/s. 80IA has the option to choose the initial/first year from which it may desire the claim of deduction for ten consecutive years, out of a slab of fifteen (or twenty) years, as prescribed under that sub-Section. It is clarified that once such initial assessment year has been opted for by the assessee, he shall be entitled to claim deduction u/s. 801A for ten consecutive years beginning from the year in respect of which he has exercised such option subject to the fulfillment of conditions prescribed in the section. Hence, the term 'initial assessment year' would mean the first year opted for by the assessee for claiming deduction u/s. 801A. However, the total number of years for claiming deduction should not transgress the prescribed slab of fifteen or twenty years, as the case may be and the period of claim should be availed in continuity.

(ii) We cannot resist our temptation to record one more fact. If an issue is covered by the judgment of the High Court, it is always open to the Department to take it on appeal to the Supreme Court and get the law settled once and for all. But, once a decision is taken at the level of the Board, we do not know why repeated appeals should be filed, only to meet with the same fate as that of a decision, on which, a circular has been issued. The Department shall take note of this for future guidance. (TCA No. 176 of 2016, dt. 01.03.2016) (AY. 2010-11)

CIT v. G.R.T. Jewellers (India) Pvt. Ltd. (Mad.)(HC); www.itatonline.org

S. 80-IA : Industrial undertakings – Infrastructure development – Application of deduction under section 80IA in case of captive consumption of electricity generated – Rate to be adopted for the purpose of computation of deduction under section 80IA 1301

The assessee was engaged in the manufacture of paper board. It installed power generating plant for the purpose of supplying uninterrupted power to manufacturing plant. The entire production from the plant was supplied to the paperboard manufacturing unit. For the purpose of computation of deduction under section 80IA, the assessee adopted the rate at which the Andhra Pradesh State Electricity Board (APSEB) supplied electricity to it. It was the stand of the Assessing Officer that the assessee was not entitled to deduction under section 80IA for the reason that as it was a case of captive consumption of electricity and there was no profit arising from the sale of electricity. It was also held that the rate adopted by the assessee is not correct

as the purchase rate cannot be said to be the market value and therefore, adopted the rate which was adopted by M/s. Indian Aluminium Company Ltd, which is assessed in the same circle, to Grid Corporation of Orissa Ltd and as a result, loss was determined and thereby, denied benefit under section 80-IA of the Act. The High Court held that the assessee was entitled to claim of deduction under section 80-IA of the Act even on account of captive consumption for the reason that the premise for claiming the benefit according to clause (iv) of sub-section (4) of section 80-IA was setting up of an undertaking for the generation of power during the specified period and therefore, it cannot be held that the benefit under section 80-IA was not available to the assessee because the power generated was consumed at home or by other business of the assessee and that it is now well-settled that a statute granting incentives for promoting growth and development should be construed liberally so as to advance the objective of the provision and not to frustrate it. On the issue of price to be adopted for the purpose of computation of deduction under section 80-IA, it was held that the rate at which electricity was purchased from ABSEB by the paper unit of the assessee can, by no means, be the market rate at which the power plant of the assessee could have sold its production in the open market and that the rate to be adopted can be ascertained on the basis of the rates fixed by the Tariff Regulation Commission for sale of electricity by the generating companies to the distribution licensees. Matter remanded to determine the market value based on above. (AY. 2002-03)
CIT v. ITC Ltd. (2016) 236 Taxman 612 / 286 CTR 400 (Cal.)(HC)
Editorial : Special Leave Petition filed against impugned order was granted, ITC Ltd. v. CIT (2016) 243 Taxman 148 (SC)

1302 **S. 80-IA : Industrial undertakings – Infrastructure development – Choice of initial AY to claim deduction is with the Assessee and prior year losses cannot be notionally set-off against the profit from subsequent years.**
The Assessee's two wind mills, which were eligible for deduction u/s. 80-IA, incurred losses from AY. 2004-05 to 2006-07. The losses were set-off against the profits derived from business of cable jointing, etc. which was not eligible for deduction. Deduction u/s. 80-IA was claimed by the Assessee from AY. 2007-08 onwards. The AO did not allow the deduction on the ground that the losses from AY 2004-05 to 2006-07 were to be notionally set-off against the profits from AY. 2007-08 onwards, thereby resulting in income from eligible business at nil. The ITAT dismissed the Department's appeal, by following its own order for AY. 2010-11, wherein it was held that the initial assessment year to claim deduction u/s. 80-IA was at the option of the Assessee. Further, it was held that the losses incurred from eligible business could not be notionally set-off against the subsequent year's profits, and that the loss had to be set-off against the profits derived from non-eligible business. (AY. 2012-13)
DCIT v. Yamuna Power and Infrastructure Ltd. (2016) 47 ITR 533 (Chd.)(Trib.)

1303 **S. 80-IA : Industrial undertakings – Infrastructure development – Initial assessment year – Option to choose with the assessee.**
The Tribunal held that option of choosing initial assessment year for claiming deduction under section 80IA in a block of ten years out of 15 years is with the assessee. (AY. 2010-11)
Dy. CIT v. KEC Industries Ltd. (2016) 177 TTJ 6 (UO) (Chd.)(Trib.)

S. 80-IA : Industrial undertakings – Adjustment of brought forward losses set off in earlier years – There is no need to notionally carry forward these losses up to the initial assessment year and set-off the same against the profits of the eligible business. 1304
The Tribunal held that losses claimed by the assessee in respect of eligible business period to the initial assessment year are to be set off against the income of the assessee from other ineligible business and there is no need to notionally carry forward these losses upto the initial assessment year and set off the same against the profits of the eligible business. (AY. 2010-11)
Dy. CIT v. KEC Industries Ltd. (2016) 177 TTJ 6 (UO) (Chd.)(Trib.)

S. 80-IA : Industrial undertakings – Infrastructure development – Liquidated damages – excess provision written back – Interest and other refund from universal services – Deduction for telecommunication services is available in respect of profits of eligible business and it is not restricted to profits derived from eligible business as mentioned in section 80IA(1). 1305
Assessee claimed deduction u/s. 80-IA(2A). AO disallowed deduction on various miscellaneous income on the ground that sub-section (1) of section 80-IA uses the phrase "derived from". According to the assessee section 80-IA alongwith sub-section (1), (2) and (2A) of the same, the qualification of "derived from" as is available in sub-section (1) of section 80-IA of the Act cannot be read into sub-section (2A) of section 80IA of the Act. It was held that sub-section (2A) of S. 80-IA overrides the requirements of sub-sections (1) and (2) as it starts with non obstante clause, namely, `notwithstanding" which is further qualified by "anything contained in sub-section (1) or sub-section (2)" and uses the words "profits and gains of eligible business" as against "profits and gains derived by an undertaking or an enterprise from" used in sub-sections (1) and (2) and, therefore, the restriction of "derived from" contained in sub-section (1) cannot be read into the provision of sub-section (2A) of S. 80IA. (AY. 2004-05)
Bharat Sanchar Nigam Ltd. v. Dy. CIT (2016) 156 ITD 847 / 175 TTJ 369 / 130 DTR 161 (Delhi)(Trib.)

S. 80-IAB. Deductions in respect of profits and gains by an undertaking or enterprise engaged in development of Special Economic Zone.

S. 80-IAB : Undertaking – Development of Special Economic Zone – Income received from sale of scrap and professional fees being part of regular business is eligible deduction. 1306
Assessee, being a developer of SEZ, was eligible for deduction u/s. 80-IAB in respect of income earned from operation and maintenance of SEZ. As regards deduction claimed u/s. 80-IAB on income received from sale of scrap and professional fees, since both were part of regular business activities which assessee was carrying on in field of infrastructure development and they could not be treated separately. (AY. 2009-10)
ACIT v. Zydus Infrastructure (P.) Ltd. (2016) 161 ITD 611 (Ahd.)(Trib.)

S. 80-IB. Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings.

1307 **S. 80-IB : Undertaking – Conditions precedent should be fulfilled for each assessment year for which deduction claimed – Maintenance of separate accounts is not a condition precedent.**

Dismissing the appeal of revenue, the Court held that, conditions precedent should be fulfilled for each assessment year for which deduction claimed and maintenance of separate accounts is not a condition precedent. In respect of three appeals the tax effect did not exceed ₹ 20 lakhs. These appeals, therefore, had to be dismissed in view of the Circular No. 21 of 2015. (AY. 2003-04 to 2009-10)

CIT v. Micro Instruments Company. (2016) 388 ITR 46 / 289 CTR 152 / 75 taxmann.com 304 (P&H)(HC)

1308 **S. 80-IB : Undertaking – Audit report – Furnishing of audit report along with return not mandatory – Audit report furnished during assessment proceedings, exemption cannot be denied – Expenditure disallowed to be taken into account for computing the deduction. [S. 40A(3), 80IA(7), 153A]**

Dismissing the appeal of the revenue the Court held that; the audit report was filed before passing of the assessment order. Hence the requirement under section 80-IB was satisfied. That the assessee's claim of deduction under section 80-IB is allowable in respect of disallowance under section 40A(3) made on the undisclosed income declared in consequence of the search. (AY. 2005-06)

CIT v. Surya Merchants Ltd. (2016) 387 ITR 105 / 290 CTR 168 / 72 taxmann.com 16 (All.)(HC)

1309 **S. 80-IB : Undertaking – Income-tax Authorities cannot sit in judgment over the approval granted by the prescribed authority under section 80-IB(8A) r.w. Rule 18D [S. 80IB(8A), 263, Rule 18D]**

The Commissioner of Income-tax passed the order under section 263 of the Income-tax Act denying deduction under section 80-IB(8A) of the Income-tax Act on the ground that the assessee is not involved in research and development activity. Quashing the order of the Commissioner, it was held that the assessee had obtained required approval from the prescribed authority as per section 80-IB(8A) r.w. Rule 18D and therefore, it was not within the scope of the revenue authorities to look into the same and go beyond the decision of the revenue authorities and that as the periodic review are to be done by the prescribed authorities under Rule 18D, there is no scope for any income-tax authorities to exercise jurisdiction to look into the same. However, it does not curtail the powers of the income-tax authorities to look into the other aspects of the claim. (AY. 2008-09)

PCIT v. B.A. Research India Ltd. (2016) 240 Taxman 443 / 288 CTR 399 / 137 DTR 369 (Guj.)(HC)

1310 **S. 80-IB : Undertaking – Cash expenses in excess of prescribed limit was added back to income is eligible for deduction. [S. 40A(3)]**

Tribunal held that though this amount may be disallowable but since it becomes gross income and deduction u/s. 80IB is allowable, further prays that the expenses incurred in

cash even if disallowed, becomes part of his gross income, deduction on these amounts should also be given. (AY. 2008-09)
Vaneet Sood v. ACIT (2016) 159 ITD 320 (Chand.)(Trib.)

S. 80-IB : Undertaking – Claim for deduction could not be restricted where the AO. failed to bring on record any material to show existence of any arrangement for business transacted between two concerns. [S. 80-IA(10)] 1311
Assessee, engaged in manufacturing and packing of consumer articles for GCPL, a Godrej group company, claimed benefits u/s. 80IB. The AO noticed that main promoter of assessee had been closely associated with Godrej group and its net profit margin was significantly higher than what it should ideally be. AO. held that reasonable net profit of assessee should be 10 per cent as against 35.5 per cent declared, and applying s. 80-IA(10) deduction u/s. 80-IB was allowed on 10 per cent of gross receipts. The A.O. can invoke provisions of deeming fiction created u/s. 80-IA(10) only when he proves that there is a close connection of assessee with other entity and further affairs are arranged in such a manner to inflate profits of eligible business. Since in instant case, AO had failed to bring any material on record to show existence of any arrangement for business transacted between two entities and it was not known on what basis he had arrived at net profit rate of 10 percent. S. 80-IA(10) could not be invoked and assessee was entitled to deduction u/s. 80-IB as claimed. (AY. 2006-07 to 2008-09)
ACIT v. Ishwar Manufacturing Co. (P.) Ltd. (2016) 157 ITD 883 (Chd.)(Trib.)

S. 80-IB : Undertaking – Subsidies – Transport, interest, and power – Profit derived from undertaking – Eligible for deduction. [S. 28(iii)(b), 56, 80-IB(4), 80IC] 1312
The assessee claimed deduction under Section 80IB of the Income Tax Act on the profits and gains of business of the industrial undertaking. The assessee included the following subsidies in the profits and gains, namely, Transport subsidy, Interest subsidy and Power subsidy. The Assessing Officer held that the amounts received by the assessee as subsidies were revenue receipts and did not qualify for deduction under Section 80-IB(4) of the Act and, accordingly, the assessee's claim for deduction on account of the three subsidies aforementioned were disallowed. This was upheld by the CIT(A) though reversed by the ITAT. The High Court also upheld the claim of the assessee. On appeal by the department to the Supreme Court; held dismissing the appeal the Court held that subsidies transport, interest, and power - Profit derived from undertaking hence eligible for deduction. (AY. 2004-05, 2006-07)
CIT v. Meghalaya Steel Ltd. (2016) 383 ITR 217 / 132 DTR 273 / 284 CTR 321 / 238 Taxman 559 (SC)
Editorial : From the Judgment of Gauhati High Court in CIT v. Meghalaya Steel Ltd (2013) 261 CTR 17 / 91 DTR 81 (Gau.)(HC)

S. 80-IB : Undertaking – Fact that the AO allowed deduction in the year of setting up does not disentitle him from examining the eligibility in subsequent years – Keeping separate books of account is not a condition precedent to a claim for a deduction, there was no statutory provision making it mandatory for an assessee to maintain separate books of account – Claim of assessee was allowed. [S. 145] 1313
An assessee must fulfil each of the conditions stipulated in Section 80-IB in each of the years in which the deduction thereunder is sought. The Assessing Officer would

be entitled to ascertain in each of the assessment years whether or not the conditions of Section 80-IB remained fulfilled. In other words, even where an assessee is found to have fulfilled all the conditions of Section 80-IB in the initial assessment year and has on account thereof been granted the deduction thereunder, an Assessing Officer assessing the assessee's income in subsequent years would be entitled to ascertain whether in that assessment year the conditions in Section 80-IB remained fulfilled or not. If not, he is bound to deny the deduction. Keeping separate books of account is not a condition precedent to a claim for a deduction under Section 80-IB. There was no statutory provision making it mandatory for an assessee to maintain separate books of account. That it may be easier for an assessee to establish a claim for deduction under Section 80-IB in the event of separate books of account being maintained is another matter altogether. That is a question of evidence and not a legal obligation.

The Assessing Officer also disallowed the deduction on the ground that the workers/ employees were common in respect of Unit-I and Unit-II and that there was no demarcation of employees/workers as per the attendance register produced. As per Section 80-IB(2)(iv), where the industrial undertaking manufactures or produces articles or things, the section would apply if the undertaking *inter alia* employs ten or more workers in a manufacturing process carried on with the aid of power. The assessees, admittedly, carry on their activities with the aid of power. Appeal of revenue was dismissed. (ITA No. 958 of 2008, dt. 02.09.2016) (AY. 2003-04)

CIT v. Mirco Instruments Company (P & H) (HC); www.itatonline.org

1314 **S. 80-IB : Undertaking – Initial assessment year – Year in which special deduction is available – Year of manufacture – Manufacture started in accounting year 1994-95 relevant to AY. 1995-96 not 1996-97.**

The assessee was in the business of manufacturing machine tools. At about the end of 1994, the assessee had manufactured three vertical machining centres. The assessee participated in an exhibition during January, 1995, and the three machines were displayed at the exhibition. According to the assessee, the three machines so manufactured were prototype and in order to have field trial being conducted, it sold the three machines to group companies in March, 1995. It was the case of the assessee that the purpose of sale to such group companies was only to conduct field trial and to get feedback in order to know the technical faults, if any in the machines and to set right such defects. The assessee claimed special deduction u/s. 80-IB for the AY. 2005-06. According to the assessee, the initial AY from which the deduction was being claimed was the AY. 1996-97. The Assessing Officer held that the initial AY was 1995-96 and the assessee was not entitled to claim deduction u/s. 80-IB(3). This was confirmed by the Commissioner (Appeals) and the Tribunal. On appeal to the High Court:

Held, dismissing the appeal, that even before the products were sold to the group companies in the month of March, 1995, the machines were exhibited in public at New Delhi. There was a lot of appreciation for the machines and in fact during the exhibition, bookings took place. Merely because the assessee had sold three machines to its group companies, it could not be said that there was no commercial transaction. It could not be said that the machines were manufactured only on trial basis and not

for commercial purposes in the financial year 1994-95 relevant to the AY. 1995-96. The assessee was not entitled to deduction u/s. 80IB for the AY. 2005-06. (AY. 2005-06)
ACE Manufacturing Systems Ltd. v. Addl. CIT (LTU) (2016) 380 ITR 432 / 136 DTR 313 / 287 CTR 573 (Karn.)(HC)

S. 80-IB : Undertaking – Small scale undertaking – Conditions prescribed to be observed every year for claiming deduction – Assessee's undertaking investing in plant and machinery more than prescribed limit – Not eligible for deduction 1315
The assessee had 4 units for manufacturing of automobile components. Its Unit 2 commenced manufacturing activity in the year 1998-99 and started claiming benefit under Section 80-IB. The AO observed that a normal industrial undertaking (other than small scale undertaking) was eligible for deduction only if it had commenced its manufacturing activities before March 31, 1995. The assessee therefore would be eligible for deduction only if it was a small scale undertaking since it commenced its operations after 31st March 1995. The AO further observed that assessee's undertaking had exceeding the limit of investment in plant and machinery which is one crore and assessee had made investment of 3 crores. Accordingly the AO denied the deduction to assessee. The assessee contended that the limit was required to be seen only in the initial year or first year of claim and that the condition need not be satisfied every year after year. On appeal to Tribunal, it was held that the assessee was not entitled to deduction as the conditions prescribed for small scale industries were not fulfilled. Further the allowance of deduction in an earlier year in which the assessee satisfied the conditions of a small scale undertaking does not mean that the assessee must be allowed deduction in subsequent eligible years also. Conditions were to be met in each year. (AY. 2006-07, 2008-09)
Sodecia India P. Ltd v. DCIT (2016) 47 ITR 297 (Chennai)(Trib.)

S. 80-IB : Undertaking – Whether manufacturing process carried on by assessee with aid of power or not – Additional evidence in the form of certificate from Institute of Chemical Technology submitted by assessee in second round of litigation – Certificate admitted as the same was vital and essential for resolving dispute – Matter remanded for *de novo* consideration in light of additional evidence 1316
The assessee had set up an industrial unit and was engaged in the manufacture of industrial lubricants. In the first round of litigation, the Tribunal remanded the matter to the AO on the ground that in the absence of technical expert opinion and other relevant material on record, it was not able to give a finding as to whether the manufacturing process carried on by the assessee was with the aid of power or not. The AO denied the claim. In the second round of appeal before the Tribunal, the assessee produced a copy of a certificate from the Institute of Chemical Technology as additional evidence whereby the Institute certified that the numbers given in the letter for power consumption was realistic. The additional evidence submitted by the assessee was accepted in the interest of substantial justice as the evidence was vital and essential for resolving the controversy and went to the root of the matter for resolving the dispute, despite the fact that this was second round of litigation and the assessee had failed to produce evidence earlier. The matter was remanded to the AO for *de novo* determination of the issue after considering the additional evidence submitted by the assessee. (AY. 2003-04, 2004-05)
Kishore Ramchandani v. ITO (2016) 47 ITR 134 (Mum.)(Trib.)

1317 **S. 80-IB : Undertaking – Matter remanded to the AO to verify whether excess deduction was claimed by the eligible unit out of the transactions with the non-eligible unit.**

The assessee, a manufacturer, had 2 units of which one was eligible for deduction u/s. 80-IB. The AO disallowed the deduction on the basis that there was close connection between the eligible and non-eligible units and the business between the two were so arranged that excess deduction was claimed by the eligible unit. The assessee filed additional evidence before the CIT(A) to prove that the said transactions took place without mark-up. The CIT(A) upheld the disallowance by the AO, without considering the remand report of the AO in which it was observed that sufficient evidence were submitted by the assessee to prove that there was no manipulation of books. On appeal, the ITAT remanded the matter to the AO and directed him to consider the evidences submitted by the Assessee along with the remand report of the AO. (AY. 2009-10)

Kaiser Industries Ltd. v. JCIT (2016) 47 ITR 656 (Amritsar)(Trib.)

1318 **S. 80-IB : Undertaking – Hotel – Rent and other misc. items – Derived from the business of the Hotel – Entitle the deduction. [S. 80IB(7)]**

Amounts by way of rent and other misc. items, though shown as "other income" in the books, constitutes "key revenue category" as per ICAI Guidelines and are "derived" from the business of the hotel and eligible deduction. (ITA No. 240-242/Coah/2015, dt. 01.03.2016) (AY. 2007-08, 2008-09, 2010-11)

Kumarakom Lake Resort Pvt. Ltd. v. ACIT (Cochin)(Trib.); www.itatonline.org

1319 **S. 80-IB : Undertaking – Failure to maintain separate books of account – AO shall compute to deduction on reasonable basis. [S. 145]**

Tribunal held that where assessee claimed deduction under section 80-IAB but failed to maintain separate books of account for eligible units, Assessing Officer shall compute deduction on reasonable basis. (AY. 2009-10, 2010-11)

Dy. CIT v. A.P. Industrial Infrastructure Corporation Ltd. (2016) 156 ITD 410 (Hyd.)(Trib.)

1320 **S. 80-IB(10) : Housing projects – Balcony – Built-up area – Terrace in pent house not part of built-up area – Finding that assessee was developer and built-up areas were within specified limits – Assessee entitled to deduction.**

Dismissing the appeal of Revenue, the Court held that the Tribunal had found that the assessee was a developer. The assessee had undertaken full responsibility of constructing the residential units and had also been responsible for the resultant profit or loss arising out of such venture. The assessee thus, had undertaken full risk. The Tribunal had rightly held that the open space attached to a penthouse could not be included in the term "balcony". The Tribunal was right in law and on facts in allowing the deduction claimed by the assessee under section 80IB(10). (AY. 2006-07)

CIT v. Amaltas Associates (2016) 389 ITR 175 (Guj.)(HC)

1321 **S. 80-IB(10) : Housing projects – Proportion deduction on the housing project was held to be proper.**

Tribunal held that assessee was entitled to deduction under section 80IB(10) proportionately out of profits in respect of wings 'A' to 'F'; whereas assessee had claimed

deduction for entire project, i.e., inclusive of Wing 'G' and not part of project. Revenue raised following question of law for consideration of High Court as to whether Tribunal was justified in upholding decision of Commissioner (Appeals) in proportionately allowing deduction under section 80-IB(10) out of profits in respect of Wings 'A' to 'F' without appreciating that assessee had claimed deduction for entire project, i.e., inclusive of Wing 'G' and not part of project. High Court held that above question stood concluded in favour of assessee and against revenue by an earlier decision of Bombay High Court in case of *CIT v. Vandana Properties (2013) 353 ITR 36* and, therefore, no substantial question of law arose for consideration. (ITA No. 2244 of 2013 dt. 4-2-2016)
CIT v. Aakash Nidhi Builders & Developers (Bom.)(HC)
Editorial : SLP filed against order of High Court was dismissed, CIT v. Aakash Nidhi Builders & Developers (2016) 243 Taxman 517 (SC)

S. 80-IB(10) : Housing projects – Deduction at source – Expenditure added back to income of assessee is eligible for deduction. [S. 40(a)(ia)] 1322
Dismissing the appeals of the revenue the Court held that in view of the scheme of section 40 deduction of tax at source was not effected by the assessee and payment to contractors could not be deducted as the expenditure became inadmissible. The expenditures were added back to the income being eligible income. This income eligible for deduction in terms of section 80-IB(10) only increased by the figure of disallowed expenditure. (AY. 2006-07)
CIT v. Sunil Vishwambharnath Tiwari (2016) 388 ITR 630 / 290 CTR 234 / 143 DTR 94 (Bom.)(HC)

S. 80-IB(10) : Housing projects – Two flats in project exceeding specified dimension – Assessee entitled to deduction in respect of other flats not exceeding specified dimension. 1323
The Assessing Officer found that the assessee had built two flats measuring 1572 square feet and 1653 square feet respectively. He held that since there was a breach of the condition specified under section 80-IB(10) of the Income-tax Act, 1961 in the construction of the two flats as they measured more than 1500 square feet, the deduction to the entire project and flats sold during the year was to be denied. The Commissioner (Appeals) confirmed the assessment order. The Appellate Tribunal held that the assessee would be disqualified for the deduction proportionately, only in respect of the two flats of area exceeding 1500 square feet but would be entitled to deduction in respect of the other flats which measured less than 1500 square feet. On appeal:
Held, dismissing the appeal, that the Tribunal was right in holding that the assessee was entitled to deduction under section 80-IB(10) with respect to income from flats measuring less than 1500 sq. ft. limit and would not be entitled to deduction under section 80IB(10) proportionately only with respect to the income from the two flats exceeding the limit of 1500 sq. ft. when the assessee had considered all the flats as forming part of a single project on interpretation of the provisions of section 80IB(10)(c). The order passed by the Appellate Tribunal was correct in the eye of law and the contentions raised on behalf of the Department could not be countenanced. (AY. 2010-11)
CIT v. Elegant Estates (2016) 383 ITR 49 (Mad.)(HC)

1324 **S. 80-IB(10) : Housing projects – Completion certificate from local authority – size of residential units including terrace exceeding 1500 sq. ft. – Commercial area more than 3%**

The Assessing Officer, for the assessment year 2010-11, disallowed the deduction claimed by the assessee under section 80-IB(10) of the Income-tax Act, 1961, on the grounds that (i) the completion certificate of building had not been obtained by the assessee from the local authority but only from an architect thereby violating the provisions of Explanation (ii) to section 80-IB(10)(a), (ii) the size of the residential units was more than 1,500 sq. ft. including the terrace area thereby violating the provisions of section 80-IB(10)(c), and (iii) the builtup area of the commercial establishment included in the project was higher than three percent of the aggregate area and more than 5,000 sq. ft. thereby violating the provisions of section 80-IB(10)(d). This was confirmed by the Commissioner (Appeals). The Tribunal held that (i) that the assessee had duly applied for the completion certificate from the Jodhpur Development Authority (i.e., the local authority) according to the condition laid down in section 80-IB(10) immediately after completion of the project. However, that authority instructed the assessee to take the completion certificate from a registered architect for official purposes. The project was completed within the allotted time frame and possession certificates were also duly furnished before the Assessing Officer. Therefore, expecting the assessee to produce the completion certificate from a local authority would only result in impossibility of performance on the part of the assessee. Accordingly, the rejection of deduction under section 80IB(10) by the Assessing Officer was not in order. (ii) That the actual builtup area of the residential building should not exceed the maximum area specified in the Act and there was no scope for making the assumptions and estimates. The definition of builtup area means inner measurement of the residential unit at the floor level including the projections and balconies as increased by the thickness of the walls but does not include the common areas shared with other residential units. Hence, it could be concluded that the open terrace was not covered within the meaning of the builtup area as it was open to the sky and would not be part of the inner measurement of the residential floor at any floor level. Therefore, the terrace area needs to be excluded from the builtup area and if the terrace area was excluded, the resultant builtup area was well within the 1,500 sq. ft limit prescribed in the Act and, hence, rejection of deduction under section 80-IB(10) by the Assessing Officer was not in order. (iii) That the commercial project was handled by an independent partnership for construction of commercial complex along with the approved plan, and both the residential and the commercial properties being independent units and belonged to two independent entities. The assessee had considered 58 bighas of land for construction of residential units and adjacent land of 11 bighas belonged to another firm which constructed the commercial project separately. Hence, the deduction under section 80-IB(10) should be claimed unitwise and, hence, rejection of deduction under section 80-IB(10) by the Assessing Officer was not in order. (AY. 2010-11)

Ashiana Amar Developers v. ITO (2016) 46 ITR 17 / 178 ITR 474 / 136 DTR 137 (Kol.) (Trib.)

S. 80-IB(11A) : Industrial undertakings other than infrastructure development undertakings – Handling, storage and transportation of food grains – Business of ginning and pressing of cotton – Failed to show integrated activities – Rejection of claim was held to be justified. 1325

Assessee was engaged in business of ginning and pressing of cotton and warehousing. Assessee filed his return claiming deduction u/s. 80IB(11A). AO rejected assessee's claim holding that assessee was not engaged in integrated business of handling, storage and transportation of food grains. Assessee could not bring any document on record to show any agreement/arrangement with outsourcing agencies for supply of labour, also had not placed on record any agreement/arrangement with transporters for transportation of food grains nor any bills/invoices had been produced to substantiate payment for transportation. Assessee had not been able to show that activities of handling, storage and transportation of food grains allegedly carried out by him were part of one composite activity and were integrated in any manner. Hence, claim of the assessee was rejected. (AY. 2008-09)

Anurag Radhesham Attal v. ITO (2016) 158 ITD 867 / (2017) 183 TTJ 423 / 147 DTR 207 (Pune)(Trib.)

S. 80-IC. Special provisions in respect of certain undertakings or enterprises in certain special category States.

S. 80-IC : Special category States – Income from erection and servicing of machinery manufactured in specified area – Entitled to deduction. 1326

Allowing the appeal the Court held that it was not disputed that the business of manufacturing activity of stone crushing plants and machinery, was entitled for deduction under the special provision of section 80-IC. The assessee was involved only in manufacturing activity of stone crushing plants and it was not installing or servicing machinery, manufactured by others. The assessee was entitled to special deduction under section 80IC in respect of the service and erection charges. (AY. 2007-08)

Torsa Machines Ltd. v. CIT (2016) 389 ITR 377 (Gauhati)(HC)

S. 80-IC : Special category States – Only those hotels which are set up as Eco-tourism units are eligible for deduction [S. 80IC(2)(b)] 1327

The assessee had set up hotels in Dehradun. AO held that for claiming deduction under S. 80-IC(2)(b), it was not enough to set up a hotel but the assessee's hotel also had to be associated with ecotourism as S. 80-IC(2)(b) read with the Fourteenth Schedule covers only those undertakings or enterprises which are engaged in eco-tourism including hotels, resorts, spa, entertainment/amusement parks and ropeways. HC held that Legislature did not intend that any person who sets up a hotel in Uttarakhand, without any regard to the exact location, and the manner in which it operates, its impact on the environment, its relationship with the local people, what it does for the people there, should be entitled to claim the benefit. HC further held that only those hotels which were setup as Ecotourism units would be entitled to the benefit of 80-IC and the fact that a No Objection Certificate has been obtained from

the Pollution Control Board is not determinative of the fulfilment of conditions of S. 80-IC. Appeal of revenue was allowed.
CIT v. Aanchal Hotels (P) Ltd. (2016) 138 DTR 169 / 287 CTR 233 / 241 Taxman 108 (Uttarakhand)(HC)
CIT v. Pankaj Nagalia (2016) 138 DTR 169 / 287 CTR 233 / 241 Taxman 108 (Uttarakhand)(HC)

1328 **S. 80-IC : Special category States – Industrial undertaking – Assessing Officer re-allocating purchases between exempt and non-exempt units – Same products sold from both units at same price range – Cost same – Reason to believe assessee inflating profits in exempt unit – Assessing Officer has powers to compute reasonable profit [S. 80IA]**
Held, dismissing the appeal of the assessee; that the purchases for both units were made from common sources. The products were manufactured by both units, majority of its expenditure and some of the customers were also common. The same products were sold from both the units at the same price range. It was shown that the machines cost less at an exempt unit, but the assessee failed to explain the reason for it. When the end product was the same, the cost would also be the same. By installing a machine of less cost, it could not be said that the assessee was achieving economy of scale or some other technological development. There was definitely a reason to believe that the assessee inflated the profits in the eligible unit and in such situation, the Assessing Officer had clear powers in terms of section 80-IA(10) of the Act to compute the reasonable profit. (AY. 2010-11)
Deepak Verma v. CIT (2016) 384 ITR 154 (P&H)(HC)
Editorial : The Supreme Court has dismissed special leave petition filed by the assessee against this judgment, Deepak Verma v. CIT (2016) 383 ITR 5 (St.)

1329 **S. 80-IC : Special category States – It is 'undertaking or enterprise', rather than 'assessee' or profits and gains, which is to be subjected to deduction.**
It is 'undertaking or enterprise' rather than assessee, which is to be subjected to deduction under section 80-IC; a unit arising due to substantial expansion would constitute new business and period of 10 years' tax holiday would commence from initial assessment of that unit. (AY. 2008-09)
Aggarwal & Co. (Engg. & Eractors) v. DY. CIT (2016) 160 ITD 540 (Asr.)(Trib.)

1330 **S. 80-IC : Special category States – Sale of scrap being part and parcel of activities of undertaking, profit derived hence to be considered for deduction.**
Sale of scrap being part and parcel of activities of assessee's undertaking, gains derived from said activity was required to be take into consideration for purposes of computation of deduction u/s. 80-IC. (AY. 2008-09 to 2011-12)
SBL (P.) Ltd. v. ITO (2016) 161 ITD 379 (Jaipur)(Trib.)

S. 80-IC : Special category States – Assembling electric bikes, would amount to manufacturing hence eligible deduction. 1331

Assessee assembling parts procured from China using simple machinery to produce electric bikes. Imported parts underwent a change and a new product was produced, said activity would come under term 'manufacture' and therefore deduction u/s. 80-IC is allowable. (AY. 2008-09)

ACIT v. Accura Bikes (P.) Ltd. (2016) 161 ITD 275 / (2017) 146 DTR 222 (SMC) (Ahd.) (Trib.)

S. 80M. Deduction in respect of certain inter corporate dividends.

S. 80M : Inter corporate dividends – Estimation of expenditure – Where the Appellate Authorities found that expenses liable to be deducted for computation of deduction under section 80M was considered under wrong head, they must direct Assessing Officer to rectify that error for all purposes. 1332

Assessee-company received dividend income from two group companies and claimed deduction. Assessing Officer enumerated management expenses related to dividend income under section 80M and allowed proportionate management expenses. Tribunal held that section 80M does not authorize Assessing Officer to estimate expenditure and recompute income. On appeal by revenue allowing the appeal the Court held that since, assessee did not provide any bifurcation of expenditure incurred in respect of dividend income, Assessing Officer had no option but to estimate expenditure and to recompute income by way of dividend to arrive at deduction that may be allowed under section 80M. Where Appellate Authorities found that expenses liable to be deducted for computation of deduction under section 80M was considered under wrong head, they must direct Assessing Officer to rectify that error for all purposes. (AY. 1991-92)

CIT v. Hero Cycles Ltd. (No. 2) (2016) 243 Taxman 28 / (2017) 393 ITR 264 / 293 CTR 23 / 147 DTR 265 (P&H)(HC)

Editorial: SLP of assessee is admitted CIT v. Hero Cycles Ltd v. CIT (2017) 245 Taxman 355 (SC)

S. 80-O. Deduction in respect of royalties, etc., from certain foreign enterprises.

S. 80-O : Royalties – Foreign enterprises – Procurement of marine products in India for foreign enterprise – No expertise capable of being used abroad – Not entitled to deduction. 1333

Allowing the appeal of revenue the Court held that Procurement of marine products in India for foreign enterprise. As no expertise capable of being used abroad the assessee is not entitled to deduction. (AY. 1993-94)

CIT v. Ramnath and Co. (2016) 388 ITR 307 (Ker.)(HC)

CIT v. Concord International (2016) 388 ITR 307 (Ker.)(HC)

CIT v. Laxmi Agencies (2016) 388 ITR 307 (Kar.)(HC)

1334 **S. 80-O : Royalties – Foreign enterprises – Remuneration from foreign enterprises – Allocation of expenses – Failure by assessee to follow consistent method for apportionment of expenses hence method adopted by assessee resulting in distorted apportionment was held to be unacceptable.**
Dismissing the appeal of the assessee the Court held that the allocation of expenses between foreign business and domestic business should be on proportionate basis. On facts the Court held that there was failure by assessee to follow consistent method for apportionment of expenses hence method adopted by assessee resulting in distorted apportionment was held to be unacceptable. (AY. 1993-94, 1997-98)
Continental Carriers v. CIT (2016) 384 ITR 102 / 135 DTR 293 (Delhi)(HC)

S. 80P. Deduction in respect of income of co-operative societies.

1335 **S. 80P : Co-operative societies – Society was not a co-operative bank but a co-operative society and as such entitled for exemption. [S. 80P(2)(a)(i)]**
Dismissing the appeal of the revenue, the Court held that the assessee was giving credit facilities only to the members and that would not make assessee a co-operative bank. Accordingly, after relying upon the judgment of the Bombay High Court in case of *Quepem Urban Co-operative Credit Society Ltd. v. ACIT [TA. Nos. 22 to 24 of 2015, dt.17-1-2015]*, it held that finding of the ITAT, which was not alleged to be perverse, that assessee was not a co-operative bank deserved to be upheld.
PCIT v. Goa PWD Staff Co-op. Credit Society Ltd. (2016) 242 Taxman 422 (Bom.)(HC)
Editorial: SLP is granted to the revenue; CIT v. Goa Staff Co-operative Housing Finance & Federation Ltd. (2016) 242 Taxman 366 (SC).

1336 **S. 80P : Co-operative societies – Business of Banking – No finding regarding issue by the Tribunal – Matter remanded.**
Allowing the appeal of Revenue, the Court held that there was no finding by the Tribunal against the assessee on the issue whether it was engaged in the business of carrying on banking business. The Tribunal, did not think it necessary to decide this issue as it found that the assessee was entitled to succeed on another basis. Thus since it might be necessary to consider leading of additional evidence, the Tribunal was to decide the issue. In the event of the Tribunal finding that the assessee was engaged in carrying on the business of banking, the Tribunal should decide whether on that basis the assessee was entitled to the benefit of section 80P(2)(a)(i) or under any other provision in respect of the claims. Matter remanded. (AY. 2003-04)
CIT v. Punjab State Co-op. Agricultural Development Bank Ltd. (2016) 389 ITR 607 (P&H) (HC)

1337 **S. 80P : Co-operative societies – Interest from investment of its reserve funds and call deposits made with various banks – Assessee is not entitled to deduction on basis that it was providing credit facilities to its members.**
Allowing the appeal of revenue, the Court held that the assessee was not entitled to deduction on the basis that it was engaged in carrying on the business of providing credit facilities to its members. If the interest income was attributable to the business of

banking, exemption under section 80P(2)(a)(i) would be available. The issue whether the assessee carried on the business of banking was not considered and had been remanded to the Tribunal. If it was established upon remand that the assessee carried on the business of banking the result might be different. (AY. 2003-04)
CIT v. Punjab State Co-op Agricultural Development Bank Ltd. (2016) 389 ITR 607 (P&H) (HC)

S. 80P : Co-operative societies – Interest earned on advances to employees – Definition of members does not include employees in accordance with Punjab Co-operative Societies Act – Assessee is not entitled to benefit. 1338
Allowing the appeal of the Revenue, the Court held that the assessee would be entitled to the benefit of section 80P(2)(a)(i) in respect of the interest earned on advances to its employees only if employees fell within the ambit of the term "members" in that section. The assessee's employees could not be said to be members. The definition of members in accordance with section 2(g) of the Punjab Co-operative Societies Act, 1961 does not include employees. (AY. 2003-04)
CIT v. Punjab State Co-op. Agricultural Development Bank Ltd. (2016) 389 ITR 607 (P&H) (HC)

S. 80P : Co-operative societies – Interest income – Other sources – Not entitled to deduction. 1339
Assessee was a co-operative society. In banks other than co-operative banks, it made short-term investment of surplus which was not immediately required for business purpose. Assessee also advanced loan to employees for housing and conveyance. Tribunal found that deduction under section 80P(2)(a)(i) was available only in respect of core activities of societies; that interest received by assessee was not from core activities and, therefore, same had to be taxed as 'Income from other sources' and, thus, assessee would not be entitled to deduction under section 80P. On appeal High Court held that since nothing was demonstrated that approach of Tribunal was erroneous or perverse in any manner, no substantial question of law arose for consideration. (AY. 2011-12)
Punjab State Co-operative Federation of House Building Societies Ltd. v. CIT (2016) 76 taxmann.com 98 (P& H)(HC)
Editorial : SLP was granted to the assessee, Punjab State Co-operative Federation of House Building Societies Ltd. v. CIT (2016) 243 Taxman 518 (SC)

S. 80P : Co-operative societies – Primary agricultural credit society entitled to deduction. 1340
Dismissing the appeals of the revenue the Court held that the primary object of the assessee-society was to provide financial accommodation to its members to meet all the agricultural requirements and to provide credit facilities to the members, as per the bye-laws and as laid down in section 5(cciv) of the Banking Regulation Act, 1949. The assessee society was admittedly not a co-operative bank but a credit co-operative society. It was entitled to the deduction under section 80P. (AY. 2008-09, 2009-10, 2011-12)
CIT v. Veerakeralam Primary Agricultural Co-operative Credit Society (2016) 388 ITR 492/ 241 Taxman 324 (Mad.)(HC)

1341 **S. 80P : Co-operative societies – Capital or revenue – Co-operative bank – Deduction is available on sum amortised.**

The assessee, a co-operative bank, sometimes purchased securities at the market value which was more than the face value. On the basis of the guidelines issued in the Circular dated March 28, 2005 by the Reserve Bank of India, it amortised the differential amount between the face value and the market value of the securities purchased and claimed deduction under section 80P(2)(a)(i). in respect thereof. On the issue whether amortisation was permissible or not, held, allowing the appeal, that the amortisation of premium might be permitted so long as the deduction was available to the assessee under section 80P. If the income of the assessee had been deductible under section 80P, whether the income had been reduced by the amortisation or not would not have any effect on the Department. There had been no loss of revenue. In such a case, refusal to allow the amortisation would have resulted in following a practice that would have been contrary to the circular that had been issued by the Reserve Bank of India. The Tribunal had erred in law in holding that the amortisation of the sum of premium paid on the investment was capital expenditure. (AY. 2005-06)

Contai Co-op. Bank Ltd v. ACIT (2016) 386 ITR 144 (Cal.)(HC)

1342 **S. 80P : Co-operative societies – Assessees not credit co-operative banks but credit co-operative societies – Exclusion clause not applicable – Exemption cannot be denied on mere ground of belated filing of return – Assessees are entitled to deduction – Matter was remanded to Tribunal [S. 80P(4), 139]**

Allowing the appeal the Court held that, Assessees are not credit co-operative banks but credit co-operative societies hence exclusion clause not applicable therefore exemption cannot be denied on mere ground of belated filing of return. Assessee is entitled to deduction, accordingly the matter was remanded to the Tribunal for reconsideration.

Chirakkal Service Co-op. Bank Ltd. v. CIT (2016) 384 ITR 490 / 239 Taxman 417 / 286 CTR 439 / 135 DTR 361 (Ker.)(HC)

1343 **S. 80P : Co-operative societies – Assessee fell within the term 'co-operative bank' and was not entitled for deduction. [S. 80P(4)]**

The Assessee was a State Co-operative Agricultural and Rural Development Bank. The question that arose before the High Court was whether Assessee was a 'co-operative bank' which was a 'primary agricultural credit society' or not. According to Revenue, Assessee was a co-operative bank, other than a 'primary agricultural credit society'/'primary co-operative agricultural and rural development bank' and, therefore, section 80P of the Act did not apply to it in view of sub-section (4) of section 80P.

The Assessee submitted that section 80P(4) of the Act provided that the provisions of this section did not apply in relation to any 'co-operative bank' other than 'primary co-operative agricultural and rural development bank'. In this regard, the High Court firstly decided whether the Assessee would be a co-operative bank which is a 'primary agricultural credit society'. In this regard, the High Court went through various definitions and provisions of the Banking Regulation Act, 1949 and the National Bank for Agricultural and Rural Development Act, 1981 and Kerala Co-operative Act, 1969 and decided that the Assessee would fall within the terms of the term 'co-operative

bank'. Further the High Court decided whether the Assessee was a 'primary agricultural credit society' or not. In this regard, it observed the provisions of explanation (a) to section 80P(4) of the Act and held that it was not a 'primary agricultural credit society'. Thus the High Court held that the Assessee was not a co-operative Bank which was a 'primary agricultural credit society' and the Assessee did not fall under section 80P(4) of the Act and hence the appeal of the Assessee was dismissed. (AY. 2007-08)
Kerala State Co-operative Agricultural & Rural Development Bank Ltd. v. CIT (2016) 383 ITR 610/ 238 Taxman 638 (Ker.)(HC)

S. 80P : Co-operative societies – Earning of co-operative society must be through utilisation of labour of members – Society running toddy shops – Tapping of toddy not main business of society – Income from utilising labour of members for tapping toddy – Not entitled to [S. 80P(2)(a)(vi)] 1344

Since income of the society had nothing to do with the collective disposal of the labour of its members but was entirely from the price realised by it for the sale of toddy through the society's own toddy shops, the Tribunal was justified in holding that the assessee-societies were not eligible for the. (AY 2008-09, 2009-10)
Hosdurg Range Kallu Chethu Vyavasaya Thozhilali Sahakarana Sangham v. CIT (2016) 380 ITR 34 (Ker.)(HC)
Nileswar Range Kallu Chethu Vyavasaya Thozhilali Sahakarana Sangham v. CIT (2016) 380 ITR 34 / 129 DTR 161 (Ker.)(HC)
Peravoor Range Kallu Chethu Vyavasaya Thozhilali Sahakarana Sangham v. CIT (2016) 380 ITR 34 (Ker.)(HC)

S. 80P : Co-operative societies – Income tax authorities neither competent nor they possess any jurisdiction to decide whether the assessee is a co-operative society or a co-operative Bank – Entitled exemption. [S. 2(24)(viia)] 1345

The assessee was a co-operative society registered under the Karnataka State Co-operative Society Act, 1956. It claimed deduction under section 80P(2)(a)(i) of the Act. The Assessing Officer opined that the assessee was not entitled to the deduction, as, claimed, for the reason that the activity of the assessee was covered under section 2(24)(viia) which required the inclusion of profits and gains of any business of banking (including providing credit facilities) carried on by a co-operative society. It was held that the bye-laws of the assessee indicated that their primary object was transactions that were apparently in the nature of banking. In that, the assessee was receiving deposits from its members and providing loans to other members and, hence, it satisfied all the three conditions contemplated under section 56(ccv) of the Banking Regulation Act. From this premise, the Assessing Officer had proceeded on the basis that a primary co-operative bank meant a co-operative society. Therefore, he held that the assessee being a primary co-operative bank was not eligible for deduction under section 80P.
The CIT(A) and the Tribunal confirmed the order of the Assessing Officer. On appeal to the High Court the Court held that the Authorities under Income-tax Act are neither competent nor do they possess any jurisdiction to resolve controversy as to whether assessee was a co-operative society or a co-operative bank, as defined under provisions of Banking Regulation Act. The assessee is entitled the exemption. (AY. 2009-10)
Belgaum Merchants Co-op. Credit Society Ltd. v. CIT (2016) 236 Taxman 351 (Karn.)(HC)

1346 **S. 80P : Co-operative societies – Marketing societies – Income derived by assessee from marketing of toddy which was produced by its members by tapping coconut trees grown by them, was eligible for deduction [S. 80P(2)(a)(iii)]**
Allowing the appeal of the assessee, the Tribunal held that; Toddy is an agricultural produce and, therefore, income derived by assessee society from marketing of toddy which was produced by its members by tapping coconut trees grown by them, was eligible for deduction u/s. 80P(2)(a)(iii). (AY. 2008-09 to 2011-12)
Kannur Range Kallu Chethu Vyavasaya Thozhilali Sahakarana Sangam Ltd. v. ACIT (2016) 159 ITD 507 / 181 TTJ 538 / (2017) 148 DTR 189 (Cochin)(Trib.)

1347 **S. 80P : Co-operative societies – Not a co-operative bank, entitled to deduction [S. 80P(2)(a)(i)]**
Dismissing the appeal of the appeal of the revenue the Tribunal held Assessee, a co-operative society, was not carrying on banking business as it was not receiving deposits from persons who were not members and, moreover, bye-laws of society permitted admission of any other co-operative society as its members, hence the assessee could not be regarded as primary-co-operative bank, hence eligible to deduction. (AY. 2007-08, 2009-10)
ITO v. Shiva Credit Souhard Sahakari Niyamit (2016) 68 SOT 228 (Panaji)(URO)(Trib.)

1348 **S. 80P : Co-operative societies – Primary co-operative bank – Not entitle to deduction. [S. 80P(2)(a)(i), Banking Regulation Act, 1949, S. 5(ccv)]**
Assessee had fulfilled all three conditions of being held a Primary Co-operative Bank as given in section 5(ccv) of Banking Regulation Act, 1949 therefore provisions of section 80P(4) were applicable and assessee was not entitled for deduction under section 80P(2)(a)(i). (AY 2010-11)
ITO v. Shri Durdundeshwar Urban Co-operative Credit Society Ltd. (2015) 68 SOT 240 (Panaji)(URO)(Trib.)

1349 **S. 80P : Co-operative societies – Interest and dividend earned by a co-op society on investments with other co-operative societies is eligible for deduction. [S. 80P(2)(d)]**
Allowing the appeal of assessee the Tribunal held that interest and dividend earned by a co-op. society on investments with other co-operative societies is eligible for deduction. The question whether the co-op. society is engaged in the business of banking for providing credit facilities to its members and the head under which the income is assessable is not material. (ITA No. 3566/Mum/2014, dt. 15.01.2016) (AY. 2009-10)
Land End Co-operative Housing Society Ltd. v. ITO (Mum.)(Trib.); www.itatonline.org

1350 **S. 80P : Co-operative societies – Interest earned on investments was held to be allowable deduction – Dividend received from mutual funds, interest from serving bank account and miscellaneous receipts, deduction was not allowable.**
The Tribunal held that the assessee is entitled to deduction under section 80P on interest earned on investments but not entitled to deduction under section 80P relating to dividend received from mutual funds which is income from other sources. Similarly interest from saving bank accounts and other receipts viz. service charges, cheque return

charges, DD commission, processing fees, loan from fees and other interest not being covered by the provisions of section 80P are not eligible for deduction under section 80P in the hands of the assessee society. (AY. 2010-11)
ITO v. Kundalika Nagari Sahakari Patpedhi Maryadit (2016) 178 TTJ 381 / 137 DTR 210 (Pune)(Trib.)
ITO v. Kamal Mahila Nagari Sahakari Patpedhi Maryadit (2016) 178 TTJ 381 / 137 DTR 210 (Pune)(Trib.)

S. 80QQB. Deduction in respect of royalty income, etc. of authors of certain books other than test books.

S. 80QQB : Royalty – Authors other than text books – Book written on income tax problems in question answer form – Entitle to deduction. 1351
It was held that book authored by the assessee on income tax problems in question answer form is a literary work in terms of s. 80QQB and, therefore, assessee is entitled to deduction u/s. 80QQB in respect of the royalty received by him on the same. (AY. 2005-06).
Dilip Loyalka v. ACIT (2016) 130 DTR 73 / 175 TTJ 334 (Kol.)(Trib.)

S. 80RR. Deduction in respect of professional income from foreign sources in certain cases.

S. 80RR : Professional income-Foreign sources – Sportsperson – Need not be currently playing in field and income need not be directly from playing in field only – Held eligible deduction. 1352
Assessee claimed deduction in respect of professional income from foreign sources. Assessing Officer held that the assessee did not fall any category of profession defined u/s. 80RR. On appeal Tribunal held that the assessee is a sportsman and sportsman may also be used to describe former player who continues to remain associated and engaged, for the promotion of the related sports activities. On the facts the assessee has been undoubtedly a cricketer of international stature, hence deduction is available to the assessee. (AY. 2001-02 & 2002-03)
Sunil Gavaskar v. ITO (2016) 47 ITR 243 / 177 TTJ 500 / 134 DTR 113 (Mum.)(Trib.)

CHAPTER IX
DOUBLE TAXATION RELIEF

S. 90. Agreement with foreign countries or specified territories.

1353 **S. 90 : Double taxation relief – Permanent establishment – The main business is fabrication and installation of platforms, project office acting as a communication channel would qualify as an activity of auxiliary character, hence eligible for exclusionary clause of Art. 5(3)(e) of the DTAA – Installation activities lasted from 19/11/2006 to 27/04/2007 which is less than minimum period of 9 months – Even if period during which pre-installation activities were in place, the total period would not exceed nine months, therefore, no PE under Art. 5(2)(h). Agreement between assessee and ASL is on principal-to-principal basis. ASL acted as an agent of independent status to whom art. 5(5) applies. ASL would not constitute Dependent Agent PE in India – DTAA-India-UAE [Art. 5(3)(e)]**

The assessee, a company incorporated in UAE, entered into contracts with ONGC for the installation of petroleum platforms and submarine pipelines and also included various activities. Whilst the activities relating to survey, installation and commissioning were done entirely in India, the platforms were designed, engineered and fabricated overseas. The assessee filed its return of income for relevant years.

The AO opined that the assessee had a fixed place PE in India in the form of a project office at Mumbai and also, held that Arcadia Shipping Limited ("ASL") constituted a Dependent Agent PE ("DAPE") of the assessee in India. The DRP upheld the order of AO. On an appeal, the Tribunal concluded that the assessee's project office in India was its PE.

On appeal, the HC held that the assessee's project office in Mumbai cannot be treated as PE in India. Firstly, there were no material to support that employees of the project office were present at the meeting or they had participated in review of the engineering documents or in the discussions or approval of the designs submitted to ONGC, it has to be accepted that the assessee's project office was only used as a communication channel. Secondly, the main business of assessee was fabrication and installation of platforms whereas project office only acted as a communication channel. Therefore, the activities of project office would be covered by the exclusionary clause under Art. 5(3)(e) of the DTAA.

On applicability of Art. 5(2)(h), the HC held that it is necessary that the 'site, project or activity continues for a period of more than nine months'. During the period, 21/05/2006 to 19/11/2006, the assessee did not have access to the site office, therefore, this period cannot be considered for determination of PE in India under Art. 5(2)(h). The installation activities lasted from 19.11.2006 to 27.04.2007, which is much less than the minimum period of nine months. Even if the time spent by ASL in conducting the pre-engineering, pre-design survey is included, the duration of the project activities in India would not exceed nine months. Therefore, if the duration of the project activities in India was less than nine months, Assessee did not have a PE in India under Art. 5(2)(h) of the DTAA.

On ASL being treated as a Dependent Agent PE ("DAPE") of the assessee under art. 5(4) of the DTAA, the HC held that the ASL provision of logistics and consultancy

support was in its regular course of business and the agreement between the assessee and ASL was on principal-to-principal basis. Further, the consultancy agreement does not authorise ASL to conclude contracts on behalf of the assessee. Therefore, ASL is an agent of independent status and therefore, would not constitute a DAPE of the assessee in India. (AY. 2007-08, 2008-09)
National Petroleum Construction Company v. DIT(IT) (2016) 383 ITR 648 / 131 DTR 113 / 284 CTR 373 / 238 Taxman 40 (Delhi)(HC)
Editorial : SLP is granted to the revenue; DIT(IT) v. National Petroleum Construction Company (2017) 244 Taxamn 56 (SC)
Editorial : SLP is granted to the revenue; DIT v. National Petroleum Construction Co. (2016) 242 Taxman 250 (SC)

S. 90 : Double taxation relief – Assessee is eligible to claim credit of taxes paid in other country even if income is exempt by virtue of section 10A – DTAA-India-USA-Canada [S. 4, 5, 10A, Art. 25, 23] 1354
Assessee carried on business of exporting software including services for on-site development of software through its permanent establishment in other country. The income earned by the assessee from export and on site development was exempt under section 10A of the Act. During the assessment proceeding, it claimed credit for taxes paid, in respect of permanent establishment, in other countries. The Assessing Officer denied the claim of the assessee on the ground that no revised return was filed by the assessee. The CIT(A) allowed the relief to assessee however, the Tribunal remanded it back to Assessing Officer with the observation that the income is exempt under section 10A. Therefore the assessee would not be able to claim credit for taxes paid outside India. On appeal, the High Court held that payment of taxes in both the countries is not *sine qua non* for claiming benefit of section 90. Taxability of income in India is not precondition to claim benefit of section 90 as section 10A does not give blanket exemption, it only has the effect of suspending the collection of revenue for 10 years. The income exempted under section 10A is chargeable to tax under section 4 and includible in the total income under section 5 but, taxability is suspended for 10 years. It was also held that the countries with which there is no agreement under section 90, credit of taxes is available by virtue of provisions of section 91. (AY. 2001-02 to 2004-05)
Wipro Ltd. v. DCIT (2016) 382 ITR 179 / 236 Taxman 209 / 282 CTR 346 / 129 DTR 68 (Karn.)(HC)

S. 90 : Double taxation relief – Offshore contract – Income from offshore contract was held to be not chargeable to tax – DTAA-India-Japan. [S. 9(1)(vii), Art. 7] 1355
Allowing the appeal of assessee Tribunal held that where Japanese company executed Engineering, Procurement, Construction and Commissioning contracts in India through Indian project office, income from offshore services, though chargeable under section 9(1)(vii) was exempt under DTAA and, hence, could not be charged to tax in light of section 90(2). (AY. 2008-09)
IHI Corporation v. ADIT(IT) (2016) 156 ITD 677 (Mum.)(Trib.)

1356 **S. 90 : Double taxation relief – Surcharge and education cess is not leviable when tax rate is prescribed under DTAA-India-UK. [Art. 2]**

Dismissing the appeal of revenue the Tribunal held that when tax rate is determined under DTAA, then tax rate prescribed therein shall have to be followed strictly without any additional taxes thereon in form of surcharge or education cess. (AY. 2010-11)

Dy. CIT v. BOC Group Ltd (2016) 156 ITD 402 (Mum.)(Trib.)

1357 **S. 90 : Double taxation relief – Computation of profits attributable to PE – Position settled by amendment in protocol to DTAA – Simply because there is more specific provision post protocol amendment, it cannot be concluded that the judicial precedent by Tribunal ceases to hold good – DTAA-India-UAE. [Art. 7]**

A protocol amending India-UAE treaty has been entered into. Protocol has two major changes- first with regards to definition of a 'resident of a contracting state' and second restrictions under domestic tax law specifically extending to computation of taxable profits under Article 7. Reverse discrimination which would have resulted by not restricting the deductions in the light of provisions of the Act for non-resident assessee was not permissible under India-UAE DTAA prior to the protocol amendment and such a reverse discrimination is not permissible even now as specifically provided for in the said protocol amendment. Every specific amendment to the law or a treaty particularly when it is disadvantageous to the taxpayers and is enacted as a measure of abundant caution is generally fraught with what tax academicians and policymaker term as the risk of its kill effect. The issue is squarely covered by the decision of Tribunal in assessee's own case. This stand has now been accepted in the protocol to India-UAE treaty. Just because there is more specific and unambiguous provision post the protocol amendment, one cannot come to conclusion that judicial precedent rendered by Co-ordinate Bench, even without specific and unambiguous expressions, ceases to hold good. That will be stretching the things too far and will also be contrary to the approach adopted by a very large number of judicial precedents. (AY. 2002-03)

Mashreq Bank PSC v. DDIT (2016) 176 TTJ 85 / 131 DTR 1 (Mum.)(Trib.)

S. 91 : Countries with which no agreement exists.

1358 **S. 91 : Double taxation relief – Income tax must be paid in both countries, for claiming relief. [S. 35D, 80HHB]**

Amount of deduction claimed under sections 80HHD and 35D are not subjected to tax in India but forming part of assessee's income. Relief under section 91 can not be granted. (AY. 1983-84)

Reliance Infrastructure Ltd. v. CIT (2016) 76 taxmann.com 257 / (2017) 390 ITR 271 (Bom.)(HC)

CHAPTER X
SPECIAL PROVISIONS RELATING TO AVOIDANCE OF TAX

S. 92. Computation of income from international transaction having regard to arm's length price.

S. 92 : Transfer pricing – Arm's length price – Specified domestic transactions – Reference to Transfer pricing Officer – Assessee investing more than ₹ 5 crore in company in which directors of assessee held in aggregate more than 20 per cent of shares – *Prima facie* material to show assessee was covered under section 92 – Reference to transfer pricing Officer was held to be valid. [S. 92A, 92BA, 92CA, 40A(2)(b)] 1359

The assessee filed Writ petition against reference to Transfer Pricing Officer; Dismissing the petition the Court held that the assessee had made expenditure in the nature of advertisement, rent and purchase of investment in subsidy to W Ltd., the aggregate of which admittedly exceeded ₹ 5 crores. There was *prima facie* material suggesting that the directors of the assesse company, in the aggregate, held more than 20 per cent of the shares in voting power in W Ltd. The aggregate of expenditure incurred by the assessee to such company exceeded ₹ 5 crores. Under the circumstances, the transfer pricing procedure was to be allowed to proceed further without interjecting at this intermediary stage. (AY. 2013-14)

D. B. Corp. Ltd v. Dy. CIT (2016) 389 ITR 162 (Guj.)(HC)

S. 92A. Meaning of Associated Enterprises.

S. 92A : Transfer pricing – Associate enterprise – When there is no connection by way of participation in management or control or capital by entities or its subsidiaries, either directly or indirectly between two enterprises, they cannot be said to be associated enterprises and provision of Chapter X of Act cannot be applied. [S. 92C] 1360

Dismissing the appeal of the revenue, the Tribunal held that Since there was no connection whatsoever by way of participation in management or control or capital by entities or its subsidiaries, either directly or indirectly, assessee and Cummins could not be said to be associate enterprises in order to apply provisions of Chapter X of Act. (AY. 2008-09)

JCIT v. Suttati Enterprises (P.) Ltd. (2016) 159 ITD 348 / 181 TTJ 199 (Pune)(Trib.)

S. 92A : Transfer pricing – Associated Enterprises – Bright Line Method – Assessee entered into licence agreement with a foreign company for particular branch – Licensor did not participate in capital and management of assessee, both companies could not be AE of each other. [S. 92C] 1361

Assessee Company was engaged in business of manufacture and sale of readymade garments under licence agreement with Jockey International Inc., USA ('JII'), A company incorporated in USA and owner of brand 'Jockey'. During the TPO proceedings, TPO view that expenditure incurred by assessee on advertisement and marketing and product promotion on behalf of JII was an international transaction. TPO made certain adjustment to assessee's ALP in respect of expenditure by applying Bright Line Method.

On appeal Tribunal held that; in order to constitute relationship of an AE, parameters laid down in both sub-section (1) and (2) of s. 92A should be fulfilled. Since there was no participation of JII in capital and management, parameters laid down in sub-section (1) of section 92A were not fulfilled and, there was no relationship of AE between assesse and JII. Consequently the adjustment was set aside. (AY. 2010-11)
Page Industries Ltd. v. Dy. CIT (2016) 159 ITD 680 / 181 TTJ 798 (Bang.)(Trib.)

1362 **S. 92A : Transfer pricing – Associated enterprises – Distribution Partners – In absence of participation in management or control or capital of buyer in seller, no AE relation would exist [S. 92C]**
The Assessee entered into distribution channel arrangements with certain foreign entities (buyers). These entities had no dominant influence over prices and other conditions of sale amounting to their *de facto* control over assessee. Tribunal held that since there was no participation of entities in management or control or capital of assessee and assessee chose to accept buyers' terms due to business compulsions and assessee's export sales to entities was less than 5 per cent of its entire exports. Provisions of S. 92A could not be invoked. Buyer must have dominant influence over prices and other conditions of sale amounting to *de facto* control of buyer over seller. (AY. 2011-12)
Orchid Pharma Ltd. v. Dy. CIT (2016) 182 TTJ 809 / (2017) 162 ITD 303 (Chennai)(Trib.)

S. 92B. Meaning of international transaction.

1363 **S. 92B : Transfer pricing – Arm's length price – Reference to Transfer Pricing Officer – Assessee must be given an opportunity to be heard before reference to Transfer Pricing Officer. [S. 92C]**
Where the assessee raises a threshold objection that it has not entered into any international transaction within the meaning of section 92B of the Act, it is imperative for the AO to deal with such an objection. If the AO decides to nevertheless make a reference, he has to record the reasons, even *prima facie*, why he considers it necessary and expedient to make such a reference to the Transfer Pricing Officer. While section 92CA(1) does not itself talk about a hearing having to be given to the assessee upon the latter raising an objection as to the jurisdiction of the AO to make a reference, such requirement appears to be implicit in the very nature of the procedure that is expected to be followed by the AO. The AO has to record that he considers it necessary and expedient to make a reference. The AO has to deal with the objections raised by the assessee. It is only thereafter that the AO can come to the conclusion, even *prime facie,* that it is necessary and expedient to make the reference. This has to be done prior to making a reference. The Central Board of Direct Taxes's Instruction No. 15 of 2015 as replaced by the Instruction No. 3 of 2016, dated March 10, 2016 clarifies the correct legal position. Since this is a procedural aspect and is intended to benefit the assessee it requires to be applied with retrospective effect. (AY. 2010-11)
Indorama Synthetics (India) Ltd v. Addl. CIT (2016) 386 ITR 665 / 241 Taxman 523 / 290 CTR 176 / 143 DTR 55 (Delhi)(HC)

S. 92B : Transfer pricing – International transaction – Advance converted into equity with in three months, could not be regarded as international transaction merely on the ground that same was reflected in Form 3CEB. [S. 92C] 1364

Allowing the appeal of the assessee, the Tribunal held that;advance of money to its AE for expansion of its business in abroad which was converted into equity within three months, it could not be regarded as international transaction of interest free loan merely on ground that same was reflected in that way by assessee inadvertently in Form 3CEB. (AY. 2008-09)

DLF Hotel Holdings Ltd. v. Dy. CIT (2016) 159 ITD 1075 / 181 TTJ 58 (Delhi)(Trib.)

S. 92B : Transfer pricing – Reimbursement of expenses – International transaction – Expenditure incurred prior to incorporation of AE, could not be classified as an international transaction. [S. 92C] 1365

Allowing the appeal of the assessee, the Tribunal held that assessee established AE in UK and to give effect to efficient group structure, performed various activities both prior to and post to incorporation of UK AE, expenditure incurred prior to incorporation of AE, could not be classified as an international transaction. (AY. 2007-08)

New Delhi Television Ltd. v. ACIT (2016) 160 ITD 491 / 182 TTJ 46 (Delhi)(Trib.)

S. 92B : Transfer pricing – International transaction – Interest – Transaction of extending credit period to AE was to be regarded as an international transaction even if it did not give rise to any income – Advance or loan and, therefore, both had to be clubbed and aggregated for purpose of determination of ALP. [S. 92C] 1366

Tribunal held that transaction was otherwise capable of generating income but because related parties decided not to charge or pay to each other, basic character and nature of transaction would not change. Thus transaction of extending credit period to AE was to be regarded as an international transaction even if it did not give rise to any income. Extending credit period for realization of sales to AE was a closely linked transaction with transaction of providing services to AE and, therefore, could not be treated as an individual and separate transaction of advance or loan and, therefore, both had to be clubbed and aggregated for purpose of determination of ALP. (AY. 2007-08)

Tally Solutions (P.) Ltd. v. ACIT (2016) 160 ITD 465 (Bang.)(Trib.)

S. 92B : Transfer pricing – Interest – Amendment by Finance Act, 2012 in s. 92B, at least to extent it dealt with question of issuance of corporate guarantees, is effective from 1-4-2012 and cannot have retrospective effect from 1-4-2002. [S. 92C] 1367

An anti-abuse legislation such as GAAR, SAAR, does not trigger levy of taxes it only tells what behaviour is acceptable or what is not acceptable and requires taxpayer to organize their affair in a manner compliant with set out norms. Amendments in anti-abuse legislations can only be prospective, amendment by Finance Act, 2012 in s. 92B, at least to extent it dealt with question of issuance of corporate guarantees, is effective from 1-4-2012 and cannot have retrospective effect from 1-4-2002. (AY. 2009-10)

Rusabh Diamonds v. ACIT (2016) 158 ITD 564 / 48 ITR 707 / 178 TTJ 425 / 135 DTR 121 (Mum.)(Trib.)

1368 **S. 92B : Transfer pricing – Corporate Guarantees – Explanation i(c) to S. 92B, though stated to be clarificatory and stated to be effective from 01.04.2002, has to be necessarily treated as effective from at best AY. 2013-14 as it is an "anti abuse" provision. [S. 92C]**

Allowing the appeal of assessee the Tribunal held that 2012 amendment does not add anything or expand the scope of international transaction defined under section 92B, assuming that it indeed does not – as learned Departmental Representative contends, this provision has already been judicially interpreted, and the matter rests there unless it is reversed by a higher judicial forum. However, if the 2012 amendment does increase the scope of international transaction under section 92B, as is our considered view, there is no way it could be implemented for the period prior to this law coming on the statute i.e., 28th May 2012. The law is well settled. It does not expect anyone to perform an impossibility.

It is for this reason that the Explanation to Section 92B, though stated to be clarificatory and stated to be effective from 1st April 2002, has to be necessarily treated as effective from at best the assessment year 2013-14. In addition to this reason, in the light of Hon'ble Delhi High Court's guidance in the case of New Skies Satellite BV also, the amendment in the definition of international transaction under Section 92B, to the extent it pertains to the issuance of corporate guarantee being outside the scope of 'international transaction', cannot be said to be retrospective in effect. The fact that it is stated to be retrospective, in the light of the aforesaid guidance of Hon'ble Delhi High Court, would not alter the situation, and it can only be treated as prospective. (AY. 2009-10)

Siro Clinpharm Private Ltd. v. DCIT (2016) 177 TTJ 609 / 134 DTR 1 (Mum.)(Trib.)

1369 **S. 92B : Transfer pricing – lending money – Transaction of advancing money by assessee to its AE located abroad for acquisition of satellite rights of Hollywood films did not fall within purview of expression 'international transaction'. [S. 92C]**

The AO has made certain adjustments on account of Arm's length interest, and computed on notional basis in respect of advance given to the AE by assessee. The DRP confirmed the addition. On appeal Tribunal held that transaction of advancing money by assessee to its AE located abroad for acquisition of satellite rights of Hollywood films did not fall within purview of expression 'international transaction' in terms of section 92B. Accordingly the addition was deleted. (AY. 2010-11)

KSS Ltd. v. Dy. CIT (2016) 157 ITD 124 (Mum.)(Trib.)

1370 **S. 92B : Transfer pricing – Corporate guarantee – Issuance of corporate guarantee by assessee on behalf of its subsidiary company is in nature of quasi capital or shareholder activity and not in nature of 'provision for services' and, therefore, said transaction is to be excluded from scope of 'international transaction'. [S. 92C]**

Tribunal held that issuance of corporate guarantee by assessee on behalf of its subsidiary company is in nature of quasi capital or shareholder activity and not in nature of 'provision for services' and, therefore, said transaction is to be excluded from scope of 'international transaction'. Even otherwise, since issuance of corporate guarantee does not have "bearing on profits, income, losses or assets", it does not constitute an international transaction, under section 92B, in respect of which an arm's length price adjustment can be made. (AY. 2006-07)

Micro Ink Ltd. v. Add. CIT (2016) 157 ITD 132 / 175 TTJ 8 / 129 DTR 49 (Ahd.)(Trib.)

S. 92C : Computation of arm's length price.

S. 92C : Transfer pricing – Transfer pricing provisions not applicable where exercise results in reduction of income chargeable to tax – No substantial question of law arose. [S. 80HHC, 92(3)] 1371

Dismissing the appeal of Revenue, the Court held that Section 92(3) provides that the transfer pricing provisions would not apply where it resulted in reduction of income chargeable to tax. The Department's contention that the import of pigments was at a price lower than the Arm's length price would increase the import price of pigments, resulting in a reduction in income chargeable to tax was not tenable. The finding arrived at by the Tribunal on the basis of imposition of anti-dumping duty by the customs was not challenged. The finding of the Tribunal that no adjustment was called for in the price paid by the assessee for import of pigments for its associated enterprises was a finding of fact which was not shown to be perverse or arbitrary. Therefore, no substantial question of law arose. (AY. 2003-04)

CIT v. Merck Ltd. (2016) 389 ITR 70 / 241 Taxman 535 / 290 CTR 226 / 143 DTR 86 (Bom.)(HC)

Editorial : Order in Merck Ltd. v. Deputy CIT (2014) 2 ITR (Trib.) OL 629 (Mumbai) affirmed.

S. 92C : Transfer pricing – Arms' length price – TNMM Method – Comparable – Software development services or even the IT enabled services – Matter was set aside. [R. 10B] 1372

The High Court held that the finding of TPO was that the said comparable was only engaged in provision of software development services. Further, the Tribunal had failed to peruse the material and merely in the absence of availability of segmental information with respect to E-Infochip Bangalore Ltd. rendered a finding that the TPO should not have considered the said comparable. Accordingly, the Court set aside the matter to the ITAT to consider whether the said comparable renders only software development services or even the IT enabled services.

PCIT v. Allscripts (India) (P) Ltd. (2016) 140 DTR 188 / 288 CTR 675 / 241 Taxman 545 (Guj.)(HC)

S. 92C : Transfer pricing – TNMM – Adjustment would be only in relation to transactions with Associate enterprises and not on entire turn over of assessee at entry level. 1373

Dismissing the appeal of the revenue the Court held that Adjustment would be only in relation to transactions with associate enterprises and not on entire turnover of assessee at entry level. Followed *CIT v. Thyssen Krupp Industries (I) Pvt. Ltd. (2016) 381 ITR 413 (Bom.)(HC)* and CIT v. *Tara Jewels Exports Pvt. Ltd. (2016) 381 ITR 404 (Bom.)(HC)* (AY. 2008-09)

CIT v. Lanxess India (P.) Ltd. (2016) 242 Taxman 472 (Bom.)(HC)

S. 92C : Transfer pricing – Arms' length price – Assessee could not be characterized as a distributor but was an Agent – Possible view, no question of law. [S. 260A] 1374

Dismissing the appeal of the Revenue, the Court held that CIT(A) on analysis of the agreements as well as on analysis of the activities performed came to the conclusion

that the assessee was a commission agent and not a distributor. ITAT confirmed the said finding, no material was brought on record to show that the finding of fact of the lower authorities was perverse. Accordingly, it held that the view taken by the ITAT was a possible view. (AY. 2004-05)
CIT v. Haworth (India) (P.) Ltd. (2016) 241 Taxman 100 (Bom.)(HC)

1375 **S. 92C : Transfer pricing – Arm's length price – Reference to Transfer Pricing Officer – Sufficient reasons in satisfaction recorded by AO – Reference to Transfer Pricing Officer was held to be proper. [S. 92A, 92B]**
An assessee is not entitled as a matter of right to invoke the writ jurisdiction at the stage of reference by the AO to the Transfer Pricing Officer. Grievances can be raised in a challenge to the draft assessment order before the Dispute Resolution Panel or the final assessment order before the Commissioner (Appeals).
The decision as to whether or not a transaction is an international transaction has far reaching consequences upon the assessee. It is only fair then that the assessee is given an opportunity of being heard on the question whether or not a transaction entered into by it is an international transaction. The requirement of the AO to furnish the reasons of satisfaction for a reference to the Transfer Pricing Officer of the arm's length price is, inter alia, to enable an assessee firstly to meet the case and represent against it on the ground that there is no international transaction and in the event of his objections being overruled, to get an opportunity of challenging before the Dispute Resolution Panel or the appellate authorities. (AY. 2011-12 to 2014-15)
Shri Vishnu Eatables (India) Ltd. v. Dy. CIT (2016) 389 ITR 385 / 243 Taxman 446 / 289 CTR 337 (P&H)(HC)

1376 **S. 92C : Transfer pricing – Arm's length price – Not open to Transfer Pricing Officer to subject only one element to entirely different method.**
Allowing the appeal the Court held that having accepted the transactional net margin method as the most appropriate method, it was not open to the Transfer Pricing Officer to subject only one element, i.e., payment of technical assistance fee, to an entirely different method. The adoption of a method as the most appropriate one assured the applicability of one standard or criteria to judge an international transaction. Each method was a package in itself, as it were, containing the necessary elements that were to be used as filters to judge the soundness of the international transaction in an arm's length price fixing exercise. If this were to be disturbed, the end result would be distorted and within one arm's length price determination for a year, two or even five methods could be adopted. Therefore, the transactional net margin method had to be applied by the Transfer Pricing Officer in respect of the technical fee payment too. (AY. 2008-09)
Magneti Marelli Power Train India P. Ltd. v. Dy. CIT (2016) 389 ITR 469 / 290 CTR 60 / 75 taxmann.com 213 / 142 DTR 329 (Delhi)(HC)

S. 92C : Transfer pricing – Adjustment has to be done only in respect of International Transactions with Associated Enterprises and not an entity level – Revenue should take consistent view. [S. 92] 1377

Dismissing the appeal of revenue the Court held that the fact that the assessee has chosen entity level PLI to benchmark the AE transactions and that it has not maintained segmental accounts is irrelevant. If segmental accounts are not available, proportionate adjustments have to be made only in respect of the international transactions with Associated Enterprises Transfer Pricing adjustment has to be done only in respect of International Transactions with Associated Enterprises. The fact that the assessee has chosen entity level PLI to benchmark the AE transactions and that it has not maintained segmental accounts is irrelevant. If segmental accounts are not available, proportionate adjustments have to be made only in respect of the international transactions with Associated Enterprises. Court also noted that during the course of all the above appeals, the fact that two appeals had been admitted on the above issue were not pointed out. Court also observed that the Income Tax Department within the jurisdiction of this Court must adopt a consistent view on issues of law. In this case, we find that the Revenue urges the absence of segmental accounts would warrant entity wise adjustment, when the Revenue had itself in Pedro Araldite Pvt. Ltd. did not canvas the point, as even according to it the issue stood covered by the earlier orders of this Court in favour of the assessee. The Revenue must apply the law equally to all and cannot take inconsistent position in law (*de hors* the facts) to apply different standards to different assessee. The administration of the tax laws should not degenerate into an arbitrary and inconsistent application of law dependent upon the assessee concerned. (AY. 2006-07)

CIT v. Alstom Project India Limited (2017) 394 ITR 141 (Bom.)(HC)

S. 92C : Transfer pricing – Arms' length price – Mere availability of proportion of turnover allocable for software product sales per se cannot lead to an assumption that segmental data for relevant facts is available to determine profitability of concerned comparable. 1378

Dismissing the appeal of revenue, the Court held that nature of transaction and appropriate filter determines elements that are to be considered in TNMM and therefore, costs, sales and assets employed wherever relevant are to be applied; mere availability of proportion of turnover allocable for software product sales per se cannot lead to an assumption that segmental data for relevant facts is available to determine profitability of concerned comparable. (AY. 2011-12)

PCIT v. Saxo India (P.) Ltd. (2016) 243 Taxman 411 (Delhi)(HC)

S. 92C : Transfer pricing – Profit level indicator – Berry ratio – Determination of arm's length price on basis of rate of commission reported by assessee with non-associated enterprises without examining similarity between two transactions was held to be not proper – Tribunal to conduct further in-depth inquiry as to relevant uncontrolled transactions before determination of arm's length price, matter remanded. 1379

Allowing the appeal of revenue, the Court held that although the Transfer Pricing Officer found fault in the use of the Berry ratio, he did not proceed to select the most appropriate method for computation of the arm's length price. The Transfer Pricing

Officer imputed the character of the trading transactions to the indenting transactions entered into by the assessee with its associated enterprises. Thus, he compared the profit margin realised by the associated enterprises from such transactions with the profit margin realised by the associated enterprises from a comparable uncontrolled transaction. The approach was not right, since it was not permissible for the Transfer Pricing Officer to recharacterise the tested transaction. The indenting transactions reported by the assessee were plainly in the nature of facilitating trade where the assessee was required to do nothing more than to follow up the customers for facilitation of the transaction. The assessee was not required to raise invoices for sale and purchase and its financial commitment and risk were inconsiderable. The Tribunal erred in proceeding to determine the arm's length price on the basis of the rate of commission reported by the assessee in respect of indenting transactions with non-associated enterprises, without further examination as to the similarity between the two transactions. The Tribunal effectively used the comparable uncontrolled price method for imputing the arm's length price of the assessee's indenting transaction with the associated enterprises. This might well be the most appropriate method to be used for determining the arm's length price. It was necessary for the Tribunal to conduct a further in-depth inquiry as to the relevant uncontrolled transactions. The Tribunal did not conduct any such enquiry and this methodology was used by the Tribunal at a stage at which it might not be feasible. The use of the Berry ratio as a profit level indicator resulted in indicating less than fair arm's length prices in tax jurisdiction where the assessees had a lower bargaining power. Therefore, the Berry ratio could not be used as a profit level indicator in cases of assessees which were using intangibles. However, there was no cogent material for the Transfer Pricing Officer to hold that the assessee had developed supply chain and human resources intangibles. In any event, there was no material to conclude that the costs of such intangibles were not captured in the operating expenses. The reason stated by the Transfer Pricing Officer, that the rate of commission paid to the assessee was based on the value of the goods, would be a valid reason to reject the use of Berry ratio because the Berry ratio could only be applied where the value of the goods was not directly linked to the quantum of profits and the profits were mainly dependent on expenses incurred. The fundamental premise being that the operating expenses adequately represented all functions performed and risks undertaken. For this reason the Berry ratio was effectively applied only in cases of stripped down distributors; that is, distributors that have no financial exposure and risk in respect of the goods distributed by them. The assessee's business was comprised of two segments, the trading segment and the indenting segment and the functional risk and the reward in the two segments were different. In the trading segment, the assessee earned a higher profit margin while in the indenting segment its profit margins were lower. The use of the Berry ratio would give unreliable results if the product mix of the comparables was different from the product mix of the assessee. This would make the task of finding a set of comparables fairly difficult. The matters were remanded to the Tribunal for decision afresh. (AY. 2007-08 to 2010-11)

Sumitomo Corporation India P. Ltd. v. CIT (2016) 387 ITR 611 / 242 Taxman 260 / 288 CTR 1 (Delhi)(HC)

S. 92C : Transfer pricing – Arm's length price – Guarantee was not approved by RBI, adjustment was not valid in the absence of an international transaction. 1380

The TPO made TP adjustment in respect of guarantee given on behalf of AE in form of pledging of shares. However, the said transaction was not approved by RBI, resulting in non-existence of any guarantee given by Appellant. Dismissing the appeal of revenue, the Court held that; no TP adjustment could be made in absence of an international transaction.

PCIT v. Adani Enterprises Ltd. (2016) 241 Taxman 542 / (2017) 152 DTR 102 (Guj.)(HC)

Editorial : SLP is granted to the revenue, PCIT v. Adani Enterprises Ltd. (2017) 247 Taxman 316 (SC)

S. 92C : Transfer pricing – Arm's length Price – ALP could not be determined on basis of Indian published price under new Exchange Control policy – Claim of royalty at 56% in relevant year was held to be justified. [S. 37(1) R. 10(B)(1)(e)] 1381

Question of law in HC was whether the Tribunal was justified in deleting the addition made by the AO on the basis of adjustment made by the TPO on account of International transactions of payment of royalty and not confirming the action of the AO in restricting the payment of royalty to 30% of the actual sales as against 5.6% claimed by the assessee? Dismissing the Revenue's appeal, HC held that once the liberalized policy did away with the requirement of computing the royalty with reference to the list price (Indian Published Price) the assessee was justified in enhancing the other royalty payment to AE @ 56% of actual sales revenue from 30% of India Published price and no adjustment in ALP was called for. (AY. 2004-05)

CIT v. Oracle India (P) Ltd. (2016) 386 ITR 1 / 241 Taxman 253 / 288 CTR 118 / 139 DTR 186 (Delhi)(HC)

S. 92C : Transfer pricing – Arm's length price – Tribunal set aside the matter – Order set aside was held to be justified. 1382

Dismissing the appeal of revenue, the Court held that ITAT remanded the matter to compute ALP, after holding that entire payment made by assessee towards 'management services' would be taken as aggregate payment for all services rendered by AE. Department contended that the set-aside should be general and the AO should be given opportunity to find out the quantum of service rendered vis-à-vis the expenses incurred. Court held that; the ITAT had given a finding after considering the relevant material hence no interference required. (AY. 2009-10)

CIT v. Fosroc Chemicals India (P.) Ltd. (2016) 240 Taxman 731 / 290 CTR 221 / 143 DTR 153 (Karn.)(HC)

S. 92C : Transfer pricing – Arm's length price – Companies which were primarily engaged in providing services as merchant banker, cannot be compared to a company providing investment advisory services. 1383

Dismissing the appeal of revenue the Court held that a company essentially engaged in activities with regard to telecom and providing call center services cannot be compared to a company providing financial services. Companies which were primarily engaged

in providing services as merchant banker, cannot be compared to a company providing investment advisory services. (AY. 2007-08)
CIT v. Goldman Sachs (India) Securities (P.) Ltd. (2016) 240 Taxman 736 / 290 CTR 236 / 143 DTR 158 (Bom.)(HC)

1384 **S. 92C : Transfer pricing – Entire exercise of transfer of business by the assessee to another domestic company was carried out independently on its own terms and conditions do hors the global agreement between their respective holding companies – No question of law arises. [S. 92B, 260A]**
Tribunal interpreting S. 92B(2) of the Act concluded that transaction would not be covered by the definition of International transaction. On revenue's appeal in HC, HC held that revenue having not disputed the findings of Tribunal that entire exercise of transfer of business by the assessee to another domestic company was carried out independently on its own terms and conditions do hors the global agreement between their respective holding companies and that the ALP of the said transfer as determined by the assessee is reasonable and the Tribunal having refused to restore the issue of determination of ALP to TPO, the question were academic and no substantial question of law arose. (AY. 2008-09)
CIT v. Kodak India (P) Ltd. (2016) 139 DTR 46 / 288 CTR 46 (Bom.)(HC)

1385 **S. 92C : Transfer pricing – Arm's length price – Cash profits to operating cost as PLI is an appropriate ratio while applying TNMM, particularly when the ratio was adopted by TPO in subsequent year.**
Dismissing the appeal of revenue the Court held that adopting ratio of cash profits to operating cost as PLI is an appropriate ratio under TNMM; particularly when the same ratio was adopted by TPO in subsequent years. (AY. 2005-06)
CIT v. Reuters India P Ltd. (2016) 239 Taxman 428 / 288 CTR 714 / 140 DTR 436 (Bom.) (HC)

1386 **S. 92C : Transfer pricing – Finding of Tribunal regarding comparable cases based on material on record – Finding of fact – Tribunal's order is justified.**
Dismissing the appeal of revenue, the Court held that the finding of Tribunal regarding comparable cases based on material on record. Finding of fact, hence, Tribunal's order is justified. Followed *CIT v. Thyssen Krupp Industries India P. Ltd. (2016) 381 ITR 413 (Bom)(HC)*. (AY. 2008-09)
CIT v. Thyssen Krupp Industries India P. Ltd. (2016) 385 ITR 612 / 239 Taxman 46 (Bom.) (HC)

1387 **S. 92C : Transfer pricing – As per CBDT's Instruction No. 3/2016 dated 10.03.2016, the AO is required to give an opportunity to the assessee to show cause why the reference should not be made to the TPO and thereafter pass a speaking order while making a reference to the TPO. The failure to do so renders the reference void – Matter was set aside to pass a speaking order. [S. 92E]**
Allowing the appeal the Court held that (i) No speaking order has been passed by the Assessing Officer while making a reference to the TPO, which is a requirement as per

the Instruction No. 3/2016 dated 10th March, 2016, issued by the CBDT. Before making a reference to the TPO, the assessee is required to be given an opportunity to show cause why the reference may not be made to the TPO and thereafter a speaking order is required to be passed by the Assessing Officer while making a reference to the TPO. (ii) Under the circumstances, on the aforesaid ground alone, the impugned reference made by the Assessing Officer to the TPO deserves to be quashed and set aside and the matter is required to be remanded to the Assessing Officer to pass a speaking order while making a reference to the TPO.
Alpha Nipon Innovatives Ltd. v. DCIT (2017) 145 DTR 206 / 291 CTR 309 (Guj.)(HC)

S. 92C : Transfer pricing – Arm's length price – Selection of comparables – An investment advisor could not be compared to a merchant banker 1388

The assessee provides private equity investment advisory services to its AE at cost plus 12.5%. The TPO selected 8 comparables and on application of Transaction Net Margin Method (TNMM) arrived at an arithmetic mean of 39.85% as against assessee operating profit of 13.12%. Dispute Resolution Panel (DRP) confirmed the TPO's order.
On appeal, the Tribunal rejected 7 comparables of the TPO following the decision of *Carlyle India Advisors (P.) Ltd v. ACIT (2012) 53 SOT 267)(Mum.)(Trib.),* where it was held that merchant bankers are not comparable to the assessee and used only one comparable in respect of investment advisory functions of the assessee (i.e. IDC (India) Ltd). Aggrieved by the Tribunal's order the Revenue was in appeal before the High Court.
The High Court held that on application of Function, Assets and Risk (FAR) analysis the Assessee Company's functions are similar to Carlyle India Advisors (P.) Ltd. viz. advising its AE on the possible companies it could invest. As far as assets are concerned both companies have similar expertise available for rendering advice to the AEs, and as far as risk is concerned the consideration received by it, is on cost plus basis similar to that of Carlyle India Advisors (P) Ltd. The High Court also noted that the Revenue was in appeal before the High Court against the Tribunal order in case of *CIT v. Carlyle India Advisors (P) Ltd. which was dismissed by the High Court (2013) 357 ITR 584 (Bom.) (HC),* following the same order of the co-ordinate Bench, the High Court dismissed the Revenue's appeal and held that the assessee company, being an investment advisor is not comparable to a merchant banker. (AY. 2006-07)
CIT v. General Atlantic (P.) Ltd. (2016) 384 ITR 271 / 238 Taxman 535 / 136 DTR 413 / 287 CTR 97 (Bom.)(HC)

S. 92C : Transfer pricing – Adjustment arising out of Arm's length price (ALP) has to be restricted to only international transactions with associated enterprise instead of entire turnover – Chapter X does not apply to transactions with non-associated enterprises. 1389

The assessee had transactions with both associated as well as non-associated enterprises. It was the contention of the Revenue that the adjustment with regard to the turnover is to be made to both the transactions with associated as well as non-associated enterprises, which was not accepted by the Tribunal. It was held by the High Court that the provisions of Chapter X apply only in respect of transactions with associated enterprises and while determining ALP in respect of transactions with

non-associated enterprises, is against the mandate prescribed in section 92 of the Act. (AY. 2007-08)
CIT v. Ratilal Becharlal & Sons (2016) 237 Taxman 71 / 138 DTR 316 / 288 CTR 31 (Bom.)(HC)

1390 **S. 92C : Transfer pricing – Arm's length price – Adjustment only in respect of transactions with its associated enterprises. [S. 92A, 92B]**
Transfer pricing Officer applied Arm's length price to sales to associated enterprises and as well as to other enterprises. The Tribunal directed the Assessing Officer to compute the Arm's length price in respect of the international transactions entered in to between the assessee with its associated enterprises alone. On appeal by revenue; dismissing the appeal the Court held that the adjustment which was to be done to arrive at arm's length price was only in respect of the transactions with its associated enterprises. (AY. 2006-07)
CIT v. Tara Jewels Exports P. Ltd. (2016) 381 ITR 404 / 129 DTR 410 / 282 CTR 525 (Bom.)(HC)

1391 **S. 92C : Transfer pricing – Arm's length price – Adjustment only in respect of transactions with its associated enterprises. [S. 92A, 92B]**
Dismissing the appeal of revenue the Court held that Tribunal was justified in restricting adjustment only on international transactions. (AY. 2008-09)
CIT v. Gold Star Jewellery Design (P) Ltd. (2016) 388 ITR 510 / 238 Taxman 5 / 138 DTR 313 / 288 CTR 28 (Bom.)(HC)

1392 **S. 92C : Transfer pricing – Arm's length price – Determination only with respect to assessee's international transactions with associated enterprises – Not in respect of transactions entered into by assessee with independent unrelated third parties.**
Held, that in terms of Chapter X of the redetermination of the consideration was to be done only with regard to income arising from international transactions on determination of arm's length price. The adjustment which was mandated was only in respect of international transaction and not transactions entered into by the assessee with independent unrelated third parties. There was no issue of avoidance of tax requiring adjustment in the valuation in respect of transactions entered into with independent third parties. The adjustment as proposed by the Department if allowed would result in increasing the profit in respect of transactions entered into with enterprises other than associated enterprises and thus the adjustment was beyond the scope and ambit of Chapter X. (AY. 2007-08)
CIT v. Thyssen Krupp Industries India P. Ltd. (2016) 381 ITR 413 / 129 DTR 412 / 70 taxmann.com 329 (Bom.)(HC)

1393 **S. 92C : Transfer pricing – Arm's length price – Adjustment to be made only for transactions attributed to international transactions and not to entire expenses.**
Held, that the adjustment made by the Assessing Officer was related to the entire expenses and not just the international transactions alone. Since the international transactions only constituted 23.38%, a transfer pricing adjustment proportionate to that extent alone could be made in respect of such international transactions. (AY. 2004-05, 2005-06)
CIT v. Keihin Panalfa Ltd. (2016) 381 ITR 407 / 286 CTR 107 (Delhi)(HC)
Editorial : Order in ACIT v. Keihin Panalfa Ltd. (2015) 4 ITR (Trib.) OL 492 (Delhi) affirmed.

S. 92C : Transfer pricing – Adjustment arising out of Arm's Length Price is to be restricted to only international transactions. [S. 92B] 1394

During the year under consideration the assessee had international transactions with Associated Enterprises over and above transactions with independent third parties. The Tribunal by its impugned order negate the contention of the Revenue that adjustment arising out of Arm's length price has to be made to the entire turnover of the Assessee, as same is contrary to the clear mandate for section 92 of the Act, which permits adjustment only of income arising from International Transactions having regard to its Arm's length price.

High Court held that transactions with parties other than the International Transactions with associated enterprise or in respect of specified domestic transactions are not within the ambit of Chapter X of the Act. Similar view was taken in Tara Jewels Exports Pvt. Ltd. (ITA No. 1814 of 2013, dtd. 5 October 2013) and Keihin Panalfa Ltd. (ITA No. 11 of 2015, dtd 9 September 2015). Revenue's appeal was dismissed. (AY. 2007-08)

CIT v. Ratilal Becharlal & Sons (2016) 237 Taxman 71 (Bom.)(HC)

Editorial : Decision in CIT v. Tara Jewels Exports Pvt Ltd (2016) 381 ITR 404 (Bom.)(HC) is accepted by the revenue.

S. 92C : Transfer pricing – Arm's length price – Capital employed under TNMM method, without segregation of capital employed in respect of AE and non-AE transactions, action of TPO was held to be not justified. 1395

Assessee has applied base of total cost under TNMM method to determine PLI. TPO has applied base capital employed. Tribunal applied base of total cost on ground that though capital employed could be base in terms of rule 10B(1)(e)(i), return on capital employed ('RoCE') obtained in absence of there being any segregation of capital employed in respect of AE and non-AE transactions, would not give an appropriate result. On appeal by revenue, dismissing the appeal the Court held that revenue could not show application of RoCE method in assessee's industry. On facts the view taken by Tribunal being a reasonable and possible view order of Tribunal was up held. (AY. 2008-09)

CIT v. Gold Star Jewellery Design (P) Ltd. (2016) 388 ITR 510 / 238 Taxman 5 / 138 DTR 313 (Bom.)(HC)

S. 92C : Transfer pricing – Arm's length price – Several transactions between two or more associated enterprises can form single composite transaction – Burden to prove – Relevance of whether transaction resulting in an increase in assessee's profit – Whether business decision commercially sound or not – Not relevant. 1396

The acquisition of various items or components in the assessee's venture could indeed be telescoped into and form a single transaction. An assessee may enter into one composite transaction with its associated enterprise involving the provision of various services or the sale of various goods. 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. This would normally constitute one transaction.

Held, that the absence of profit may at the highest be a factor while considering whether or not the transactions were genuine. That would depend upon the facts of each case.

However, mere absence of profit would not be a ground for holding that the transactions were not genuine and ought not to be taken into consideration in the assessment proceedings.
(ii) That absent any law, an assessee could not be compelled to avail of the services available in India. It was for the assessee to determine whose services it desired to avail of and whose goods it intended to purchase. It was certainly understandable if the assessee preferred to deal with its group entities/associated enterprises. So long as there was no bar in law to the assessee availing of the services of a particular party, the authorities under the Act must determine whether the consideration paid therefor was at an arm's length price or not. [Matter remanded to the Tribunal for decision afresh.] (AY. 2007-08)
CIT v. Knorr Bremse India P. Ltd. (2015) 128 DTR 25 / (2016) 380 ITR 307 / 236 Taxman 318 / 282 CTR 44 (P&H)(HC)

1397 **S. 92C : Transfer pricing – Companies with large turnover like Infosys & Wipro are not comparable to companies with smaller turnover and should be excluded from the list of comparables.**

(a) For transfer pricing purposes, the Tribunal did not accept three companies as comparable by stating as follows:
   (i) HCL Comnet Systems & Services Ltd.: We find force in the submission of the ld. AR that this company cannot be a comparable as the turnover of this company is 260.18 crores while in the case of the Assessee, the turnover is around ₹ 11 crores only. While making the selection of comparables, the turnover filter, in our opinion, has to be the basis for selection. A company having turnover of ₹ 11 crores cannot be compared with a company which is having turnover of ₹ 260 crores which is more than 23 times the turnover of the assessee. This company cannot be regarded to be in equal size to the asseessee. We, accordingly, direct the AO to exclude this company out of the comparables.
   (ii) Infosys BPO Ltd.: In this case also we noted the turnover in respect of this Company is ₹ 649.56 crores while the turnover of the asseessee company is around ₹ 11 crores which is much more than 65 times of the assessee's turnover. We, therefore, do not find any illegality or infirmity in the order of CIT(A) in excluding this Company out of the comparables.
   (iii) Wipro Ltd.: The turnover reported in the case of Wipro Ltd. Is ₹ 939.78 crores while in the case of the asseessee the turnover is around ₹ 11 crores. Therefore, on the basis of the turnover filter itself this company cannot be regarded to be comparable to the asseessee.

(b) The said findings of the Tribunal in respect of the said three Companies are on the basis of appreciation of evidence on record. We find no infirmity in the said findings of the Tribunal on that count. In fact, the Tribunal has endorsed the views of the CIT Appeals whilst coming to such conclusions. The concurrent findings of facts arrived at by the Authorities below, cannot be reappreciated by this Court in the present Appeal as held by the Apex Court in the Judgment reported in 2011(1) SCC 673 in the case of *Vijay Kumar Talwar v. CIT.*

(c) The said Companies are no doubt large and distinct companies where the area of development of subject services are different and as such the profit earned therefrom cannot be a bench-marked or equated with the assessee. The learned Counsel has rightly relied upon the Judgment of the Delhi High Court reported in (2013) 36 taxmann.com 289 (Delhi) in the case of *Commissioner of Income-tax v. Agnity India Technologies (P.) Ltd*. Learned Counsel has also brought to our notice the Order of the Income Tax Appellate Tribunal whilst examining similar circumstances for the assessment year 2005-06. He has taken us through the findings therein to point out that the conclusions arrived at are based on a comparison that the condition in any uncontrolled transaction between an independent enterprises for the purpose of such comparison, economically relevant characteristics must be sufficiently comparable if two parties are to be placed in a similar situation. Learned Counsel as such submitted that it is not open for the appellant to now contend a different criteria to ascertain the comparability. In fact the Tribunal whilst passing the impugned Order has considered the said principles whilst coming to the conclusion that the said three Companies cannot be treated to be comparable to the assessee Company. The turnover is obviously a relevant factor to consider the comparability. (AY. 2007-08)

CIT v. Pentair Water India Pvt. Ltd. (2016) 381 ITR 216 / 282 CTR 160 / 69 taxman.com 180 (Bom.)(HC)

S. 92C : Transfer pricing – Even if TNMM is found acceptable as regards all other transactions, it is open to the TPO to segregate a portion and subject it to an entirely different method i.e., CUP if the assessee does not provide satisfactory replies to his queries. 1398

The High Court had to consider the question "Whether the Transactional Net Margin Method adopted by the assessee is the most appropriate method envisaged under Section 92C(2) of the Income-tax Act, 1961 read with Rule 10C of the Income-tax Rules, 1962 and whether the Income Tax Appellate Tribunal had erred in directing the Assessing Officer to apply Comparable Uncontrolled Price Method?" HELD by the High Court:

(i) The narrow controversy which this Court is called upon to decide is as to whether the adoption of the CUP method by the revenue authorities was justified. What the assessee urges essentially is that whereas the TP report furnished by it applied the TNMM method which was found acceptable as regards all other transactions/ business activities, it was not open to the revenue to segregate a portion and subject it to an entirely different method, i.e. CUP. The assessee relies upon paras 3.6, 3.9 and 3.10 of the OECD guidelines in support of its contentions. It also relies upon certain rulings of different Benches of the ITAT to urge that such sequential segregation and setting portion of the TP exercise – so to say, to break with the integrity is unjustified and unsupported by the text of the law, i.e. Section 92C of the Income-tax Act. The assessee also relies upon Rule 10E of the Income-tax Rules, which guide the proper approach of the TPO in such matters.

(ii) The cumulative effect of various provisions of the Income-tax Act, notably Sections 92, 92C, 92D and 92E read together with Rule 10B and 10D is the obligation to discern, if in a given set of circumstances, the assessee has disclosed

international transactions, as well as an ALP. The ultimate purpose of this exercise- the primary onus of which is upon the assessee, is to ensure that no amount which is otherwise to be designated or treated as income, under law, escapes assessment. The assessee's TP report is to be accurate and based on materials; its explanations for the queries raised by the TPO, convincing and reasonable. The underlying emphasis of the law (Section 92-C) is that the method appropriate to the transaction, amongst the four specified ones, is to be applied.

(iii) The factual discussion in this case clearly reveals that the assessee chose to import components not from the manufacturer (which was an AE) but an intermediary. Normally, this would have been a commercial decision, which revenue authorities would not question. However, interestingly, the vendor of the components (which constituted over 85% of the raw materials imported and about 38% of the total raw materials sourced) was also connected with both the assessee and the manufacturer. If these realities emerged during the TP exercise, compelling the TPO to closely scrutinize the value of such imports and seek further details from the assessee, to justify its decision, the onus was clearly on the latter to afford a convincing and reasonable explanation. Such of the explanations that were forthcoming, were apparently unconvincing. What the assessee banks upon in its appeal to this Court is the unbending and inflexible acceptance of its TP exercise; according to its logic, a "bundled" or aggregated series or chain of transactions used in the TP report should remain undisturbed. Now, there can be no dispute that the AO would normally accept the figures given, if they do not show features that call for his interference. However, his job also extends to critically evaluating materials and in cases which do require scrutiny, go ahead and do so. In the process, at least in this case, the unusual features which remained unexplained by the assessee, influenced the TPO and the AO to resort to transfer pricing adjustment and determine ALP by adopting the CUP method for the procurements from Sumitomo Japan. The "second test" spoken of in Sony Ericsson (supra) i.e "the form and substance of the transaction were the same but the arrangements made in relation to a transaction, when viewed in their totality, differ from those which would have been adopted by an independent enterprise behaving in a commercially rational manner." was in effect adopted. This Court finds no infirmity in this approach. As a result, the question framed is answered against the assessee and in favour of the revenue. (AY. 2002-03, 2003-04)

Denso India Ltd. v. CIT (2016) 388 ITR 324 / 133 DTR 33 / 240 Taxman 713 / 287 CTR 597 (Delhi)(HC)

Editorial : SLP of assessee is dismissed Denso India (P) Ltd. (2017) 246 Taxman 375 (SC)

1399 **S. 92C : Transfer pricing – CUP method can be applied by a comparing a pricing formulae, rather than the pricing quantification in amount. Rule 10AB inserted w.e.f. 01.04.2012 is beneficial in nature and so retrospective w.e.f. 01.04.2002**

Dismissing the appeal of revenue the Court held that CUP method can be applied by a comparing a pricing formulae, rather than the pricing quantification in amount. Rule 10AB inserted w.e.f. 01.04.2012 is beneficial in nature and so retrospective w.e.f. 01.04.2002. (AY. 2007-08) (ITA No. 374/2015, dt. 10.12.2015)

Pr.CIT v. Global Forwarding India Pvt. Ltd. (Delhi)(HC); www.itatonline.org

S. 92C : Transfer pricing – Advertising marketing and Sales promotion (AMP) Expenditure – Onus is on revenue. [S. 92B, 92CA] 1400

Dismissing the appeal of revenue the Court held that the onus is on the Revenue to demonstrate by tangible material that there is an international transaction involving AMP expenses between the Indian Co and the AE. In the absence of that first step, the question of determining the ALP of such a transaction does not arise. In the absence of a machinery provision it is hazardous for any TPO to proceed to determine the ALP of such a transaction since Bright Line Test has been negatived as a valid method of determining the existence of an international transaction and thereafter its ALP. (AY. 2008-09)

CIT v. Whirlpool of India Ltd. (2016) 381 ITR 154 / 237 Taxman 49 / 283 CTR 273 / 129 DTR 169 (Delhi)(HC)

S. 92C : Transfer pricing – Arm's length price – Advertising, marketing and promotion expenses – Bright line method not legally permissible method – Need for detailed examination – Matter remanded. 1401

Adoption of the Bright Line test for determining the existence of an international transaction involving the advertising, marketing and promotion expenses was no longer legally permissible. Therefore, there would be a need for a detailed examination of the operating agreement between the assessee, associated enterprise and the franchisees to ascertain if any part of the advertising, marketing and promotion expenses was for the purpose of creating marketing intangibles for the associated enterprise of the assessee. It was only after an international transaction involving the assessee and its associated enterprise in relation to the advertising, marketing and promotion expenses was shown to exist, that the further question of determining the arm's length price of such international transaction would arise. (AY. 2009-10)

ITO v. Yum Restaurants (I) P. Ltd. (2016) 380 ITR 637 / 131 DTR 23 / 237 Taxman 652 / 283 CTR 129 (Delhi)(HC)

S. 92C : Transfer pricing – Amount in dispute exceeding five crores of rupees – Matter has to be referred to Transfer Pricing Officer [S. 92CA, 144C] 1402

The assessee had entered into international transactions. The international transactions were certified to be at Arm's length, based on the transactional net margin method as defined. The transfer pricing report and the transfer pricing documentation had been filed with the Assessing Officer during the AY. 2012-13. The Assessing Officer proceeded to pass an assessment order without referring the matter to the Transfer Pricing Officer. On a writ petition to quash the order. Held, that since the provisions of the Act make it very clear that u/s. 92CA the only option was to place the matter before the Transfer Pricing Officer, and that option had not been followed, the assessment order was not valid and had to be set aside. (AY. 2012-13)

Carrier Race Technologies P. Ltd. v. ITO (2016) 380 ITR 483 / 64 taxmann.com 252 (Mad.) (HC)

1403 **S. 92C : Transfer pricing – Arm's length price – Adjustments – AMP expenses – Since the revenue sharing model of the assessee was duly support by relevant documents the TPOs alteration to the sharing ratio was to be set aside.**

During relevant year, assessee entered into international transactions with its AE. In terms of agreement, assessee retained 75 per cent of revenue and paid 25 per cent of revenue to its subsidiaries for marketing and administrative support services provided by them. The TPO fixed remuneration sharing model of 15 per cent in cases where customers entered into contracts directly with assessee and thus made certain addition to assessee's ALP. The CIT(A) and the Tribunal set aside said addition noting that TPO in principle had accepted remuneration model of 25 per cent revenue sharing and same had been substantiated and justified by documents submitted before him. Further the department had not doubted the genuineness of the documents relied upon by the assessee. Accordingly the High Court dismissed the department's appeal. (AY. 2006-07)

CIT v. ITC, Infotech India Ltd. (2016) 384 ITR 380 / 237 Taxman 476 (Cal.)(HC)

1404 **S. 92C : Transfer pricing – Arm's length price – Selection of comparables – Selecting a comparable in a subsequent assessment year for determining ALP, would not *ipso facto* make it a comparable to determine ALP in subject assessment year**

For the purpose of determination of arm's length price, the assessee had, before the CIT(A) forwarded three additional comparables. The assessee sought their inclusion as they had been regarded as comparable in subsequent assessment years. The CIT(A) sought a remand report from the TPO to determine whether these additional comparables submitted by the assessee had been used as comparables in the subsequent years. In the remand report, the TPO confirmed that the comparables had been used in the subsequent years, and accordingly the CIT(A) considered the comprables in determining the ALP. On appeal by the department, the Tribunal held that inclusion in the subsequent years would not *ipso facto* lead to the same comarables being applied in the subject assessment year. The Tribunal rejected the comparables on merits. The High Court upheld the order of the Tribunal in holding that the comparables would not *ipso facto* apply for determining ALP of the subsequent year. The High Court also held that since neither the TPO nor the CIT(A) has examined the merits of including the comparables, it would be appropriate to restore the matter to the TPO to consider the comparables. (AY. 2003-04)

Advance Power Display Systems Ltd. v. CIT (2016) 382 ITR 607 / 237 Taxman 16 / 290 CTR 330 (Bom.)(HC)

1405 **S. 92C : Transfer pricing – Arm's length price – AMP Expenses – No adjustment could be made where on account of AMP expenses, where there was no international transaction with AEs for promoting the brand of the AE.**

The assessee-company was engaged in the business of manufacturing and trading of soft contact lenses and eye care solutions. In transfer pricing proceedings, the TPO noted that the assessee had entered into an agreement with its AE, B&L USA, for distribution of the product manufactured by its group companies, in terms of which the assessee was required to promote the B&L brand and to develop marketing intangibles for B&L products in India by incurring expenditure on AMP. The TPO opined that the AMP

expenses did not benefit the assessee as it had incurred a loss in assessment year 2006-07. The TPO noted that the assessee did not receive any reimbursement from its AE for the AMP expenses. The TPO concluded that the assessee had developed marketing intangibles for its AE and was in the process of making the intangible even more valuable by incurring huge AMP expenses, bearing risks and using both its tangible assets and skilled, trained manpower. TPO, applied 10 per cent markup on AMP expenses and made addition to assessee's ALP. The adjustment was confirmed by the DRP.

The High Court held that the mere fact that B&L, USA through B&L, South Asia, Inc held 99.9% of the share of the assessee would not *ipso facto* lead to the conclusion that AMP expenditure by the assessee involved an international transaction with B&L, USA. The Court further held that merely because there was an incidental benefit to the foreign AE, it cannot be said that the AMP expenses incurred by the Indian entity was for promoting the brand of the foreign AE. The revenue had been unable to show the existence of an international transaction involving AMP expenses between the assessee and its AE and accordingly no adjustment could be made. (AY. 2006-07 to 2009-10)

Bausch & Lomb Eyecare (India) (P.) Ltd. v. ACIT (2016) 381 ITR 227 / 237 Taxman 24 / 283 CTR 296 / 129 DTR 201 (Delhi)(HC)

Editorial : SLP is granted the revenue; Addl. CIT v. Bausch & Lomb Eyecare (India) (P.) Ltd. (2016) 242 Taxman 6 (SC)

SLP is granted to the revenue; Addl. CIT v. Bausch & Lomb Eyecare (India) (P.) Ltd. (2017) 245 Taxman 57 (SC)

S. 92C : Transfer pricing – Arms' length price – Assessee, a logistics service provider, offering a bouquet of international and domestic freight handling services – residual profits were split between the assessee and the AE's in the ratio of 50:50 – similar arrangement present with third parties – common industry practice – CUP applied by assessee – Held, transaction at ALP. 1406

Assessee, a logistics service provider, was offering a bouquet of international and domestic freight handling services including time defined air and ocean transport and freight forwarding services. In the said business, the residual profits were split between the assessee and the AEs in the ratio of 50:50. The Assessee used the CUP Method for benchmarking its international transactions with its AEs. TPO, for want of documents / vouchers related to third parties adopted TNMM instead of CUP. ITAT held that in this field of business activity, the 50:50 business model (i.e. the business model of sharing residual profits in equal ratio with the service provider at the other end of the transaction i.e. at the consignee's end in the case of export transaction and at consigner's end in the case of import transaction), was a standard practice. Further, it acknowledged that where a standard formula is adopted, the data regarding the precise amount charged or received for precisely the same services may not be available. ITAT upheld that ALP of services rendered to, or received from, the AEs, which was computed on the basis of the same 50 : 50 model as was the industry norm and was employed by the assessee for computing similar services to the independent enterprises. High Court found the impugned order of the ITAT to be well reasoned and researched and did not admit the substantial question of law. (AY. 2006-07, 2007-08)

CIT v. Toll Global Forwarding India (P.) Ltd. (2016) 381 ITR 38 / 237 Taxman 326 / 283 CTR 346 / 130 DTR 401 (Delhi)(HC)

1407 **S. 92C : Transfer pricing – DTAA does not contain machinery provision for applying arm's length standard as envisaged in aforesaid Article – Adjustment was held to be justified – DTAA-India-Netherlands [S. 90, Art. 9, 12]**

The assessee was a company incorporated in and tax resident of the Netherlands. During the relevant previous years, the assessee had rendered certain technical services to its associated enterprises in India.

The income so earned by the assessee, from rendition of technical services to Indian AE was subjected to arm's length price adjustments under the transfer pricing regulations, to the tune of ₹ 100.03 crores. The quantification of arm's length price was not disputed by the assessee. The assessee contended that; in view of the treaty protection available to the assessee, the impugned ALP adjustments cannot be made. Dismissing the appeal of the assessee, the Tribunal held that Transfer pricing legislation cannot be rendered ineffective on basis of limitations in provisions of Article 9 of India-Netherlands DTAA. Therefore, as long as conditions precedent in article 9 are attracted application of arm's length standard certainly comes into play and, in such a situation, domestic transfer pricing law will apply because DTAA does not contain machinery provision for applying arm's length standard as envisaged in article 9(1) of India Netherlands DTAA. (AY. 2007-08 to 2010-11)

Shell Global Solutions International BV v. DDIT (IT) (2016) 182 TTJ 830 / (2017) 162 ITD 193 (Ahd) (Trib.)

1408 **S. 92C : Transfer pricing – Cup method – No reason was given for rejecting comparables selected by assessee, matter required readjudication**

Tribunal held that Commissioner (Appeals) at time of working out adjustment on Arm's length price did not give any opportunity to assessee while rejecting CUP method and taking TNMM as most appropriate method and also did not provide any reason for rejecting comparables selected by assessee, matter required readjudication. (AY. 2004-05, 2005-06)

RS Components & Controls Ltd. v. DCIT (2016) 158 ITD 118 (Delhi)(Trib.)

1409 **S. 92C : Transfer pricing – Arm's length price – Assessing Officer/TPO should allow adjustments on account of under-utilisation of capacity and also difference in depreciation method adopted by assessee and comparable companies**

Tribunal held that adjustments on account of under-utilization of capacity and difference in depreciation are factors which are likely to materially affect price or cost charged or paid, or profit arising from, such transactions in open market, Assessing Officer/TPO should allow adjustments on account of under-utilisation of capacity and also difference in depreciation method adopted by assessee and comparable companies. (AY. 2008-09)

Srini Pharmaceuticals Ltd. v. ACIT (2016) 158 ITD 275 / 180 TTJ 742 (Hyd.)(Trib.)

1410 **S. 92C : Transfer pricing – Arm's length price – Comparable – Export sales of a comparable amounted to 97 per cent of total revenue, it could not be rejected from comparable list for failing export revenue filter.**

Tribunal held that Turnover filter being an important criteria in choosing comparables, comparables having turnover of more than ₹ 200 crores have to be eliminated from

list of comparables when assessee was in slab of ₹ 1 cr to ₹ 200 crs. When TNMM is adopted as most appropriate method for determination of ALP, only net margin of tested party has to be considered relative to an appropriate base, without looking into individual elements of cost, as all direct and indirect costs of operation are aggregated, irrespective of their classification and composition. Assessee being a software service provider, a software product company, a company rendering bio-informatics software product/services and engaged in development of products in field of bio-technology, and pharmaceuticals and company actively involved in R&D activities with leading scientific and educational institutions are not comparable to assessee. Where export sales of a comparable amounted to 97 per cent of total revenue, it could not be rejected from comparable list for failing export revenue filter. (AY. 2008-09)
ITO v. Infinera India Ltd. (2016) 157 ITD 637 (Bang.)(Trib.)

S. 92C : Transfer pricing – Transaction which is on capital account, and from which no income/potential income arises, cannot come within purview of Indian Transfer pricing provisions. [S. 2(24), 92B] 1411
Tribunal held that; if an international transaction is on capital account and does not result in income as defined under section 2(24), provisions of Chapter X of Act would not be applicable to such transaction. (AY. 2009-10)
Topsgrup Electronic Systems Ltd. v. ITO (2016) 157 ITD 1123 / 48 ITR) 753 / 178 TTJ 19 (Mum.)(Trib.)

S. 92C : Transfer pricing – Loan granted by assessee to its foreign AE – LIBOR rate of interest should be applied for determining ALP 1412
In the case of *Siva Industries & Holdings Ltd. (supra)*, identical issue was considered by the Tribunal. In fact, the ITAT Bangalore Bench in the case of *TTK Prestige Ltd. v. Asstt. CIT [IT Appeal No. 1257 (Bang.) of 2011]* for AY. 2005-06, has also dealt with an identical issue and following the decision of the Mumbai Bench of the Tribunal in *Tata Autocomp Systems Ltd. v. Asstt. CIT (2012) 52 SOT 48* held that in the matter of determination of ALP in respect of a loan transaction, LIBOR rate of interest should be the interest rate applied for determining the ALP. (AY. 2008-09)
Indegene Life Systems (P.) Ltd. v. ACIT (2015) 70 SOT 279 (Bang.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Advisory related support service cannot be compared with merchant banking activities. 1413
Assessee-company was rendering investment advisory related support services to its AE. Tribunal held that a company carrying out merchant banking activities could not be accepted as valid comparable while determining ALP of the assessee. A company offering portfolio management services for domestic retail investors in different fields, could not be accepted as comparable – A company in whose case there had been a restructuring/realignment of investment advisory business which had impacted its financial results of relevant period, could also not be accepted as valid comparable. (AY. 2010-11)
Carlyle India Advisors (P.) Ltd. v. ACIT (2016) 157 ITD 600 (Mum.)(Trib.)

1414 **S. 92C : Transfer pricing – Arm's length price – TNMM-KPO cannot be equated to a low end ITES provider, the issue is restored to file of TPO to carry out this exercise.**
The assessee-company was engaged in the provision of Information Technology enabled back office support services in the nature of customized business/financial research support to its AE. The assessee selected Transactional Net Margin Method as the most appropriate method. Selecting 15 comparables it claimed that its transaction was at arm's length price. The TPO selected fresh comparables and recommended TP adjustment. On appeal the Tribunal held that in a TNMM methodology identical FAR analysis cannot be insisted upon and method is in fact resorted to when complete data is not available; in that case impact on net profitability of minor variations in comparable companies so selected is considered as capable of tolerating minor variations in FAR analysis of comparables. The selection of comparables is an exercise which would be hugely facilitated and relatively free from the need to address micro variations. Accordingly, the issue is restored to file of TPO to carry out this exercise. (AY. 2010-11, 2011-12)
Copal Research India (P.) Ltd. v. Dy. CIT (2016) 160 ITD 523 / (2017) 152 DTR 94 (Delhi) (Trib.)

1415 **S. 92C : Transfer pricing – Arm's length price – Royalty – Matter was set aside to readjudication.**
Assessee was a leading BPO services company. It had made payment towards royalty and aggregated this international transaction, by using TNMM, along with ITES services and stated that payment of royalty was at arm's length. TPO held that royalty should have been treated as a separate transaction and should not have been aggregated with ITES. TPO held CUP to be most appropriate method and determined ALP of transaction relating to royalty to be at nil and thus, proposed adjustment. On appeal the Tribunal held that since TPO did not examine arm's length price of impugned royalty payment in accordance with provisions of section 92C, it had been wrongly determined as nil by TPO and hence matter required readjudication. (AY. 2009-10)
Daksh Business Process Services P. Ltd. v. DCIT (2016) 49 ITR 49 (Delhi)(Trib.)

1416 **S. 92C : Transfer pricing – Purchase equipment from AE – Equipment was sold on cost-to-cost basis hence addition was held to be not justified.**
Dismissing the appeal of revenue, the Tribunal held that Equipment was sold on cost to cost basis hence addition was held to be not justified. (AY. 2007-08)
Dy. CIT v. C-Dot Alcatel-Lucent Research Centre (P.) Ltd. (2016) 177 TTJ 211 (Delhi)(Trib.)

1417 **S. 92C : Transfer pricing – Comparable – Company developing its own software products could not be accepted as comparable, with a company engaged in providing open and end-to-end web solutions software consultancy and design and development of software using latest technology and also turnover.**
The assessee company is engaged in the business of development of software and provides sales & marketing support. Dismissing the appeal of the revenue, the Tribunal held that; a company developing its own software products could not be accepted as comparable. A company engaged in providing open and end to end web solutions software consultancy and design and development of software using latest technology,

was not acceptable as comparable on account of functional difference. Turnover being an important filter, in view of fact that assessee's turnover was only ₹ 8.15 crores, companies having turnover in excess of ₹ 200 crores could not be accepted as comparables.
Dy. CIT v. Fair Isaac India Software (P.) Ltd. (2016) 51 ITR 117 (Bang.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – ALP of AMP expenses by simply comparing quantitative figure of AMP expenses incurred by assessee and comparables is not sufficient – The amount of subsidy or reimbursement received from AE on account of AMP expenses cannot be reduced from total AMP expenses before determination of ALP of such expenses. 1418
Tribunal held that ALP of AMP expenses by simply comparing quantitative figure of AMP expenses incurred by assessee and comparables is not sufficient. Matter remanded. The amount of subsidy or reimbursement received from AE on account of AMP expenses cannot be reduced from total AMP expenses before determination of ALP of such expenses. Decided in favour of revenue. (AY. 2006-07)
Casio India Co. (P.) Ltd. v. Dy. CIT (2015) 70 SOT 48 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Software product company cannot be compared with software development service company. 1419
Tribunal held that A software product company can not be compared with software development service company. A company, which owns significant intangible and has huge revenues from software products, cannot be compared with software development service company. Assessee can raise a plea for exclusion, especially when it had objected to the inclusion before the TPO and the DRP. No purpose will be served in remitting the question of comparability back to the TPO/Assessing Officer. Restriction of working capital adjustment based on PLR of SBI will be appropriate since it is based on a presumption with all lending or credit having uniform interest rates as decided by SBI. (AY. 2009-10)
Citrix R & D India (P.) Ltd. v. Dy. CIT (2016) 136 DTR 335 (Bang.)(Trib.)

S. 92C : Transfer pricing – Arms' length price – AMP expense not an international transaction since there was no agreement, arrangement or understanding between the assessee and AE to share or incur any such expenditure. [S. 92B] 1420
The assessee was in the business of providing IT enabled services. The TPO alleged that it had incurred excessive advertising expenditure, and applied bright line test to determine the incremental AMP expense incurred by it. On appeal, the ITAT held that the TPO had wrongly invoked provisions of section 92, since there was no evidence of any arrangement, agreement or understanding between the Assessee and its AE for sharing or incurring advertisement, marketing and promotion expenses. Further, the ITAT dismissed the argument of the Revenue that the amendment to section 92B included AMP expenses as an international transaction, on the basis that the explanation to section 92B provided an illustrative list of international transactions and incurrence of advertisement, marketing and promotion was not specifically listed as an international transaction. (AY. 2009-10)
Amadeus India P. Ltd. v. ACIT (2016) 52 ITR 83 (Delhi)(Trib.)

1421 **S. 92C : Transfer pricing – Arm's length price – No adjustment on account of notional interest attributable to delayed payments receivable from the AE if the TPO has accepted that the overall profit margin of the Assessee is at arm's length based on TNMM.**

The TPO made an adjustment u/s. 92C on account of notional interest attributable to delayed payments receivable from its AE. The TPO alleged that the AE ought to have paid within 30 days of the invoice and any excess credit period would require compensation of delayed interest at 15.77%. The ITAT following the decision in the case of *Rusabh Diamonds (2016) 48 ITR (Trib.) 707 (Mum.)* held that if the overall profitability of the Assessee is accepted by the TPO as per TNMM, then no separate adjustment can be made on account of notional interest attributable to delayed payments receivable from the AE. Further, it was also held that although the amendment to section 92B would include trade debts, the same would not be applicable for assessment years prior to AY. 2013-14. (AY. 2009-10)

Amadeus India P. Ltd. v. ACIT (2016) 52 ITR 83 (Delhi)(Trib.)

1422 **S. 92C : Transfer pricing – Arm's length price – Health care comparable was held to be acceptable by applying the functional test.**

Allowing the appeal of the assessee the Tribunal held that; In case of assessee company rendering business support services to its AE. Providing services under head technical assistance and human resource development, providing event management services and a company providing access to information relating healthcare technology to healthcare delivery institution and health professionals in India, were acceptable as comparable. However, a company rendering pay roll services to its clients could not be accepted as comparable on account of functional difference. (AY. 2010-11)

Eli Lilly & Co. (India) (P.) Ltd. v. ACIT (2016) 159 ITD 482 / 176 TTJ 234 (Delhi)(Trib.)

1423 **S. 92C : Transfer pricing – Arm's length price – comparable with 4% export revenue as compared to 100% export revenue of assessee cannot be included – comparable being public sector undertaking functioning in controlled environment cannot be comparable for private company – pre-operating and preliminary expenditure not to included in operating cost.**

The Tribunal held that

(i) HMT Bearings Ltd. cannot be compared with the assessee, as the former is a public sector undertaking, totally operating under controlled environment, whereas the latter is a private company operating in uncontrolled business environment.

(ii) The export sales of SLN Bearings Ltd. are less than 4%, the company had no functional similarity with the assessee, therefore could not be compared with the assessee-company whose exports constituted 100% of the sales.

(iii) The TPO was not justified in excluding foreign exchange gain from the operating profit of the assessee, and such gains should be included as part of operating income.

(iv) Preliminary and pre-operating expenditure have nothing to do with operations of the company and should not be included as part of operating cost. (AY. 2005-06)

KHF Components Pvt. Ltd. v. ITO (2016) 49 ITR 46 (Bang.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Knowledge process outsourcing companies not comparable with business process outsourcing – Companies whose functional profile different from assessee's not comparable – Comparable transactional net margin method covering within its ambit royalty payments – Transfer pricing officer not examining Arm's length price of royalty payment in accordance with provisions – Matter remanded. [S. 92CA] 1424

The Tribunal held that a comparable that provided high level services involving specialized knowledge and domain expertise and was involved in knowledge process outsourcing services was entirely different from the assessee's business process outsourcing services, and could not be included as a comparable. Also, the TPO was incorrect in overlooking the fact the a comparable that outsourced most of its work to other vendors or service providers would have a different cost structure as compared to a business model were services were rendered using one's own employees and own infrastructure. As far as royalty is concerned the Tribunal held that it was not necessary for the assessee to prove anything in excess of the fact that expenditure is incurred wholly and exclusively for purpose of business and nothing more. The TPO cannot determine ALP at nil, and in the present case the TPO did not examine the ALP of the royalty payment in accordance with S. 92C therefore, the issue was to be examined afresh by the TPO. (AY. 2009-10)

Daksh Business Process Services P. Ltd. v. Dy. CIT (2016) 49 ITR 49 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – a company which grew with a compounded annual growth rate of 147 per cent for 3 years should be excluded from comparable list due to consistently abnormal profits earned by it. 1425

The Appellate Tribunal held that where company grew with a compounded annual growth rate (CAGR) of 147 per cent for 3 years, it should be excluded from comparable list due to consistently abnormal profits earned by it. (AY. 2008-09)

ACIT v. Transcend MT Services (P.) Ltd. (2016) 158 ITD 507 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – comparables inappropriate on account of functional difference and related party transactions – had to be excluded 1426

Where in case of one comparable selected by TPO, there was amalgamation of another company and said extraordinary event resulted in earning of high operating margin of that company, it had to be excluded from list of comparables. (AY. 2005-06)

ADP (P.) Ltd. v. Dy. CIT (2015) 70 SOT 716 (Hyd.)(Trib.)

S. 92C : Transfer pricing – Arms' length price – international loan transaction in hard currency – interest rate on rupee transactions in India would not be relevant. 1427

Where ALP of an international loan transaction, which was designated in hard currency, is to be ascertained, interest rate on rupee transactions in India is not relevant. (AY. 2008-09)

Advanta India Ltd. v. ACIT (2016) 137 DTR 233 / 179 TTJ 50 (Bang.)(Trib.)

1428 **S. 92C : Transfer pricing – Computation of Arm's length price – Adjustment on account of corporate guarantee fee – assessee itself charged guarantee commission of 1 per cent from its AE in subsequent assessment year and also offered the same for tax – guarantee commission should be benchmarked by taking 1 per cent of the outstanding guaranteed amount.**

Assessee itself having agreed to charge guarantee commission @ 1 per cent of the outstanding guaranteed amount from its AE in the subsequent years, and the Tribunal having accepted charging of guarantee commission at rates between 0.5 per cent and 1 per cent in various cases, guarantee commission in respect of the corporate guarantees given by the assessee on behalf of its AEs should be benchmarked by taking the rate of 1 per cent of the outstanding guaranteed amount. (AY. 2009-10)

Aegis Ltd. v. Addl. CIT (2016) 131 DTR 172 (Mum.)(Trib.)

1429 **S. 92C : Transfer pricing – Uncontrollable price method – Sale price between two parties could not be merely on basis of written down value. Therefore, the tribunal upheld the findings of the DRP.**

Dismissing the appeal of the revenue, the Tribunal held that when machinery was sold, buyer of machinery would naturally look for efficiency and life of machinery after purchase. Therefore, written down value might be one of factor to be taken into consideration for determining value of machinery. However, in view of specific provision in Rule 10B(1)(a) of IT Rules, written down value could not be determining factor to decide ALP. Value of machinery had to be compared with identified transaction in uncontrolled market. Since such exercise was not done by TPO, the Tribunal was of considered opinion that DRP rightly found that sale price between two parties could not be merely on basis of written down value. Therefore, the Tribunal upheld the findings of the DRP and accordingly, appeal of Revenue was dismissed. (AY. 2010-11)

ACIT v. Interpump Hydraulics India P. Ltd. (2016) 50 ITR 43 (Chennai)(Trib.)

1430 **S. 92C : Transfer pricing – Arm's length price – Comparable – Companies engaged in Medical description could not be compared with the companies which is engaged in software development.**

Allowing the appeal of the assessee, the Tribunal held that; Companies engaged in activity of medical transcription and portfolio management and providing open and end-to-end web solutions and industry specialised services could not be compared with assessee in TP study, which is engaged in software development. (AY. 2007-08)

AOL Online India (P.) Ltd. v. Dy. CIT (2016) 158 ITD 437 (Bang.)(Trib.)

1431 **S. 92C : Transfer pricing – Arm's length price – Royalty – Import of raw materials and export of finished goods with royalty payment – TPO was justified in segregating transactions and determining ALP of royalty payments by applying CUP method, matter was remanded.**

Tribunal held that since payment of royalties and fee for technical services had no relation with total sales made by assessee, it could not be construed as interlinked with other international transactions entered into with AE. Therefore, TPO justified in segregating international transactions of payment of royalty and fee for technical services

from other international transactions and determining their ALP on basis of CUP method. Fact that assessee paid expenses in nature of royalty and fee for technical as a percentage of 'value addition' made by it and not on sale price, TPO not only applied CUP method in a wrong manner but also went wrong in determining ALP. Matter was remanded. (AY. 2011-12)
Gruner India (P.) Ltd. v. Dy. CIT (2016) 159 ITD 772 / 179 TTJ 1 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Royalty – Rate of royalty approved by RBI has a persuasive value in process of determination of ALP but it cannot be considered as conclusive 1432
Tribunal held that, rate of royalty approved by RBI has a persuasive value in process of determination of ALP but it cannot be considered as conclusive, therefore, royalty and fees for technical services paid by it to its AE as per rates approved by RBI and same *per se* be considered at ALP, was to be rejected. (AY. 2011-12)
Gruner India (P.) Ltd. v. Dy. CIT (2016) 159 ITD 772 / 179 TTJ 1 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Eligibility u/s. 80-IC, does not operate as a bar on determination of ALP – Enhancement of income cannot be considered for claiming exemption u/s. 80IC. [S. 80IC] 1433
Tribunal held that;eligibility of assessee to deduction u/s. 80-IC does not operate as a bar on determining ALP of international transaction undertaken by it and further enhancement of income due to such transfer pricing adjustment cannot be considered for allowing benefit of deduction under said section. (AY. 2011-12)
Gruner India (P.) Ltd. v. Dy. CIT (2016) 159 ITD 772 / 179 TTJ 1 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arms length price – Comparbles – Significant soft ware products, super normal profits,testing of various products and engaged in infrastructure development was incomparable to market support service provider. 1434
Tribunal held that Company which owned significant software products and was engaged in various diversified business operations was incomparable to assessee, a software development service provider. Company engaged into high end service (KPO) and which returned super normal profits could not be compared with low end service provider. Company providing services in nature of testing of various products and engaged in infrastructure development was incomparable to market support service provider. (AY. 2008-09)
Avaya India (P.) Ltd. v. Dy. CIT (2016) 160 ITD 179 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Provisions can be invoked, in case of assessee, which is a 100 per cent EOU under STP scheme and enjoys a tax holiday [S. 10A] 1435
Tribunal held that TPO provisions can be invoked even assessee, is a 100 per cent EOU under STP scheme and enjoys a tax holiday u/s. 10A. Followed, *Aztec Software & Technology Services (P.) Ltd. v. ACIT (2007) 107 ITD 141 (Bang.)(SB)* (AY. 2006-07)
Transcend MT Services (P.) Ltd. v. ACIT (2016) 159 ITD 967 (Delhi)(Trib.)

1436 **S. 92C : Transfer pricing – Arm's length price – Royalty – matter was set aside.**
Allowing the appeal of the Revenue, the Tribunal held that the matter was to be relooked as the percentage computed by the. TPO is 1.14% in comparison with the Arm's Length Price margin being 4.60%. The disputed issue was remitted back to the Assessing Officer for recalculation to consider Royalty payment on brought out components based on technical specifications. (AY. 2011-12)
DCIT v. Regen Powertech (P.) Ltd. (2016) 161 ITD 43 (Chennai)(Trib.)

1437 **S. 92C : Transfer pricing – Price charged by AE would include mark up for extended period credit period provided hence adjustment was not justified.**
TPO rejected assessee's explanation and computed adjusted CUP price by loading CUP price with interest attributable to credit period of 120 days as mentioned in invoice. TPO made a downward adjustment to price of raw material paid by assessee to its AE. Allowing the appeal the Tribunal held that since assessee was enjoying larger credit than printed in invoice, i.e. it ranged 120 days to 240 days, it was appropriate to consider extra credit period enjoyed by assessee so as to determine ALP. Price charged by AE would include mark up for extended period credit period provided hence adjustment was not justified. (AY. 2008-09)
Salcomp Manufacturing India (P.) Ltd. v. ACIT (2016) 161 ITD 35 (Chennai)(Trib.)

1438 **S. 92C : Transfer pricing – External Commercial Borrowing (ECB) availed from AE – Interest paid by assessee was in accordance with LIBOR – TPO could not make adjustment to ALP by applying implicit interest rate on India's External Debt, which was an unadjusted industrial average.**
In appellate proceedings, assessee-company raised a plea that while determining ALP interest rate in respect of External Commercial Borrowing (ECB) availed from Associated Enterprise, the TPO had relied on an inappropriate source and, thus, adjustment made by him deserved to be set aside. Tribunal held that since interest paid by assessee was in accordance with LIBOR, which was an accepted method, TPO could not apply implicit interest rate on India's External Debt, which was an unadjusted industrial average. Therefore, impugned adjustment made to interest rate paid on ECBs, was set aside. (AY. 2008-09)
Salcomp Manufacturing India (P.) Ltd. v. ACIT (2016) 161 ITD 35 (Chennai)(Trib.)

1439 **S. 92C : Transfer pricing – Arm's length price – CUP method is most appropriate method for international transaction of purchase of raw material and CPM is most appropriate method for sale of exports.**
Allowing the appeal the Tribunal held that CUP method is most appropriate method for international transaction of purchase of raw material and CPM is most appropriate method for sale of exports. (AY. 2010-11)
Golkonda Aluminium Extrusion Ltd. v. ITO (2016) 161 ITD 273

S. 92C : Transfer pricing – The assessee is obliged to carry out a bench-marking exercise with independent comparables and prove that its transactions with AEs are at Arm's length. Mere fact that the transaction is approved by the RBI and Govt. is not sufficient, matter was set aside. 1440

The assessee is obliged to carry out a bench-marking exercise with independent comparables and prove that its transactions with AEs are at Arm's length. Mere fact that the transaction is approved by the RBI and Govt is not sufficient. Therefore, in the interest of justice and fair play, this case should be restored back to the file of AO, how shall require the assessee to bench mark its international transaction of 'royalty' with independent comparables following suitable methods prescribed under the Act and on its compliance, the AO after giving adequate opportunity to the assessee shall decide this issue in accordance with the TP regulations. (AY. 2007-08)

Sara Lee TTK Ltd. v. DCIT (2016) 142 DTR 258 (Mum.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – RBI approval of royalty rates paid by assessee to its AE itself implied that payments were at arm's length price. Appeal of revenue was dismissed. 1441

Assessee in business of manufacture and sale of whole and ground spices-exported spices to its AEs and AEs had given their support and technology for setting up a state of art steam sterilization facilities to cater to spices market of world. Assessee paid royalty to its AEs at 0.75 per cent on FOB value. Royalty agreement was prior to applicability of TP provisions and rate of royalty was below 8 per cent rate prescribed under automatic route for year 2004. Royalty payments were RBI prescribed, and found approval of Government of India. RBI approval of royalty rates paid by assessee to its AE itself implied that payments were at arm's length price. Appeal of revenue was dismissed. (AY. 2004-05 to 2010-11)

DCIT v. AVT McCormick Ingredients Ltd. (2016) 178 TTJ 99 / 137 DTR 92 / 67 taxmann.com 322 (Chennai)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Adjustment on account of price variation in export sale was deleted. 1442

TPO made an adjustment on account of arm's length price of transaction between AEs for price variation in export sales of whole and ground spices. CIT(A) deleted same holding that revenue had not brought any evidence to show that price variation was on higher side and impacted arm's length price. Tribunal affirmed the view of the CIT(A). (AY. 2004-05, 2005-06)

DCIT v. AVT McCormick Ingredients Ltd. (2016) 178 TTJ 99 / 67 taxmann.com 322 / 137 DTR 92 / 67 taxmann.com 322 (Chennai)(Trib.)

S. 92C : Transfer pricing – Arm's Length Price – Charging of interest on receivables – Adjustment on account of notional interest on share application money which re-characterized as loan was not sustainable in law. 1443

DRP held that "charging of interest was not warranted and AO directed not to charge notional interest. Held, allotment of shares did not make any change to position of Assessee, as subsidiary was admittedly wholly owned subsidiary of Assessee. Delay in

allotment of shares by subsidiary company, as long as subsidiary was wholly owned subsidiary, did not prejudice interests of Assessee. Since Assessee was only shareholder of subsidiary company, fruits of said investment belong to Assessee only and in entirety. Assessee had behaved in commercially rational manner inasmuch as whether new shares were allotted at x point of time or y point of time, it did not make difference to position of shareholder so far as subsidiary was wholly owned by single shareholder. Nominal value of shares, as long as all shares were held by Assessee was entirely benefit neutral from commercial point of view. Very foundation of adjustment made by AO was devoid of legally sustainable merits. Adjustment on account of notional interest on share application money which re-characterized as loan was not sustainable in law. (AY. 2009-10)
ITO v. Sterling Oil Resources (P) Ltd. (2016) 137 DTR 308 / (2016) 179 TTJ 298 (Mum.) (Trib.)

1444 **S. 92C : Transfer pricing – Arm's length price – Payment of royalty or technical know-how fees to AE was at arm's length.**
Dismissing the appeal of assessee the Tribunal held that the fact that no remuneration was paid for similar services rendered by the AE in the past is no ground to reject payment in a later financial year for non-business consideration. The TPO has not disputed the most appropriate method of determination of ALP chosen by the assessee viz., CUP method and comparability of the companies set out in the TP study of the assessee. Rate of royalty paid by the assessee at 1.5 per cent is lower than the rate of royalty paid by the comparable uncontrolled enterprises in similar conditions. Therefore, the payment of royalty by the assessee was at arm's length. (AY. 2004-05)
Dy. CIT v. Bata India Ltd. (2016) 179 TTJ 328 / 138 DTR 78 (Kol.)(Trib.)

1445 **S. 92C : Transfer pricing – Transaction between two foreign parties couldn't constitute a comparable uncontrolled transaction for CUP method – Matter remanded.**
CUP is most appropriate method for determining ALP of purchase or sale of goods or services because it seeks to compare exact price charged or paid rather than profit rate. TPO proceeded to determine ALP of import of raw matarials, components and semi-finished goods under CUP method by considering transaction between assessee's AE in Italy and third party also in Italy. Such a geographical difference, wherein both buyer and seller were foreign parties, could not constitute a comparable uncontrolled transaction. CUP method requires comparison of price charged in a comparable uncontrolled transaction and then making transfer pricing adjustment for difference, if required. Since TPO had not compared any price charged in a comparable uncontrolled transaction with price paid by assessee, therefore matter is remanded back. (AY. 2004-05)
Dy. CIT v. Rayban Sun Optics India Ltd. (2016) 179 TTJ 219 / 69 taxmann.com 137 / 138 DTR 329 (Delhi)(Trib.)

1446 **S. 92C : Transfer pricing – Arm's length price – RPM is a useful method where goods purchased by Indian AE are sold without any value enhancement – Addition was deleted.**
Assessee benchmarked its international transaction of import of finished goods under TNMM. However, TPO rejected TNMM on ground that it was a transaction of import

of finished goods from its AE, which were sold as such without any value addition by assessee in capacity of a distributor and adopted RPM as most appropriate method and computed ALP of import of finished goods and thereby proposed transfer pricing adjustment. The ITAT held that RPM is a useful method where goods purchased by Indian AE are sold without any value enhancement. ALP of an international transaction of purchase of goods is always determined on basis of gross profit margin on resale price charged in a comparable transaction between enterprises other than AEs. Thus where the TPO had not brought on record any comparable uncontrolled case and had not eventually determined gross profit margin from purchase and resale of similar goods in a comparable uncontrolled transaction, action of Assessing Officer in making additions could not be approved. (AY. 2004-05)

Dy. CIT v. Rayban Sun Optics India Ltd. (2016) 179 TTJ 219 / 69 taxmann.com 137 / 138 DTR 329 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Interest – Commercial expediency of a loan to subsidiary is wholly irrelevant in ascertaining arm's length interest on such a loan – no bar on anyone advancing an interest free loans to anyone but when such transactions are covered by international transactions between AEs S. 92C mandates that income from such transactions are to be computed on basis of arm's length price. 1447

AO by adopting an arm's length interest on this loan made ALP adjustment to income of assessee and brought it to tax in hands of assessee. Assessee contended since there was no erosion of tax base in India by Assessee Company giving an interest free loan to its Indian AE, provisions of transfer pricing could not have been pressed into service. Commercial expediency of a loan to subsidiary is wholly irrelevant in ascertaining arm's length interest on such a loan. There is indeed no bar on anyone advancing interest free loans to anyone but when such transactions are covered by international transactions between AEs. S. 92C mandates that income from such transactions is to be computed on basis of arm's length price. Computation of income on basis of arm's length price does not require that assessee must report some income first, and only then it could be adjusted for ALP. When no income was reported in respect of an item in nature of income, such as interest, but, substitution of transaction price by arm's length price resulted in an income, it could very well be brought to tax u/s. 92. (AY. 2003-04, 2004-05)

Instrumentarium Corporation Ltd. v. ADIT (2016) 160 ITD 1 / 179 TTJ 665 / 138 DTR 225 / 49 ITR 489 (SB) (Kol.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Company having turnover more than ten times that of assessee, could not be accepted as comparable while determining ALP. 1448

Assessee-company was rendering software development services to its AE, companies having turnover more than ten times that of assessee, could not be accepted as comparables while determining ALP. Company developing its own software products was also not acceptable as comparable.

DCIT v. Sunquest Information Systems (India) (P.) Ltd. (2016) 160 ITD 49 (Bang.)(Trib.)

1449 **S. 92C : Transfer pricing – Arm's length price – Foreign exchange gain/losses are considered as part of operational income/loss of assessee, then such items of expenditure or gain are to be considered as operational in nature in case of comparable also.**

Foreign exchange adjustment once allowed as operational in nature should also be considered while working out the operating margin of the comparables. This is because comparability should be done based on equal footing and if foreign exchange gains/ losses are considered as part of operational income/loss of the assessee, then such items of expenditure, are also to be considered as operational in nature in the case of comparables also. TPO is therefore directed to work out the margin of the comparables that are left in the list after considering foreign exchange gains/losses as operational in nature.

DCIT v. Sunquest Information Systems (India) (P.) Ltd. (2016) 160 ITD 49 (Bang.)(Trib.)

1450 **S. 92C : Transfer pricing – Selection of Comparables – Accepted by TPO in preceding as well as succeeding years – No ground for deviation.**

The Tribunal held that the comparables selected by assessee in the year under consideration having all along been accepted by TPO in preceding as well as succeeding assessment years, there is no ground from deviating the same in the year under consideration. (AY. 2009-10)

Halliburton Technology India Pvt. Ltd. v. Dy. CIT (2016) 178 TTJ 12 (UO) (Pune)(Trib.)

1451 **S. 92C : Transfer pricing – TPO was not justified in changing base from 'costs' incurred to 'FOB value of exports' and applying 6 per cent mark up.**

The Tribunal held that the action of Assessing Officer/TPO in making adjustment on account of transfer pricing cannot be upheld mere so as the shifting of the base on which mark up has been applied has been rejected by the jurisdictional High Court in the assessee's own case in earlier years. (AY. 2009-10)

Li & Fung (India) (P) Ltd. v. Dy. CIT (2016) 158 ITD 498 / 178 TTJ 10 / 136 DTR 15 (Delhi)(Trib.)

1452 **S. 92C : Transfer pricing – Cup method and acceptability of quotations of comparable cases. [S. 10B]**

The Tribunal held that the AO was in error not only in resorting to an unscientific and unrecognized method for ascertaining the ALP of the services rendered by the assessee but also in rejecting *bona fide* quotations as a valid input for ascertaining the ALP. Hence, impugned ALP adjustment is deleted. (AY. 2011-12)

Gulf Energy Maritime Services (P) Ltd. v. ITO (2016) 178 TTJ 683 / 136 DTR 130 (Mum.) (Trib.)

1453 **S. 92C : Transfer pricing – Whether a transaction is entered into at an Arm's Length Price or not must depend upon the facts of each case relating to the transaction *per se.* The fact that the transaction has not yielded results or has resulted in a loss is irrelevant**

(i) The contention of the lower authorities for not accepting the assessee's case was that the assessee had not been able to substantiate that the payment for the

services had actually increased its profits. The TPO held that the assessee should have been able to show the level of increase in profit post the said transactions.

(ii) The answer to the issue whether a transaction is at an arm's length price or not is not dependent on whether the transaction results in an increase in the assessee's profit. This would be contrary to the established manner in which business is conducted by people and by enterprises. Business decisions are at times good and profitable and at times bad and unprofitable. Business decisions may and, in fact, often do result in a loss. The question whether the decision was commercially sound or not is not relevant. The only question is whether the transaction was entered into *bona fide* or not or whether it was sham and only for the purpose of diverting the profits.

(iii) The TPO observed that regular increase in profits is a normal incidence in business. This is entirely incorrect. All businesses are not profitable. All decisions do not enhance profitability. Losses are also an incidence of business. Many are the failed business ventures of people and enterprises.

(iv) Enterprises, businessmen and professionals constantly experiment with different business models, theories and ventures. The aim indeed is to further the business, to enhance their profits. So long as that is the aim, it is sufficient for the purpose of the Income-tax Act. In a given case, profit may not even be the motive. Even so it would not indicate that the transactions in question are not at an arm's length price. Whether a transaction is entered into at an arm's length price or not must depend upon the facts of each case relating to the transaction *per se*, i.e., the transaction itself. Profit is only a possibility and a desired result with or without the aid of an international transaction. Every business venture is not necessarily profitable or successful. All business ventures do not succeed equally or uniformally. Indeed, if an assessee is able to establish financial or other commercial benefits arising from a transaction, it would further strengthen its case. But if it cannot do so, it does not weaken it. (ITA No. 5886/Del/2012, dt. 23.08.2016) (AY. 2008-09)

Knorr-Bremse India Pvt. Ltd. v. ACIT (Delhi)(Trib.); www.itatonline.org

S. 92C : Transfer pricing – Arm's length price – Determination of ALP of notional interest on interest-free loans to AE remanded to verify whether there was also a receipt of interest-free loans – ALP of guarantee commission to be 0.50% following earlier year orders – ALP of interest on outstanding trade balances should be similar interest charged on third parties and not LIBOR. 1454

The assessee had granted interest-free loans to its AEs as well as guarantees to loans given by banks to its AEs. The TPO held that in a third party situation, interest would have been charged and consequently, notional interest on the loans was added to the income of the Assessee as ALP. Further, notional guarantee commission was also added to the income of the Assessee. As the issue of interest-free loans received by the Assessee was not raised before TPO or the DRP, the ITAT, following its earlier order, remanded the matter to the AO, to verify whether the Assessee had also received interest-free loans from its AEs and consequently, ALP to be determined. Further, the ITAT followed its earlier year to hold that ALP guarantee commission should be taken as 0.50%.

Further, the TPO also made an addition on the outstanding trade balances of the AE and took LIBOR as the ALP. The ITAT, following its earlier year order, deleted the adjustment and held that trade balances was not an international transaction *per se*, but were only a consequence of international transactions. However, if ALP was to be determined, then the same should be the interest charged by the assessee to third parties on such outstanding balances and not LIBOR. Since no such attempt was made by the TPO to determine the ALP, the adjustment was deleted by the ITAT. (AY. 2009-10)
Nimbus Communications Ltd. v. ACIT (2016) 47 ITR 496 (Mum.)(Trib.)

1455 **S. 92C : Transfer pricing – Arm's length price – Internal TNMM cannot be applied in case single comparable, which was earlier an AE, is selected.**
The assessee was providing ITeS services to its AEs as well as to one non-AE. The non-AE party was an AE in the previous years, but during the current year, it was not an AE. Applying TNMM, the assessee compared the margin earned by it from its AE transactions with the margin from its transaction with the non-AE party, and submitted that it was at arm's length. The TPO rejected the benchmarking analysis of the Assessee. The ITAT held that though a single comparable may be valid, in case of an indirect method like TNMM, the same may not be true. The availability of data being one of the conditions under rule 10C(1)(c) for selecting the most appropriate method, existence of one single comparable would be a serious limitation to select TNMM. Further, the fact that the non-AE was an AE in the earlier years and the assessee continued to provide services to it at a loss, makes internal TNMM less reliable than external TNMM, which was more applicable to the assessee.
The ITAT also remanded the proposition of restricting the adjustment to the overall income earned by the AE from the third party since necessary details were not submitted by the assessee. Further, with respect to capacity adjustment, the ITAT did not allow the same since mere fact of high employee cost with no quantification of underutilised capacity could not be a reason for allowing capacity adjustment. (AY. 2008-09)
Fortune Infotech Ltd. v. ACIT (2016) 157 ITD 1244 / 47 ITR 113 / 176 TTJ 619 / 131 DTR 321 (Ahd.)(Trib.)

1456 **S. 92C : Transfer pricing – Arm's length price – margin for 96% transactions determined in MAP – No distinction in facts or nature for remaining 4% – Same margin should be adopted.**
The assessee provided information technology enabled services to its associated enterprises. It had shown a margin of 12.26 per cent. The Assessing Officer treated the information technology enabled services business as one and applied the markup at 21.58 per cent. Out of the total transactions with its associated enterprises around the world, around 96 per cent of the transactions were with entities based in the U. S.A. and the remaining 4 per cent were with associated enterprises located elsewhere. The lower authorities did not make any distinction while applying the markup and the treated the entire turnover as one and, accordingly, applied the markup. The Tribunal held that the Deputy Commissioner issued the letter dated April 9, 2015, under the mutual agreement procedure proceedings for the assessment years 2006-07 to 2010-

11 in the case of the assessee. For the assessment year 2006-07, for the transactions with associated enterprises in the USA, the margin of 14.38 per cent (as against the margin of 21.58 per cent determined by the Transfer Pricing Officer) was confirmed. The annual accounts of the assessee showed that the aggregate turnover was shown at ₹ 47,30,521, and no distinction was made between transactions with associated enterprises in the USA and others. Similarly in the orders passed by the lower authorities also no such distinction was made out. Therefore, whatever margin was determined for the 96 per cent of the transactions, should be determined for the remaining 4 percent transactions as well. Even at this stage, no distinction in facts or nature of transactions was brought out on record. Therefore, the markup of 14.38 per cent should be determined for the remaining 4 percent transactions pertaining to entities not in the USA as well. (AY. 2006-07, 2007-08)

J.P. Morgan Services Pvt. Ltd. v. DCIT (2016) 46 ITR 561 / 70 taxmann.com 228 (Mum.) (Trib.)

S. 92C : Transfer pricing – Arm's length price – Most appropriate method – Rule of consistency 1457

For assessment years 2006-07 to 2008-09, international transactions entered into by the assessee with its associated enterprises included the export of finished goods to overseas companies and import of finished goods for resale and the Transfer Pricing Officer had accepted the aggregation and the transactional net margin method applied by the assessee in its transfer pricing study report. For the present assessment year, the assessee explained the reasons for adopting the transactional net margin method and the difference between the exports made to the associated enterprises and non associated enterprises and also sales made in the domestic market and further explained the functional risks which were different for the two segments. The conduct of the business and the products manufactured were identical in the year under consideration, when compared to assessment years 2006-07, 2007-08 and 2008-09. The explanations of the assessee were rejected by the Transfer Pricing Officer without any basis. Since the Transfer Pricing Officer had failed to demonstrate how the facts of the present year were different from those of the other years, there was no justification for taking a different stand. Therefore, the transactional net margin method should be applied on aggregate basis for benchmarking international transactions of the assessee and since the margins declared by the assessee were higher than the margins declared by the comparables selected by the assessee, the international transactions entered into by the assessee with its associated enterprises were at arm's length and the addition was not warranted. (AY. 2005-06)

Vishay Components India P. Ltd. v. Addl. CIT (2015) 174 TTJ 354 / 128 DTR 178 / (2016) 45 ITR 471 (Pune)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Turnover filter – Turnover over ₹ 200 crores to be excluded – RPT filter – RPT up to 15% can be considered. 1458

The Tribunal held that the assessee, engaged in development of delivery of domain specific software to its AE could not be compared to companies engaged in development of both, software products and software.

Further, considering both conflicting views on the elimination of comparable companies based on turnover, the Tribunal, following favourable view in *CIT v. Pentair Water India Pvt. Ltd.,* Bombay High Court, held that turnover is a relevant criteria for choosing comparable companies in determination of ALP and excluded companies on the basis of turnover and size. Assessee turnover was around ₹ 47.46 crs. It would, therefore, fall within the category of companies in the range of turnover between ₹ 1 crore and ₹ 200 crores. Thus, companies having turnover of more than ₹ 200 crores had to be eliminated from the list of comparables. Thus, the order of the Dispute Resolution Panel excluding the six companies from the list of comparable companies chosen by the Transfer Pricing Officer on the basis of turnover and size was upheld. That comparables having related party transactions of up to 15 per cent of the total revenues could be considered. The Transfer Pricing Officer/Assessing Officer was further directed to examine the financials of the company and adopt a threshold limit of 15 per cent of the total revenue attributable to related party transaction as a ground for rejecting comparable companies. (AY. 2010-11)

Obopay Mobile Technology India Pvt. Ltd. v. DCIT (2016) 157 ITD 982 / 46 ITR 42 / 177 TTJ 191 (Bang.)(Trib.)

1459 **S. 92C : Transfer pricing – Interest on delayed realization of marketing expenses from Associated Enterprises – Transaction of extending credit period to AEs cannot be regarded as "international transaction" in the absence of any income arising therefrom is not acceptable – Both transactions have to be aggregated for determination of ALP. [S. 92CA]**

Tribunal held that Transaction of extending credit period to AEs cannot be regarded as "international transaction" in the absence of any income arising therefrom is not acceptable. Both transactions have to be aggregated for determination of ALP. (ITA No. 1364/Bang/2011, dt. 19.08.2016) (AY. 2007-08)

Tally Solutions Pvt. Ltd. v. ACIT (Bang.)(Trib.); www.itatonline.org

1460 **S. 92C : Transfer pricing – The TPO is required to be consistent in matters relating to selection of comparables. If a comparable has been included or rejected in an earlier year, he is not entitled to take a different view in a later year if there is no change in circumstances. [S. 92CA]**

The Tribunal held that; The TPO is required to be consistent in matters relating to selection of comparables. If a comparable has been included or rejected in an earlier year, he is not entitled to take a different view in a later year if there is no change in circumstances. (ITA No. 1722/Del/2015, dt. 05.08.2015) (AY. 2010-11)

Hyundai Rotem Company v. ACIT (Delhi)(Trib.); www.itatonline.org

1461 **S. 92C : Transfer pricing – Arm's length price – once combined net profit had been arrived at by taking into account all transactions of AE as well as non-AE which was factored into all costs and revenue then to separate out non-AE transactions over and above such a profit determined was not desirable**

Wherein respect of revenue derived by assessee-company from distribution of television channels and sale of advertisement time, Profit Split Method (PSM) was adopted on basis of detailed analysis and allocation of demand between AEs and non-AEs, DRP was

not justified in concluding that profits from non-AE would not be covered under PSM and same had to be determined separately at a higher rate. (AY. 2007-08)
Satellite Television Asian Region Ltd. v. Dy. CIT (2016) 177 TTJ 249 / 133 DTR 153 / 66 taxmann.com 247 (Mum.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Additional mark-up applied by TPO without any FAR analysis or without any benchmarking exercise with any comparables, adjustment on account of extra mark-up is unjustified 1462
Where an additional mark-up applied by TPO was without any FAR analysis or without any benchmarking exercise with any comparables, addition/adjustment on account of extra mark-up was to be deleted. (AY. 2010-11)
Tamasek Holdings Advisors India (P.) Ltd. v. Dy. CIT (2016) 177 TTJ 678 / 138 DTR 282 (Mum.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Company having income from sale of I.P. rights is incomparable to software development service provider 1463
A company having income from sale of I.P. rights is incomparable to software development service provider. (AY. 2006-07)
VeriSign Services India (P.) Ltd. v. Dy. CIT (2016) 177 TTJ 372 / 132 DTR 73 (Bang.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Comparable and adjustment – Assessee has benchmarked international transactions on TNMM basis and Transfer Pricing Officer has neither disputed assessee's claim that TNMM is most appropriate method, nor comparable selected by assessee, it is not open to Transfer Pricing Officer to even reject benchmarking done by assessee. 1464
Where assessee had benchmarked international transactions on TNMM basis and Transfer Pricing Officer had neither disputed assessee's claim that TNMM was most appropriate method, nor comparable selected by assessee, it was not open to Transfer Pricing Officer to even reject benchmarking done by assessee and make *ad hoc* addition in value of international transaction; such a course of action is not permissible under scheme of transfer pricing law. Even when a method of ascertaining ALP is, for good and sufficient reasons, rejected by TPO, he has to select most appropriate method, out of recognised methods under rules 10AB and 10B, and then apply same. (AY. 2008-09)
Det Norske Veritas A/S v. Addl. DIT (2016) 157 ITD 1022 / 178 TTJ 59 / 134 DTR 97 (Mum.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Where on FAR analysis conclusion that a company is correctly chosen as a comparable remains unassailed, then it is necessary for revenue at that stage to bring some cogent reason, argument or fact justifying that still comparable needs to be excluded. 1465
Where on FAR analysis, conclusion that a company is correctly chosen as a comparable remains unassailed, then it is necessary for revenue at that stage to bring some cogent reason, argument or fact justifying that still comparable needs to be excluded; merely re-iterating TPO's stand at this stage that it is consistently a loss making company, will not hold good. (AY. 2005-06)
Dy. CIT v. Nortel Networks India (P.) Ltd. (2016) 157 ITD 971 / 176 TTJ 25 (UO) (Delhi)(Trib.)

1466 **S. 92C : Transfer pricing – Arm's length price – Company providing software development services could not be compared with company which was (a) engaged in sale and development of software, (b) having huge turnover in comparison to turnover of assessee, (c) predominantly product development company, (d) having minimal employee cost, (e) engaged in development of niche product and development service, (f) engaged in animation services or (g) incurring selling/research & development expenditure for sale/development of products.**

Assessee was providing software development services to its AE and non-AEs. The TPO applied (a) new comparables, (b) negative working capital adjustment and (c) took cost incurred in non-AE transactions to determine ALP. Company which was (a) engaged in sale and development of software, (b) having huge turnover in comparison to turnover of assessee, (c) predominantly a product development company, (d) having minimal employee cost, (e) engaged in development of niche product and development service, (f) engaged in animation services or (g) incurring selling/research & development expenditure for sale/development of products could not be accepted as valid comparable while determining ALP. No clear cut direction could be given for negative working capital adjustment as it was required to be analyzed on basis of assessee's work profile and comparable companies, working results; therefore, A.O./TPO was to be directed to re-workout working capital adjustment after giving due opportunity to assesse. AO./Transfer Pricing Officer was to be directed to exclude TP adjustment on non-AE transactions and re-workout costs pertaining to AE transactions and restrict adjustment only to AE transaction. (AY. 2007-08)

NTT Data India Enterprises Application Services (P.) Ltd v. ACIT (2016) 157 ITD 897 (Hyd.)(Trib.)

1467 **S. 92C : Transfer pricing – Arm's length price – In case of assessee, engaged in development and delivery of domain specific software to its AE, companies having turnover in excess of ₹ 200 crore and companies having related party transactions in excess of 15 per cent, could not be accepted as comparable while determining ALP.**

Assessee entered into international transaction of development and delivery of domain specific software to its AE, Obapay Inc., USA. Since turnover of assessee was less than ₹ 20 crores, companies having turnover in excess of ₹ 200 crores, could not be accepted as comparables. Companies having related party transactions in excess of 15 per cent during relevant period, were not acceptable as comparables. A company engaged in development of its own software products, could not be accepted as comparables. Foreign exchange fluctuation gain was to be treated as part of operating profit while determining ALP. (AY. 2010-11)

Obopay Mobile Technology India (P.) Ltd. v. Dy. CIT (2016) 157 ITD 982 / 46 ITR 42 / 177 TTJ 191 (Bang.)(Trib.)

1468 **S. 92C : Transfer pricing – Arm's length price – Interest – Assessee claims that interest is not being charged from AEs as well as non-AEs for delay in realization of funds given to AEs as a result of commercial transaction and that contention is not disputed to be factually incorrect, it cannot be open to TPO to compute interest and make adjustment accordingly.**

Where assessee claims that interest is not being charged from AEs as well as non-AEs for delay in realization of funds given to them as a result of commercial transaction and

that contention is not disputed to be factually incorrect, it cannot be open to TPO to compute interest and make adjustment accordingly. When international transactions have been benchmarked on basis of TNMM, and interest on delay in realization of amounts is only incidental to such transactions rather than a standalone transaction, such an adjustment cannot be made independently. (AY. 2008-09)
Det Norske Veritas A/S v. Addl. DIT (2016) 157 ITD 1022 / 178 TTJ 59 (Mum.)(Trib.)

S. 92C : Transfer pricing – A company subjected to merger by way of amalgamation cannot be taken as comparable. 1469
Tribunal held as under:—
1. A company subjected to merger by way of amalgamation cannot be taken as comparable.
2. Company with outsourcing cost of 66 per cent cannot be taken as comparable to assessee having outsourcing cost at 8 per cent.
3. A company functionally similar cannot be excluded from comparables on the ground of law turnover. (AY. 2006-07)

American Express (I) (P) Ltd. v. Dy. CIT (2016) 177 TTJ 33 (Delhi)(UO)(Trib.)

S. 92C : Transfer pricing – Turnover being less than 20 crores, companies having turnover in excess of 200 crore are to be excluded. 1470
Tribunal held that the assessee's turnover being less than 20 crores, companies having turnover in excess of 200 crore are to be excluded from the list of the comparables. (AY. 2010-11)
Dy. CIT v. Obopay Mobile Technology India (P) Ltd. (2016) 157 ITD 982 / 46 ITR 42 / 177 TTJ 191 (Bang.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – TPO adopted a comparable operating on larger scale than assessee – When there is wide difference in brand value of two companies and, without quantification of same any company could not be ascertained as comparable. 1471
Assessee is an export oriented company and offered back office services (ITES) to one of its AE. It adopted TNM method to calculate the ALP and adopted 14 comparables but later contended before TPO to exclude Infosys BPO on grounds of its high revenue and wider business model. TPO rejected the plea of assessee. The AO and DRP upheld the decision of TPO. The Tribunal directed the TPO to exclude Infosys BPO as comparable and held that assessee's business profile is limited and not comparable to business model of Infosys, owing to the wide difference in turnover. The wide difference in turnover makes it clear that there is wide difference in the brand value of the two companies. Department has not brought on record any brand value of Act is on record and, When there is wide difference in brand value of two companies and, without quantification of same any company could not be ascertained as comparable of assessee. (AY. 2010-11)
Actis Global Services (P) Ltd. v. ITO (2016) 175 TTJ 506 / 141 DTR 40 (Delhi)(Trib.)

1472 **S. 92C : Transfer pricing – Arm's length price – Assessee rejected re-sale price method (RSPM) giving reasons mentioned in transfer pricing study – TPO made adjustment of ALP of international transaction involving import of goods for re-sale in India – Plea to change the method could be entertained at Tribunal stage as additional ground.**
Assessee rejected re-sale price method by giving reason that reliable data is not available relating to comparables for applying RSPM in public domain. In selection of comparables and comparability analysis, it was at the secondary stage after selection of most appropriate method. DR submitted that only pure question of law can be admitted as additional ground and in absence of basic facts relating to comparables, the ground for selecting RSPM as appropriate method cannot be entertained as it requires examination of fresh facts relating to comparables. The Tribunal held that selection of method is a purely legal issue and can be entertained at Tribunal stage in the form of additional ground. Having held so, it is required to be seen whether re-sale price method is the most appropriate method as claimed by the assessee. Only because the assessee, at the initial stage, while preparing transfer pricing study, has rejected RSPM and selected TNMM for insufficient data in the public domain, it cannot be precluded from making a plea at a later stage before the appellate authorities that RSPM is the most appropriate method for determining the arm's length price of transaction relating to import and sale of FDFs. However, considering the fact that the assessee has raised this issue for the first time before the Tribunal, a fair opportunity must be given to the department, and matter was restored to AO/TPO for examining afresh after considering all materials on record. When the AO/TPO decide the issue relating to selection of most appropriate method, reasonable opportunity must be afforded to assessee as well. (AY. 2003–04)
Pfizer Ltd. v. ACIT (2015) 64 taxmann.com 465 / (2016) 175 TTJ 92 / 139 DTR 81 (Mum.) (Trib.)

1473 **S. 92C : Transfer pricing adjustment – Arm's length price – Turnover filter – TPO rejected assessee's filters and applied certain new filters – Held in case functional comparability was there, then comparable could be rejected, if assets employed and risk assumed were significantly different – Filter by TPO held incorrect.**
Assessee was wholly owned subsidiary and was primarily engaged in providing IT enabled services to its parent company. Assessee entered into certain international transaction. TPO examined filters used by assessee in search process and rejected Assessee's filters and applied new filters to arrive at appropriate comparables. Tribunal held that authorities have made general observations and comparing functional profile on broad basis is insufficient because in case of functional comparability, the comparable could be rejected, if it was demonstrated that assets employed and risk assumed were significantly different from tested party. (AY. 2010-11)
Rampgreen Solutions Pvt. Ltd. v. Dy. CIT (2016) 175 TTJ 531 (Delhi)(Trib.)

1474 **S. 92C : Transfer pricing – Arm's length price – Comparable – Abnormal profit, low employee cannot be compared – Risk adjustment, matter remanded to the Assessing Officer.**
A company which had abnormal profit in relevant year as compared to preceding as well as succeeding years, cannot be selected as comparable. A company which has very

low employee cost as compared to assessee-company cannot be selected as comparable. A company engaged in e-publishing business and mainly carrying out data conversion work, can be selected as comparable to company which is involved in file conversion, content medication and test editing as a part of its back office support services, which is similar to data conversion. A leading provider of business process outsourcing service cannot be compared to company rendering technical support services by its own.
Where an assessee, a captive service provider, does not assume any risk or takes lesser risk as compared to comparable company which undertakes higher risks, it is entitled to some risk adjustments; but where assessee had not produced complete spectrum of risk faced by it, issue was to be restored to file of Assessing Officer. (AY. 2009-10)
Schlumberger Global Support Centre Ltd. v. Dy. DIT (2016) 131 DTR 58 / 176 TTJ 30 (Pune)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Advance of loan to subsidiary at 7 percent was held to be at arm's length price. 1475
During relevant year, assessee had advanced loan to its subsidiary 'A' Ltd. at an interest rate of 7 per cent per annum. TPO, finding that loan was advanced without any security, concluded that 17.26 per cent per annum, compounded on monthly basis was a reasonable uncontrolled price. He thus made certain addition to assessee's ALP. It was undisputed that assessee had advanced loan to subsidiary at 7 per cent per annum and therefore, as long as comparable uncontrolled price of US $ denominated lending was less than 247 points (i.e., 700-453) above LIBOR rate, transaction entered into by assessee with its subsidiary could not be said to be at less than arm's length price. In view of fact that Indian Banks were charging 250 basis points above LIBOR on similar loans, it could not be concluded that amount advanced by assessee to its subsidiary company at 247 basis points above LIBOR which was equivalent to 7 per cent annum, was not at arm's length price. Therefore, impugned addition was to be deleted. (AY. 2008-09)
UFO Movies India Ltd. v. ACIT (2016) 175 TTJ 633 / 131 DTR 81 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Company admitted financial irregularities and conspiracy hatched and committed by its directors, financial results of said company could not be relied upon. 1476
Where a company admitted financial irregularities and conspiracy hatched and committed by its directors, financial results of said company could not be relied upon and said company could not be selected as comparable for transfer pricing purposes. (AY. 2005-06)
ACIT v. Motherson Sumi Infotech & Design Ltd. (2015) 155 ITD 8 / 174 TTJ 766 / 129 DTR 106 (Delhi)(Trib.)

S. 92C : Transfer pricing – Net margin method – Arbitrary action of the AO in treating the payment by the assessee to the AE as excessive/unreasonable was held to be not justified. 1477
Dismissing the appeal of revenue the Tribunal held that, arbitrary action of the AO in treating the payment by the assessee to the AE as excessive/unreasonable was held to be not justified. (ITA No. 7700/Mum/2010, dt. 25.05.2016) (AY. 2003-04)
ITO v. Intertoll ICS india Private Limited (Mum.)(Trib.); www.itatonline.org

1478 **S. 92C : Transfer pricing – Advertising, marketing and sales promotion (AMP) – In the case of a manufacturer operating in a competitive industry, high AMP expenditure cannot be assumed to have been incurred for the benefit of the brand owner – Adjustment by the TPO was deleted.**

In the case of a manufacturer operating in a competitive industry, high AMP expenditure cannot be assumed to have been incurred for the benefit of the brand owner. The TPO has to prove that the real intention of the assessee in incurring AMP expenses was to benefit the AEs and not to promote its own business. Also, if the assessee has reported high turnover & profits & offered to tax, the basic ingredient required to invoke s. 92 that there is transfer of profit from India remains unproved. In the absence of the AO/ TPO showing that there is a formal/informal agreement to share the AMP expenditure, the adjustment cannot be made. The matter cannot be remanded to the AO/TPO for reconsideration. (ITA No. 7714, 1119, 976, 518 and 335/Mum/2012, dt. 04.05.2016) (AY. 2009-10, 2010-11)

Loreal India Private Ltd. v. DCIT (Mum.)(Trib.); www.itatonline.org

1479 **S. 92C : Transfer pricing – Alleged excess investment in share capital of wholly owned subsidiary cannot be termed as loan and notional interest charged thereon.**

The Tribunal deleted the Transfer pricing addition on account of

a) alleged excess consideration paid on investment in share capital of wholly owned subsidiary re-characterized as loan
b) and notional interest thereon on the ground that
    i. Chapter X of the Act is inapplicable to an international transaction on capital account which does not result in income chargeable to tax and
    ii. Re-characterisation of the transaction is not permitted under the Act, and
    iii. That potential income, to qualify as income subject to transfer pricing under the Act, should arise from the impugned international transaction which is before the TPO for consideration and not out of a hypothetical transaction that may or may not take place in the future. (ITA No. 2115/Mum/2015, dt. 19.02.2016) (AY. 2009-10)

Topsgroup Electronic Systems v. ITO (Mum.)(Trib.); www.itatonline.org

1480 **S. 92C : Transfer pricing – "Need Test", "Evidence Test" or "Rendition Test" to evaluate the ALP of intra-group services rendered by an Associated Enterprise – Adjustment by the TPO was held to be not justified.**

The rendering of intra-group services for which Assessee has paid ₹ 21,20,48,533/- TPO determined ALP at NIL holding that the assessee did not obtained any benefit of such services and the services provided by the foreign AE were either not required, these are incidental or stewardship services or duplicate services and hence unwarranted. Since, in his opinion, the assessee failed to provide any evidence about the services rendered by the AE necessitating the payment of such charges, he computed the ALP of this international transaction at ₹ Nil. TPO has simply held that as there is no benefit from the services for which payments has been made in determined the ALP of this international transaction at Nil without carrying out any FAR analysis of this intra-group services. On appeal HELD by the Tribunal:

(i) Regarding the need test, it is apparent that looking to the size of the business of the assessee and also for the continuous growth of the services assessee has justified that such services are required. It is pertinent to note that requirement of the services should be judged from the viewpoint of the appellant as a businessman. Therefore in this regard we are of the view that assessee has substantiated that these services are required by it. As the company is one of the parties as service receiver of that agreement it proves that such services were required by the assessee. Further the assessee is part of the MNE organization, which has provided the service to many companies across the globe. As all other companies situated in all together different companies and operating in different geographies have also received and used these services which is evident from the allocation list submitted by the assessee therefore this itself proves that for the assessee to remain competitive in its business such services are required. Therefore the assessee satisfied the need test which is alleged by ld. TPO to have not been satisfied by the assessee.

(ii) Regarding the receipt of the services from AE, the assessee can be asked to maintain and produce the evidence of receipt of services, which a businessman keeps and maintains regarding services related from the third party. The burden cannot be higher on the assessee for evidencing the receipt of services of higher level merely because the services have been rendered by its AE. Against these overwhelming evidence placed by the assessee before the lower authorities ld. TPO has merely stated that assessee has not been able to provide any evidence n that the AE has provided such services to the assessee. We could not find any instances placed in the order of LD, TPO where it held that the evidence placed by the assessee are not substantiated by rendition of service by the AE.

(iii) Hence in view of the overwhelming evidence placed by the assessee for receipt of services and following the decision of co-ordinate bench respectfully, we are of the view that rendering of services must be seen from the view point of the assessee and further assessee cannot be asked to keep and maintain evidences of services rendered by AE higher than which is expected from a businessman receiving services from an unrelated provider. Therefore, we reject the view point of Ld. TPO and Ld. DRP that assessee has not shown the receipt of the services. In view of above we are of the view that assessee has justified the receipt of services and satisfied the rendition test.

(iv) From the above decision of Hon'ble High court it is apparent that the user of the services are concerned with the usefulness of its services which enhances the value thereof and consequently in furtherance of its commercial interest. Merely profitability cannot be the criteria for benefit, it is much more than what is determinable in monetary terms. Therefore while determining ALP of IA, usefulness, enhancement in value and furtherance of business interest is required to be seen. (ITA No. 5882/Del/2010 5816/Del/2011 & 6282/Del/2012, dt. 02.05.2016) (AY. 2006-07 2007-08, 2008-09)

GE Money Financial Services Pvt. Ltd. Ltd. v. ACIT (Delhi)(Trib.); www.itatonline.org

1481 **S. 92C : Transfer pricing – Unpaid service-tax could not be disallowed as no deduction was claimed – Carry forward of losses of amalgamating company cannot be disallowed – Rule 46A is not applicable to DRP proceedings. [S. 43B, 72A]**

The Tribunal held that

1. TP adjustment was to be restricted only to AE transactions despite the fact that assessee carried out benchmarking at entity level;
2. Revenue's contention that DRP erred in admitting additional evidence (which was not produced by assessee before AO) in violation of Rule 46A, was invalid since Rule 46A is not applicable to DRP proceedings
3. Disallowance of unpaid service tax could not be made under section 43B where the assessee did not claim the same in its Profit and Loss account.
4. Where the assessee fulfilled all the conditions prescribed under Section 72A read with Rule 9C, the AO could not deny the claim of carry forward of losses pertaining to the amalgamating company. (ITA No. 5335, 5487, 2143 & 2095/M/2014, dt. 28.10.2015) (AY. 2007-08, 2009-10)

DCIT v. Alstom Project Ltd. (Mum.)(Trib.); www.itatonline.org

1482 **S. 92C : Transfer pricing – Corporate Guarantees are not comparable to Bank Guarantees – ALP of corporate guarantee was taken at 0.5%. [S. 92B, 92CA]**

Corporate Guarantees are not comparable to Bank Guarantees & so the commission of 3% charged by Banks is not a benchmark to evaluate the ALP of a corporate guarantee but it has to taken at 0.5%. ITAT decisions which upheld the 3% rate cannot be followed as they are contrary to *CIT v. Everest Kento Cylinders Ltd. (2015) 378 ITR 57 (Bom.) (HC)*. (ITA No. 859&768/MUM/2014Dt. 29.04.2016) (AY. 2008-09)

Thomas Cook (India) Limited v. ACIT (Mum.)(Trib.); www.itatonline.org

1483 **S. 92C : Transfer pricing – Arm's length price – Copy right infringement expenditure – Matter was remanded.**

Tribunal held that where assessee claimed deduction of expenditure incurred towards copyright infringement settlement from operating cost of transactions with its AE, since all facts relating to issue were not on record, i.e., whether infringement of copyright was with regard to international transactions and whether it formed part of operating expenditure or not, matter was to be remanded back for disposal afresh. (AY. 2010-11)

Avineon India (P.) Ltd. v. Dy. CIT (2016) 157 ITD 483 (Hyd.)(Trib.)

1484 **S. 92C : Transfer pricing – Arm's length price – Expenditure was incurred by assessee – Tour operator in its role of a principal and not as an agent of its foreign AE, for arranging tours, inasmuch as said amount was not recoverable *per se* from its AE, said sum could not at all be construed as 'Pass through costs' and were liable to be considered while determining ALP of international transaction.**

Assessee-company, engaged in business of inbound tours and travels, provided services to foreign tourist (arranging hotels, tour and travels) sent by its AE to India. Assessee claimed that expenses incurred for arranging tours were on behalf of AE and it was simply paying such costs and passing through same to its AE and, hence, said expenses being pass through cost, should be ignored while computing ALP of said transactions. AO did not concur with the assessee's submission hence by applying 11.72 percent on

such costs made the addition. CIT(A) deleted the addition. On appeal by revenue, the Tribunal held that. It was found that assessee got a composite fixed amount from its AE for hotel, transportation, air fare and it had to bear all costs in making arrangements for stay and travel of tourists in India. Since entire sum represented costs incurred by assessee in its role of a principal and not as an agent of its AE, inasmuch as said amount was not recoverable *per se* from its AE, said sum could not at all be construed as 'Pass through costs' and were to be included while computing ALP of said transaction. (AY. 2006-07)
Dy. CIT v. Fritidsresor Tours & Travels India (P.) Ltd. (2016) 157 ITD 495 / 139 DTR 336 / 180 TTJ 65 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – For determining ALP under 'Cost plus method', both direct and indirect costs of providing services are to be considered in hands of assessee as well as comparable uncontrolled companies – Current year data only to be considered. 1485
For determining ALP under 'Cost plus method', both direct and indirect costs of providing services are to be considered in hands of assessee as well as comparable uncontrolled companies. Ratio of 'Net profit to total costs' has no place in mechanism provided for computing ALP under 'Cost Plus Method' under rule 10B. Since determination of ALP had been made on basis of multiple year data and not current year data alone, matter should be restored to file of Assessing Officer. (AY. 2006-07)
Dy. CIT v. Fritidsresor Tours & Travels India (P.) Ltd. (2016) 157 ITD 495 / 139 DTR 336 / 180 TTJ 65 (Delhi) (Trib.)

S. 92C : Transfer pricing – Arm's length price – Comparable – Company which had under gone business restructuring could not be accepted as comparable – Company which had extrodinary event of amalgamation cannot be held to be comparables. 1486
In case of assessee rendering software development services to its AE, company which was developing its own software products and company which had undergone business restructuring process during relevant year, could not be accepted as comparables while determining ALP. A company in whose case extraordinary event of amalgamation took place, a company which had huge brand value and a company engaged in business of BPO service and providing high-end technology services such as software testing and validation, could not be accepted as comparables. Matter remanded. (AY. 2010-11)
Equant Solutions India (P.) Ltd. v. Dy. CIT (2016) 157 ITD 292 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Interest – Transaction relating to extra credit period to AE has to be aggregated with sale transactions for determining ALP. 1487
Tribunal held that; where extended credit period to AE for realisation of sale proceeds is directly related to and arising out of sale transaction, sale transaction with AE and resultant extended credit period for realisation of sale proceeds being two sides of a coin, are closely linked transactions and, thus, transaction relating to extra credit has to be aggregated with sale transactions for determining ALP. where assessee had provided extended credit facilities for realisation of export receivables to both AE and non-AE without charging interest but in case of AE extended period exceeded 180 days, before concluding that a tangible benefit had been passed on to AE as a result of such

extended credit facility, margin of both transactions, viz., AE and non-A.E., had to be seen and, if there was considerable difference between margin of AE transaction with that of non-A.E., then it needed to be examined whether higher margin charged to A.E. took care of extended credit period for realisation of export sale proceeds. Matter remanded. (AY. 2009-10)
Yash Jewellery (P.) Ltd. v. Dy. CIT (2016) 157 ITD 340 / 180 TTJ 464 (Mum.)(Trib.)

1488 **S. 92C : Transfer pricing – Arm's length price – When interest was includible in operating income and operating income itself had been accepted as reasonable by TPO under TNMM, there could not be an occasion to make adjustment for notional interest on delayed realization of debtors.**
Assessee was a leading ink manufacturer in India. During relevant year, assessee supplied base material to its subsidiary in USA. Subsidiary company manufactured printing ink by using base material and sold it in USA. TPO held that the assessee had allowed its subsidiary an average credit period of 186 days as against average credit period of 130 days allowed to independent enterprises, i.e., non-AEs. He thus made adjustment in respect of excess credit period of 56 days by computing time value of money at rate of 6.38 per cent on LIBOR plus basis. The DRP set aside the objections of AO. On appeal Tribunal held that when interest was includible in operating income and operating income itself had been accepted as reasonable by TPO under TNMM, there could not be an occasion to make adjustment for notional interest on delayed realization of debtors. Moreover, since assessee had sold semi-finished goods to its subsidiary company whereas sale transactions with independent enterprises were in respect of finished goods, there was no occasion of any comparison between them in order to determine ALP. In view of aforesaid, impugned addition was to be deleted. (AY. 2006-07)
Micro Ink Ltd. v. Add. CIT (2016) 157 ITD 132 / 175 TTJ 8 (Ahd.)(Trib.)

1489 **S. 92C : Transfer pricing – Arm's length price – Export of commodities to AE at same price at which those were purchased from local market did not call for transfer pricing adjustment if transaction was made by assessee to retain status of Star Export House.**
Assessee had acted as a support service provider in respect of transactions of export of guar gums and pet chips and did not make any profit and sold goods to AE at same price at which it was purchased from local market and AE in turn sold commodities to customers at same price at which these were bought from assessee, just to retain status of Star Export House, international transactions with AE met arm's length standard and, accordingly, addition on account of arm's length price was not justified. (AY. 2002-03)
Pepsico India Holdings (P.) Ltd. v. ADCIT (2016) 157 ITD 1 (Delhi)(Trib.)

1490 **S. 92C : Transfer pricing – Arm's length price – TP adjustment towards ALP, if any, is required to be made only in respect of international transactions entered into by assessee with its AEs and not at entity level of assessee.**
Allowing the appeal of assesse the Tribunal held that TP adjustment towards ALP, if any, is required to be made only in respect of international transactions entered into by assessee with its AEs and not at entity level of assessee. (AY. 2008-09)
Maine Global Enterprises (P.) Ltd v. ACIT (2016) 156 ITD 841 (Mum.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – CUP method – Transfer pricing adjustment made relying on TNMM was to be deleted. 1491

Allowing the appeal of assessee the Tribunal held that; Where assessee had followed CUP method for determining ALP, which was a standard method, it could not be discarded in preference over transactional profit methods unless revenue authorities were able to demonstrate fallacies in application of such method (AY. 2010-11).

Kailash Jewels (P.) Ltd. v. ITO (2016) 156 ITD 685 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Berry ratio can be used as PLI in benchmarking ALP for indenting and steel trading transactions of assessee; it does not offend rule 10B. 1492

Tribunal held that berry ratio could be used as PLI in benchmarking ALP for indenting and steel trading transactions of assessee and berry ratio adopted by assessee does not offend rule 10B. Compensation model of assessee did not include profit attributable to assessee on account of location saving, hence, adjustments for use of locational savings was unwarranted. Further, use of intangibles could not be inferred or assumed and had to be demonstrated on basis of cogent materials by TPO/Assessing Officer and adjustment for use of intangibles was unwarranted. TPO cannot make notional adjustments to cost base of AEs for determining arm's length price of assessee and hence same were to be deleted and matter was to be remanded back for necessary factual verifications and ALP computation. (AY. 2010-11).

Marubeni Itochu Steel India (P.) Ltd. v. Dy. CIT (2016) 156 ITD 620 / 177 TTJ 539 / 134 DTR 145 (Delhi)(Trib.).

S. 92C : Transfer pricing – Arm's length price – Comparables – Company which outsourced its ITES to third party vendors could not be accepted as valid comparables. 1493

Allowing the appeal of assessee the Tribunal held that, where assessee, engaged in manufacturing cassia gum powder, rendered marketing support services to its AE, company involved in high end niche market segment of financial contents and company which outsourced its ITES to third party vendors, could not be accepted as valid comparables while determining ALP. Matter remanded. (AY. 2007-08)

Lubrizol Advanced Materials India (P.) Ltd v. Dy. CIT (2016) 156 ITD 249 / 180 TTJ 616 (Ahd.)(Trib.)

S. 92C : Transfer pricing – Arm's length price (CUP) – Where internally uncontrolled comparable transactions of rendering similar services as provided to AEs are available, CUP would be most appropriate method for determining ALP. 1494

Tribunal held that, while determining ALP under CUP method, if number of comparable uncontrolled transactions are available, it is arithmetic mean of price charged in all such transactions, which is considered for determining ALP of an international transaction; in such a case, neither Assessing Officer nor Transfer Pricing Officer can resort to cherry-picking. (AY. 2005-06)

ADIT v. ABB Lummus Heat Transfer BV (2016) 156 ITD 168 / 135 DTR 233 / 177 TTJ 82 (Delhi)(Trib.)

1495 **S. 92C : Transfer pricing – Arm's length price – Sale of product to associated enterprises cannot be taken as bench mark.**
Tribunal held that prices, on which assessee has sold same products to resident associated enterprises, cannot be taken as bench mark for ascertaining arm's length price of its similar sale transaction with non-resident enterprises (AY. 2007-08, 2008-09)
Gemstone Glass (P.) Ltd. v. JCIT (2015) 174 TTJ 800 / 128 DTR 108 / (2016) 156 ITD 176 (Ahd.)(Trib.)

1496 **S. 92C : Transfer pricing – Arm's length price – CPM method – TPO was directed to adopt TNMM method.**
Tribunal held that, CPM is not a residuary method in sense that if every other method of ascertaining arm's length price fails, CPM can be applied on basis of imperfect data; if at all there is a residuary method, or what is termed as method of last resort, it is transactional net margin method. The matter was remitted to TPO to determine the arm's length price on the basis of TNMM method. (AY. 2007-08, 2008-09)
Gemstone Glass (P.) Ltd v. JCIT (2015) 174 TTJ 800 / 128 DTR 108 / (2016) 156 ITD 176 (Ahd.)(Trib.)

1497 **S. 92C : Transfer pricing – Arm's length price – Advertisement marketing and promotion expenses – Matter remanded.**
It was held that it is mandatory to make a comparison of the AMP functions performed by the assessee and comparables and then making an adjustment, if any, due to difference between the two so that the AMP functions performed by the assessee and comparable are brought to a similar platform. TPO having made transfer pricing analysis only on the basis of AMP spend without discussing AMP functions, matter remanded for decision afresh. (AY. 2010-11).
Discovery Communications India v. Dy. CIT (2016) 130 DTR 137 / 175 TTJ 271 (Delhi) (Trib.)

1498 **S. 92C : Transfer pricing – Arms' length price – Import of goods from AE – CUP method – Adjustment on the basis of price on day-to-day basis was held to be not justified.**
Assessee having made imports from its AEs at a price lower than the accepted comparable CUP price, no ALP adjustment could be made. When the ALP is justified on the basis of the CUP method accepted by the TPO, there cannot be an occasion to make adjustment on the basis of price averaging on day-to-day basis. (AY. 2004-05)
UE Trade Corporation India (P) Ltd. v. ITO (2016) 130 DTR 345 / 176 TTJ 252 (Delhi) (Trib.)

1499 **S. 92C : Transfer pricing – Arm's length price – Selection of comparable – Functionally different cannot be treated as comparable.**
It was held that the fact that the segmental details of SP Ltd. (comparable) in the public domain for the relevant year were not reliable, the said company was functionally incomparable to the business support services segment of assessee company as it organized events on sponsorship and was functioning with an entirely different revenue

generation model and, therefore, SP Ltd. cannot be treated as comparable to the assessee. (AY. 2008-09)
Qualcomm India (P) Ltd. v. Dy. CIT (2016) 130 DTR 1 / 175 TTJ 497 / 45 ITR 370 (Delhi) (Trib.)

S. 92C : Transfer pricing – Arm's length price – Assessee engaged in trading/ distributing activities – Resale Price Method to be regarded as most appropriate method – Internal comparables were to be preferred to external comparables for distribution segment, wherever appropriate data was available. 1500
Assessee does central spare-parts management entity/division for all Honda products sold in India and also exports products to Honda subsidiaries/dealers in Indian subcontinent/Europe, Africa and South America. Assessee had used TNMM Method as the most appropriate method. TPO rejected the TNMM used by the assessee as most appropriate method and held that RPM was MAM. Further, also TPO considered internal comparable uncontrolled transaction of the assessee for determination of the ALP since assessee had transactions with both related and unrelated parties. DRP upheld the action of TPO. Held that assessee has, in all its reports and submission, stated that it is a distributor/re-seller of spare parts, and that it is selling as well as purchasing the spare parts, from both related and unrelated entities. Even the functional analysis carried on by the assessee in its TP report does not claim or indicate that the assessee is carrying out manufacturing activity of any type. In the TP study, the assessee has described itself to be engaged in the business of trading activity. However, the assessee has, as a passing reference, stated before the DRP that it places order for certain spares with the manufacturer in certain circumstances. Placing orders for manufacturing, does not make the assessee a manufacturer. It would be a case of procurement of spares through job work orders on factories. There may be cases of value addition, in case the assessee supplies certain parts to the job work manufacturer for manufacture of a spare part. Assessee is predominantly a distributor and is involved in some cases in placing orders for certain spares from factories. This does not make the assessee a manufacturer. Instead of buying goods off the shelf, it is buying spares by placing job work order from manufacturer. The claim of laying down the design, specification etc. by the assessee, is not acceptable for the reason that, it is the Automobile company which manufactures the car, which does such functions. The type of specification, quality etc., of spares is duly defined in each and every car/auto manufacture. Further, assessee has expressed a situation where certain parts are imported, and used as parts of the kit, that is manufactured/assemble locally on Job order basis, and then sold. The burden is on the assessee to furnish the required data for separate determining of ALP in all cases where there is value addition through manufacture/assembly. Facts and functions of the assessee have not been properly reported by the assessee and resultantly have not been appreciated and adjudicated upon by the TPO. The function of distributor has to be treated differently from the function of job order manufacturer of spare or cases where there is value addition. Hence, the facts of the case, the functional profile etc. have to be examined afresh to arrive at the correct ALP. Following directions were passed : (a) RPM is the MAM for the Distributor/trading segment. Finding of the DRP for the segment where value addition is made to imported spares, and in case where

procurement is done by placing job work orders, fresh adjudication is to be done *de novo* to determine the MAM, is upheld. (b) The burden is on the assessee to substantiate its claim of value addition etc. (c) Internal comparables were to be preferred to external comparables for the distribution segment, wherever appropriate data was available. (AY. 2009-10, 2010-11)
Honda Motor India (P) Ltd. v. ACIT (2016) 176 TTJ 282 / 66 taxmann.com 9 / 137 DTR 254 (Delhi)(Trib.)

1501 **S. 92C : Transfer pricing – Arm's length price – Assessee was not having debtors and was entirely funded by advance received from AE – Revenue did not contend that comparables considered were not carrying any debtors, creditors and inventories – Adjustment of working capital needed on comparables in order to bring parity.**
Held that revenue has not disputed the averment of the assessee that it was carrying no debtors and its supplies to the AEs were always funded by them through advances. Effectively what it would mean was that assessee did not need any working capital loan at all and was relying on its own resources. Hence to bring the uncontrolled transaction comparable to the transactions of an assessee, it was required to eliminate the material differences which are likely to affect the price or cost or profits arising from the transactions. There is no case for the Revenue that the comparables considered were not carrying debtors, inventories and creditors. When assessee was not having any debtors and was entirely funded by advance received from AE abroad against supplies, then in order to bring parity between the results of the selected comparables and that of the assessee it is essential that adjustment for the working capital is made on the results of such comparables. Only then can the uncontrolled transaction become comparable to the international transactions of the assessee. Therefore, DRP was correct in giving the direction to the AO to carry out the necessary working capital adjustment in working out the average PLI of the comparables. (AY. 2010-11)
Indigra Exports (P) Ltd. v. DCIT (2016) 176 TTJ 384 / 64 taxmann.com 370 / 135 DTR 225 (Bang.)(Trib.)

1502 **S. 92C : Transfer pricing – Arm's length price – Foreign exchange gain/loss can be non-operational – If AO shows that such gains/loss came out of hedging and transactions which were independent of business revenue earning transaction of assessee – Revenue earned by assessee was from export – Foreign exchange income/loss was to be treated as operating in nature.**
Held that foreign exchange gain/loss could be considered as non-operational only if the AO could show that such gains/loss came out of hedging and transactions which were independent of the business revenue earning transaction of the assessee. Preponderance of probability will always weigh in favour of the assessee when its revenues are only from exports. No presumption that foreign exchange gain/loss were not having any nexus to the operations of the assessee. AO is directed to accept the claim of the assessee. (AY. 2010-11)
Indigra Exports (P) Ltd. v. DCIT (2016) 176 TTJ 384 / 64 taxmann.com 370 / 135 DTR 225 (Bang.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Assessee opined that economic slow-down, frequent power disruptions, spiralling cost of raw material all resulted in lower utilisation of capacity, leading to underabsorption of fixed costs – TPO held that assessee was not able to substantiate its claim for adjustment of depreciation while working out its PLI – Depreciation on fixed assets need not be directly proportional to utilisation of machinery because assets can get depreciated by non-usage as well – Attempt of assessee to have a lesser charge of depreciation while working out its PLI in guise of under utilisation of capacity, was not correct 1503

Assessee had a capacity for production of 1,22,233 sq.mts. of granite but it had only produced 28,336 sq.mt during the year. Therefore, there was underutilisation of capacity and assets. Fixed cost remaining the same, irrespective of the actual utilisation, such cost had to be charged to the production. As per assessee reason for under utilisation was that there were difficulties in procuring raw material, not owning any captive mines, and severe shortage of power. Thereby, assessee made adjustment in depreciation. Held that it would mean that wear and tear of the fixed assets were considered at a lower level than what it would have been if such assets were used without respite. Depreciation on fixed assets need not be directly proportional to utilisation of machinery. Assets can get depreciated by non-usage as well. Hence attempt of the assessee to have a lesser charge of depreciation while working out its PLI in the guise of underutilisation of capacity was not correct. No doubt, Rule 10B(1)(e) requires adjustment of differences between international transactions and the comparable uncontrolled transactions which would materially affect the net material margin. But assessee was unable to establish that the comparables had claimed depreciation after considering their capacity utilisation. Further assessee also could not establish the existence of a linear relationship between its depreciation cost and machine utilisation. Thereby, grounds are dismissed. (AY. 2010-11)

Indigra Exports (P) Ltd. v. DCIT (2016) 176 TTJ 384 / 64 taxmann.com 370 / 135 DTR 225 (Bang.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Comparables chosen on the basis of FAR Analysis – Cannot be excluded as it was not consistently loss making companies – Onus on Revenue to bring more cogent reason, argument or fact to justify its exclusion. 1504

The assessee had availed of the services of expatriates from its AE's for provision of technical services to RIL under the agreement. The TPO after considering the comparables chosen by the assessee excluded loss making companies like Himachal Futuristic Communication Ltd. (HFCL) and made an adjustment. The CIT(A) observed that the TPO had not disputed FAR of HFCL so far as comparability with the assessee was concerned. Accordingly it held that it cannot be said that HFCL was consistently loss making company and hence could not be treated as comparable. On appeal to Tribunal, it was held that where on FAR analysis the conclusion that a company was correctly chosen as a comparable remains unassailed, then it was necessary for the revenue at that stage to bring some cogent reason, argument or fact justifying that still the comparable needs to be excluded. It further held that merely reiterating TPO's stand would not hold good at Tribunal stage. (AY. 2005-06)

DCIT v. Nortel Networks India (P.) Ltd. (2016) 176 TTJ 25 (UO) / 66 taxmann.com 177 (Delhi)(Trib.)

1505 **S. 92C : Transfer pricing – Arm's length price – Net operating profit margin of assessee to be computed and compared with net operating profit margin of the comparable companies with same base.**

Assessee was a subsidiary of Agilent Technologies Europe BV. Its business operations comprised of facilitation of sales of Agilent products in Indian market. It was a 'Commission agent' as regards its transactions under Indent model and a 'Trader' as regards its transactions under Buy-Sell model. For the purpose of determining the ALP of its international transaction, the assessee combined both the segments. It compared its OP/OC (Operating Profit/Operating Cost) margin with the OP/VAE (Operating Profit/Value added expenses) margin of the comparable companies for determining the ALP of its international transactions To maintain parity, the TPO adopted 'Value Added Expenses' as base (denominator) while computing the margin of the comparable companies. On appeal to Tribunal, it was held that as per rule 10B(1)(e), while applying TNMM, the margin of the tested party as well the comparable companies should be computed having regard to the same base and accordingly, the action of the TPO was upheld by the ITAT. Further, the ITAT also observed that for bench marking the trading segment, operating cost could be an appropriate base, while value added expenses could be an appropriate base of commission agents. Since both the segments were incorrectly combined to determine the ALP, the matter was remanded for *de novo* determination. (AY. 2005-06)

DDIT v. Agilent Technologies India (P.) Ltd. (2016) 176 TTJ 415 / 67 taxmann.com 95 / 136 DTR 25 (Delhi)(Trib.)

1506 **S. 92C : Transfer pricing – Arm's length price – Selection of comparables – A company, though in almost similar line of business functionally, ceases to be comparable, because of adoption of a different business model as per which activities are mostly outsourced – Comparable cannot be rejected if there was no negative phase of economic cycle.**

The assessee's primary functions include the provision of electronic publishing services, such as, computerized data conversion, web-page construction, data entry/key boarding, copyediting, and CAD/CAM/GIM mapping services to its AE. The assessee undertook one international transaction of : 'Provision of IT-Enabled data Conversion services'. The TPO selected 11 companies as comparables. On appeal to Tribunal, it was held that VIT Ltd. though functionally similar to assessee but had outsourcing 75% of its jobs as against complete in-house working of assessee, and hence could not be treated as comparable. Though revenue has right to file cross objections against the adverse order of the CIT(A) but it has no right to file appeal against the view taken by the AO/TPO himself which was not disturbed in the first appeal. When TPO himself considered ASE Ltd as comparable, there could be no reason for revenue to be aggrieved against its inclusion; and department could take recourse to other legal remedies, if any, available as per law insofar as its grievance against decision of Assessing Officer/TPO was concerned. Further it held that comparable company namely Ask Me Info Hubs Ltd. could not be rejected if there was no negative phase of economic cycle and TPO's observations that the company had declining turnover and profitability was factually unfounded. (AY. 2007-08)

ACIT v. Tech Books Electronics P. Ltd. (2016) 176 TTJ 20 / 65 taxmann.com 241 / 138 DTR 145 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – No transfer pricing adjustment if the TPO had accepted international transaction to be arm's length in subsequent year and facts have remained the same. 1507

The Assessee submitted documents supporting the selection of CUP as the most appropriate method to benchmark its transactions, which was rejected by the TPO on the basis that they were sketchy. The TPO applied TNMM wherein one company was selected as comparable by the TPO. The Assessee submitted additional evidences before the CIT(A) to prove that CUP was the correct method to be applied and the company selected by the TPO was not comparable to the assessee due to various reasons. The CIT(A) accepted the additional evidences since the assessee was prevented by sufficient cause, being the illness and subsequent death of his accountant, to submit them at the time of assessment. The CIT(A) deleted the TP adjustment. On appeal by the Department, the ITAT upheld the order of the CIT(A) since the AO did not dispute the correctness of the additional evidences submitted by the Assessee and the Assessee was prevented by sufficient cause from submitting the same at the time of assessment. Further, the TPO had accepted the CUP method applied by the Assessee in subsequent years. The ITAT also held that the company selected by the TPO as comparable was into manufacturing activity while the Assessee was only into trading and hence the adjustment made by the TPO was rightly deleted by the CIT(A). (AY. 2006-07)

DCIT v. Davinder Kumar Bhasin (2015) 174 TTJ 844 / 128 DTR 218 / (2016) 45 ITR 232 (Chd.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Selection of comparable – DRP in preceding year accepted EDCIL as comparable – No change in circumstances in current year – EDCIL to be accepted as a comparable – After including EDCIL as comparable, margin within +/-5% – No transfer pricing adjustment. 1508

During the assessment, TPO rejected the EDCIL as comparable on the basis that the said is not functionally comparable. On appeal against the final assessment order, assessee argued that EDCIL is engaged in provision of support services and company operates in three segments. Two segments of EDCIL are comparable to services provided by assessee to its AE. Held that, in assessee's own case for AY. 08-09 DRP directed the TPO to consider the two segments as comparable to the assessee and since business of EDCIL and assessee has remained unchanged there exists no reason to reject the company in the year under consideration. AO/DRP was directed to include the comparable in the final set. Further, after inclusion of EDCIL margin comes within +/- 5%, international transaction is considered to be at arm's length and adjustment is liable to be deleted. (AY. 2009-10)

Eli Lilly & Co. (India) (P) Ltd v. ACIT (2016) 159 ITD 482 / 176 TTJ 234 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arms' length price – Adjustments of global profits of assessee – No judicial authority for the proposition that the TP adjustments cannot result in a situation that these are in excess of global profits 1509

Assessee contended that the total adjustment made to the arm's length price of the appellant should be restricted to the overall income earned by the AE from third parties. Conceptual justification for this proposition is that the ALP adjustment should be restricted to the overall profits of the group as a whole. Held that all intra AE

relationships are not linear. There are complex structures involved in many intra AE transactions, and, if it is held that the ALP adjustments cannot exceed the global profits, it will result in interaction of too many tax jurisdictions, in many a cases with irreconcilable tax laws – particularly with respect to permissible tax manoeuvrings, to come to a logical conclusion in such cases. Therefore, it cannot be held that ALP adjustments cannot result in a situation that the profits of the AEs and the ALP adjustments, put together, exceed the global profits of the group as a whole. There is no judicial authority for the proposition that the TP adjustments of an assessee cannot result in a situation that these are in excess of the global profits. Right course of action will be to remit the matter to the Assessing Officer with a direction to re-examine this aspect of the matter in the light of the decision of Global Vantage (P.) Ltd.' (2013) 354 ITR 21 (Del. HC) In the absence of necessary information such as average selling expenses in this line of activity at the relevant point of time, this issue cannot be decided at this stage. In case the assessee can indeed demonstrate that the residual revenues belonging to the assessee, after making appropriate adjustments for the average selling expenses in his line of commercial activity, are less than the transaction value, or within 5% range of the same, the same will have to be accepted as an arm's length price by the Assessing Officer. The functional profile of the AE, as also other related factors such as weightage to this functional profile in terms of the revenue allocation, will also have to be examined. (AY. 2008-09)

Fortune Infotech Ltd. v. ACIT (2016) 157 ITD 1244 / 176 TTJ 619 / 47 ITR 113 / 131 DTR 321 (Ahd.)(Trib.)

1510 **S. 92C : Transfer pricing – Arm's length price – Selection of Comparable – Turnover relevant criteria for choosing comparables – Turnover of companies above ₹ 200 crs to be excluded – AO directed to recompute arithmetic mean.**

Held that Delhi High Court in the case of *Chryscapital Investment Advisors (India) (P.) Ltd. v. Dy. CIT 376 ITR 183* has considered the issue as to whether comparable can be rejected on the ground that they have exceptionally high profit margins or fluctuation profit margins, as compared to the assessee in transfer pricing analysis. The observations of the High Court, insofar as it refers to turnover, were in the nature of obiter dictum. Judicial discipline requires that the Tribunal should follow the decision of a non-jurisdiction High Court. However, it was found that the Bombay High Court in the case of *CIT v. Pentair Water India Pvt. Ltd., Tax Appeal No. 18 of 2015* judgment dated 16-9-2015 has taken the view that turnover is a relevant criterion for choosing companies as comparable companies in determination of ALP in transfer pricing cases. There was no decision of the jurisdictional High Court on this issue. Following the principle that where two views are available on an issue, the view favourable to the assessee has to be adopted, the view of the Bombay High Court on the issue was to be followed and, thus, the companies, viz., Flextronics Software Systems Ltd., iGate Global Solutions Ltd., Mindtree Ltd., Persistent Systems Ltd., Sasken Communication Technologies Ltd., Infosys Technologies Ltd. having turnover above ₹ 200 crores should be excluded from the list of comparable companies. The Assessing Officer was directed to compute the Arithmetic mean by excluding the aforesaid companies from the list of comparable (AY. 2006-07)

FCG Software Services (India) (P) Ltd. v. ITO (2016) 176 TTJ 145 / 66 taxmann.com 296 (Bang) (Trib.)

S. 92C : Transfer pricing – Arm's length price – Adjustment on account of underutilization capacity – No specific submission and quantification of underutilization capacity – Impact is to be with reasonable precision, quantified and then only adjustment can be held. 1511

Held that merely because the employee costs of the assessee are higher, it does not lead to the conclusion that there is an underutilization of capacity. Underutilization is much more in the case of non AE transactions inasmuch as "the employee costs to turnover ratio in AE segment is 76% whereas in non-AE segment it is 97%". There is no specific submission and quantification on the fact, if at all, of the underutilization of capacity. There is no room for vague generalities and over simplifications, as the impact of underutilized capacity is to be, with reasonable precision, quantified and then only it can be adjusted. The exercise of quantifying the capacity underutilization has not been carried out at all. There is no discussion in the orders of the authorities below or in the submissions of the assessee. Therefore, we are not inclined to uphold the assessee's grievance with respect to denial of adjustment for capacity underutilization. (AY. 2008-09)

Fortune Infotech Ltd. v. ACIT (2016) 157 ITD 1244 / 176 TTJ 619 / 47 ITR 113 / 131 DTR 321 (Ahd.)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Not permissible to substitute actual profit earned by assessee with any other profit base i.e. either by considering actual profits for earlier years or by taking into account projected profits of subsequent years 1512

Assessee adopted PLI of OP/OC and computed its weighted average profit rate of 16.53%, by taking profit margins for a period of four years, being actual figure for the current year at 6.52% and projected figures for coming three years at 17.23%, 19.05% and 19.05%. TPO rejected the approach and held that only profit for the current year could be considered as the assessee's PLI. Held that when we consider the language of section 92(1) in juxtaposition to that of section 92C(1), it emerges that it is the income arising from an international transaction which is to be computed having regard to its ALP. Section 92C(3)(a) provides that where the AO is of the opinion that "the price charged or paid in an international transaction" has not been determined as per ALP, then, he may proceed to determine the ALP in relation to the said international transaction. The base for comparison, being the actual income of the assessee from an international transaction, cannot be substituted with any hypothetical figure by considering, *inter alia*, projected profits for the subsequent years. Essence of the entire transfer pricing provisions is to compare the actual price/profit realized/earned by the assessee from an international transaction with the price/profit realized/earned from comparable uncontrolled transactions. It is totally impermissible to substitute actual profit earned by the assessee from an international transaction with any other profit base, either by considering the actual profits for the earlier years as well or by taking into account the projected profits of the subsequent years, for the purposes of determining the ALP of an international transaction. Figures taken for subsequent three years are mere projections. Therefore, view point of the assessee in calculating its PLI by considering figures for the current year and also projected figures for subsequent three years is erroneous. (AY. 2008-09)

Headstrong Services India (P) Ltd v. DCIT (2016) 158 ITD 717 / 176 TTJ 665 / 135 DTR 73 (Delhi)(Trib.)

1513 **S. 92C : Transfer pricing – Arm's length price – Transactional Net Margin Method – Rule 10B(1)(e) – Calculation of net profit margin as per Rule 10B(1)(e) Adjustment to the profit margin should be made to the comparables and not to the assessee.**

Held that from bare perusal of Rule 10B(1)(e)(i) brings out that net profit margin realized by the enterprise from an international transaction is to be computed in relation to a particular base. Sub-clause (ii) provides that the net profit margin realized by the enterprise from the comparable uncontrolled transaction is computed having regard to the same base. Sub-clause (iii) provides that the net profit margin realized by a comparable company, determined as per sub-clause (ii) above, 'is adjusted to take into account the differences, if any, between the international transaction and the comparable uncontrolled transactions which could materially affect the amount of net profit margin in the open market.' On going through sub-clauses of Rule 10B(1)(e), it becomes patent that as per the first step, the net profit margin 'realized' by the enterprise from an international transaction is to be computed. Use of the word 'realized' in the provision richly indicates that it is the calculation of actual operating profit margin of the assessee earned from international transaction, which is not any adjusted figure. From the language of sub-clause (iv), where again reference has been made to profit margin 'realized' by the assessee from the international transaction. When we consider sub-clauses (ii) and (iii), it turns out that, firstly, the net operating margin actually realized from the comparable uncontrolled transaction is computed, which is determined in the same way as that of the assessee as per clause (i), that is, actual figures without making any adjustment. Then sub-clause (iii) talks of adjusting the actually realized margin of comparables to bring the same at par with the international transaction undertaken by the assessee, so as to iron out the effects of differences between the international transaction and comparable uncontrolled transactions. On going through all the sub-clauses of Rule 10B(1)(e), the position which follows is that the net profit margin realized by the assessee from its international transaction is taken as such and the adjustments, if any, due to differences between the international transaction and comparable uncontrolled transactions, are given effect to in the profit margin of comparables. Contention of AR that the adjustment should be carried out in the profit margin of the assessee is devoid of merit and contrary to the legal provisions. (AY. 2008-09)

Headstrong Services India (P) Ltd v. DCIT (2016) 158 ITD 717 / 176 TTJ 665 / 135 DTR 73 (Delhi)(Trib.)

1514 **S. 92C : Transfer pricing – Arm's length price – Foreign Exchange Fluctuation can be legally made in profit margin of comparables and not in the margin of assessee – When assessee enters an agreement with its AE with effect from first day of previous year – No scope for comparing foreign exchange rate of the year with previous years.**

Held that any northwards or southwards sojourn in the foreign currency rate leaves its impact on the operating profit of the assessee in the same manner as on that of the comparables. If the assessee's profit margin got shrinked due to adverse fluctuation in the foreign exchange rate, the same rate when applied to the comparables, would have affected their profit margins as well. Since adjustment was permissible in the profit margin of comparables only due to differences between the international transaction and

the comparable uncontrolled transaction, and not due to a factor affecting profit of both the assessee and comparables in the same manner, we refuse to allow any adjustment in the profit rate of comparables because of fluctuation in the foreign currency rate. Therefore neither the assessee can claim any adjustment on account of foreign exchange fluctuation rate in its profit nor such an adjustment. (AY. 2008-09)
Headstrong Services India (P) Ltd v. DCIT (2016) 158 ITD 717 / 176 TTJ 665 / 135 DTR 73 (Delhi)(Trib.)

S. 92C : Transfer pricing – Arm's length price – TNMM is the most appropriate method since domestic segment cannot be compared to export segment. 1515
The assessee, engaged in manufacture and sale of tractors, selected TNMM as the most appropriate method to benchmark its international transaction. The AO changed the same to Cost Plus Method and compared the gross margin from sale of tractors in the domestic segment to the AE segment. The ITAT held that TNMM was the most appropriate method for since the domestic segment and export segment could not be compared due to various differences in risks as well as the fact that the TPO had accepted TNMM in the previous years. (AY. 2006-07, 2007-08)
John Deere India P. Ltd. v. DCIT & John Deere Equipment P. Ltd. v. ITO (2015) 172 TTJ 470 / 123 DTR 188 / 69 SOT 45 (2016) 45 ITR 389 (Pune)(Trib.)

S. 92C : Transfer pricing – Arm's length price – Internal CUP method cannot be applied – in comparing revenue sharing formula between assessee & its AE on one hand and its AE & third parties 1516
Held that assessee has treated itself as a tested party in its transfer pricing study report, which has been accepted by the TPO. Under the CUP method as prescribed under Rule 10B(1)(a), price charged for services rendered in a comparable uncontrolled transaction is identified which is then adjusted to account for differences, if any, between the international transaction undertaken by the assessee and comparable uncontrolled transactions. Such adjusted price is taken as ALP in respect of the services provided by the assessee in the international transaction. From the machinery provision contained in Rule 10B(1)(a), it is clear that the internal CUP provides for comparing the assessee's international transaction with another comparable uncontrolled transaction undertaken by it. We fail to appreciate the logic behind the learned AR's submission in comparing the Revenue sharing formula between the assessee and its AE on the one hand and its AE and third parties on the other. As the assessee is a tested party, under the CUP method, it is only the price charged by it which can be compared with the price charged by some comparable(s) in uncontrolled transactions. The argument put forth on behalf of the assessee can be successfully applied only in determining the ALP of the international transactions undertaken by its AE so as to make a valid comparison between remuneration paid by such AE to the assessee with that paid to unrelated parties, provided other terms and conditions of the provision of services are similar. Assessee can resort to the CUP method only by showing that the price charged by it from its AE was favourably comparable to the price charged by some other comparable company in uncontrolled transaction(s). No material on record to show the price charged in a comparable uncontrolled situation. Therefore hold that the view before the DRP

to the CUP method is devoid of merits and most appropriate method is TNMM which was originally adopted by the assessee and also approved by the TPO. (AY. 2008-09)
Headstrong Services India (P) Ltd v. DCIT (2016) 158 ITD 717 / 176 TTJ 665 / 135 DTR 73 (Delhi)(Trib.)

1517 **S. 92C : Transfer pricing – Arm's Length Price – Burden is on asessee to show that comparable had a particular capacity utlisation. [R. 10B(1)(e), 10B(3)]**
Tribunal held that the assessee's contention that the adjustment on account of difference between capacity utilization of comparable companies and the assessee should be adjusted in the profit margin of the assessee is rejected. Adjustment for capacity utilization or for that matter any other adjustment, can be legally made only in the profit margin of the comparables, if otherwise factually warranted. (AY. 2011-12)
Saxo India (P) Ltd. v. ACIT (2016) 176 TTJ 540 / 67 taxmann.com 155 (Delhi)(Trib.)

1518 **S. 92C : Transfer pricing – Arm's length price – As per separate segment of software development covering IT infrastructure sector is comparable to software service provider – Transaction being deemed to be two AEs will cease to be uncontrolled transaction. [S. 92B]**
Tribunal held that where a company which has a separate segment of software development covering IT Infrastructure sector is comparable to software service provider. Tribunal also held that as per section 92B assessee's transaction with non-AE third person shall be deemed to be a transaction entered in to between two AEs if there exists a prior agreement in relation to relevant transaction between non-AE third person and AE of assessee or terms are already determined between non-AE third person and AE of assessee; transaction being deemed to be between two AEs, will cease to be uncontrolled transaction. (AY. 2011-12).
Saxo India (P) Ltd. v. ACIT (2016) 176 TTJ 540 / 67 taxmann.com 155 (Delhi)(Trib.)

1519 **S. 92C : Transfer pricing – Arm's length price – Though functionally similar but outsourcing 75 per cent of its jobs as against complete in house working of assessee, cannot be treated as comparable. [R. 10B(1)(e)]**
Tribunal held that though functionally similar but outsourcing 75 per cent of its jobs as against complete in-house working of assessee, cannot be treated as comparable. Arguments of the Department Representative to treat ASE-Ltd., as functionally dissimilar and delete it from the list of comparables is not acceptable, as the same has been treated by the TPO as comparable and the CIT(A) has not tinkered with this conclusion of the AO/TPO. (AY. 2007-08)
ACIT v. Tech Books Electronics (P) Ltd. (2016) 176 TTJ 20 / 65 taxmann.com 241 / 138 DTR 145 (Delhi)(Trib.)

1520 **S. 92C : Transfer pricing – Reimbursement for business support service – Addition was deleted.**
The Tribunal held that the assessee did not incur any expenditure on its own on this behalf and provided all details of service rendered by AE worked out by assessee, the addition towards ALP deleted. (AY. 2007-08)
Gillette India Ltd. v. ACIT (2015) 70 SOT 289 / (2016) 175 TTJ 35 (UO)(Jaipur)(Trib.)

S. 92C : Transfer pricing – Most appropriate method – Matter was set aside. 1521
The Tribunal set aside the order of AO and directed AO to refer the matter again to the DRP which shall determine the actual function performed by the assessee, the assets employed and the risks assumed by it after examining the agreement between the parties and thereafter decide the matter in accordant with law. (AY. 2009-10, 2010-11)
Roca Bathroom Products P. Ltd. v. Jt. CIT (2016) 175 TTJ 450 / 129 DTR 257 (Chennai) (Trib.)
Dy. CIT v. Parryware Roca (P) Ltd. (2016) 175 TTJ 450 / 129 DTR 257 (Chennai)(Trib.)

S. 92C : Transfer pricing – Selection of comparables – In the absence of segmental analysis it cannot be considered as comparable. 1522
The Tribunal held that in the absence of segmental analysis, it cannot be considered as a comparable. Tribunal relied on the decision of Mumbai bench of Tribunal in the case of *Ivonik Degussa India (P) Ltd. (2013) 151 TTJ 1 (Mum.)*. The Tribunal upheld the order of CIT(A) and dismissed the ground raised by the Department. (AY. 2003-04)
Dy. CIT v. Pfizer Ltd. (2015) 64 taxmann.com 465 / (2016) 175 TTJ 92 / 139 DTR 81 (Mum.)(Trib.)

S. 92C : Transfer pricing – Assessee falling within category of companies having turnover between ₹ 1 crore and ₹ 200 crores – Companies having turnover of more than ₹ 200 crores to be eliminated from list of comparables – Foreign Exchange Fluctuation Gains to be added to operating revenue. 1523
On appeal, the Tribunal held that the turnover filter is an important criteria in choosing the comparables. The assesee's turnover was in the range of ₹ 1 crore to ₹ 200 crores. Thus, companies having turnover of more than ₹ 200 crores had to be eliminated from the list of comparables. Thus, the order of the Dispute Resolution Panel excluding the six companies from the list of comparable companies chosen by the Transfer Pricing Officer on the basis of turnover and size was upheld. Comparables having related party transactions of up to 15 per cent of the total revenues could be considered. Matter remanded. The foreign exchange fluctuation gains were required to be added to the operating revenue. (AY. 2010-11)
Obopay Mobile Technology India Pvt. Ltd. v. Dy. CIT (2016) 157 ITD 982 / 46 ITR 42 / 176 TTJ 191 (Bang.)(Trib.)

S. 92C : Transfer pricing – AO shall examine issue of transfer pricing and with approval of Commissioner make a reference to Transfer Pricing Officer – No transfer pricing adjustment can be made where assessee enjoyed benefit u/s. 10A or section 80HHE or where tax rate in country of associated enterprises is higher than in India. [S. 10A, 80HHE, 92CA] 1524
The assessee contended that under section 92C or 92CA, 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 and 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 Transfer Pricing Officer.

On appeal, the Tribunal held that the AO erred in not himself examining the issue of transfer pricing and with the approval of the Commissioner, made a reference to the Transfer Pricing Officer u/s. 92CA(1) of the Act. The AO as well as the CIT(A) failed to apply their mind to the transfer pricing report filed by the assessee. The assessee was correct in contending that no transfer pricing adjustment can be made in a case where the assessee enjoyed the benefit u/s. 10A or section 80HHE of the Act or where the tax rate in the country of associated enterprise is higher than that of the tax rate in India. (AY. 2005-06)

Dy. CIT v. Tata Consultancy Services Ltd. (2015) 174 TTJ 570 / (2016) 46 ITR 394 (Mum.) (Trib.)

1525 **S. 92C : Transfer pricing – Argument that transfer pricing adjustment cannot be made if the assessee's income is deductible u/s. 10A/10B is not acceptable. [S. 10A, 10B]**

The assessee claimed that as its profit from the rendering of software development services is deductible u/s. 10A, then, no motive can be attributed for artificially reducing the profit by manipulating the price with its AE. It was submitted that the profit of an assessee, eligible for deduction under section 10A, becomes tax neutral irrespective of its quantum and that, therefore, either the international transaction should not be processed in terms of Chapter-X of the Act or higher amount of deduction should be allowed corresponding to the amount of addition on account of transfer pricing adjustment.

HELD by the Tribunal rejecting the contention:

(i) In so far as the first submission for not carrying out any transfer pricing adjustment in view of the benefit enjoyed by it u/s. 10A of the Act is concerned, we find that no exception has been carved out by the statute for non-determination of the ALP of an international transaction of an assessee who is eligible for the benefit of deduction section 10A/10B or any other section of Chapter- VIA of the Act. Section 92(1) clearly provides that any income arising from an international transaction is required to be computed having regard to its arm's length price. There is no provision exempting the computation of total income arising from an international transaction having regard to its ALP, in the case of an assessee entitled to deduction u/s 10A or 10B or any other relevant provision. Section 92C dealing with computation of ALP clearly provides that the ALP in relation to an international transaction shall be determined by one of the methods given in this provision. This section also does not immune an international transaction from the computation of its ALP when income is otherwise eligible for deduction. On the contrary, we find that sub-section (4) of section 92C plainly stipulates that where an ALP is determined, the AO may compute the total income of the assessee having regard to the ALP so determined. This shows that the total income of an assessee entering into an international transaction, is required to be necessarily computed having regard to its ALP without any exception. Thus, the argument that since its income is subject to deduction u/s. 10A, the provisions of the Chapter-X of the Act should not be applied, in our considered opinion, has no force in view of the clear statutory mandate contained in proviso to section 92C(4).

(ii) Our view is fortified by the Special Bench order in the case of *Aztech Software and Technology Services Ltd. v. ACIT (2007) 107 ITD 141 (SB)(Bangalore)* in which

similar issue has been decided by the Special Bench by holding that availability of exemption u/s. 10A to the assessee is no bar to applicability of sections 92C and 92CA. Similar view has been taken by Pune Bench of the Tribunal in the case of *ACIT v. MSS India (P) Ltd. (2009) 123 TTJ 657 (Pune)* and several other orders. The reliance of the AR on the order of the Mumbai Bench of the Tribunal in the case of *DCIT v. Tata Consultants Services Ltd. (ITA No. 7513/M/2010) dated 4.11.2015*, in our considered opinion is misconceived, because, in that case, the Tribunal primarily found that the AO erred in not himself examining the issue of TP and failed to apply his mind to the TP report filed by the assessee. The last sentence in para 54 of the order upholding the assessee's contention that no TP adjustment can be made where the assessee enjoys benefit of deduction u/s 10A or 80HHE, etc is only *obiter dicta* inasmuch as the addition was found to be not sustainable on the other main grounds as discussed in the body of the order. On the contrary, we find that the decision of the Special bench in Aztech Software (supra) permitting the applicability of sections 92C and 92CA to an assessee availing the benefit of section 10A of the Act is its *ratio decidendi*. On a specific query, the learned AR could not point out any judgment of some Hon'ble High Court deciding this point either way. In view of the fact that there is already a Special Bench decision in the case of Aztech Software (supra) which supports the making of transfer pricing adjustment notwithstanding the eligibility of deduction u/s 10A to the assessee, apart from clear statutory mandate contained in proviso to section 92C(4), we are more inclined to go with the view of the Special Bench.

(iii) It is, therefore, held that the eligibility of the assessee to deduction u/s. 10A of the Act does not operate as a bar for determining the ALP of international transaction undertaken by it and further the enhancement of income due to such transfer pricing addition cannot be considered for allowing the benefit of deduction under this section. (AY. 2008-09)

Headstrong Services India Pvt. Ltd. (2016) 158 ITD 717 / 176 TTJ 665 / 135 DTR 73 (Delhi)(Trib.)

S. 92C : Transfer pricing – The existence of an "International transaction" w.r.t. AMP Expenditure cannot be assumed. The onus is on the TPO to prove such transaction. There is no machinery provision to ascertain the price to promote the AE's brand values. The AMP Expenditure should be treated as operating cost to apply TNMM and determine ALP of transactions with AE. 1526

(i) No TP adjustment can be made by deducing from the difference between AMP expenditure incurred by assessee-company and AMP expenditure of comparable entity, if there is no explicit arrangement between the assessee-company and its foreign AE for incurring such expenditure. The fact that the benefit of such AMP expenditure would also enure to its foreign AE is not sufficient to infer existence of international transaction. The onus lies on the revenue to prove the existence of international transaction involving AMP expenditure between the assessee company and its foreign AE.

(ii) In the absence of machinery provisions to ascertain the price incurred by the assessee-company to promote the brand values of the products of the foreign entity, no TP adjustment can be made by invoking the provisions of Chapter X of the Act.

(iii) On facts, it is not a case of revenue that there existed an arrangement and agreement between the assessee-company and its foreign AE to incur AMP expenditure to promote brand value of its products on behalf of the foreign AE, merely because the assessee-company incurred more expenditure on AMP compared to the expenditure incurred by comparable companies, it cannot be inferred that there existed international transaction between assessee-company and its foreign AE. Therefore, the question of determination of ALP on such transaction does not arise.

(iv) However, the transaction of expenditure on AMP should be treated as a part of aggregate of bundle of transactions on which TNMM should be applied in order to determine the ALP of its transactions with its AE. In other words, the transaction of expenditure on AMP cannot be treated as a separate transaction.

(v) In the present case, we find from the TP study that the operating profit cost to the total operating cost was adopted as Profit Level Indicator which means that the AMP expenditure was not considered as a part of the operating cost. This goes to show that the AMP expenditure was not subsumed in the operating profitability of the assessee-company. Therefore, in order to determine the ALP of international transaction with its AE, it is *sine qua non* that the AMP expenditure should be considered as a part of the operating cost. Therefore, we restore the issue of determination of ALP, on the above lines, to the file of the AO/TPO. (ITA Nos. 29/B/14 & 227/B/15, dt. 05.02.2016) (AY. 2009-10, 2010-11)

Essilor India Pvt. Ltd. v. DCIT (2016) 178 TTJ 69 / 135 DTR 20 (Bang.)(Trib.); www.itatonline.org

1527 **S. 92C : Transferring pricing – adjustment on account of ECB from parent company – When internal CUP with unrelated parties is available it should be given precedence over external CUP – Addition was deleted.**

Allowing the appeal of assessee the Tribunal held that revenue has not disputed the submission made by the assessee before the CIT(A) that effective rate of interest paid by it in India was 6.62% on loans. Interest paid by assessee on loans taken from AE abroad was 5%. This was below the rate of interest assessee was paying on loans taken within India. When internal CUP with unrelated parties is available, in our opinion, it should be given precedence over external CUP. Addition was deleted. (ITA No. 1292/Bang/2010 & ITA No. 287/Bang/2013, dt. 18.03.2016) (AY. 2006-07, 2007-08)

Intergarden India Pvt. Ltd. v. ACIT (Bag.)(Trib.); www.itatonline.org

S. 92CA. Reference to Transfer Pricing Officer.

1528 **S. 92CA : Reference to transfer pricing officer – Failure to supply satisfaction note to assessee before making reference to TPO is at highest a mere irregularity and, it cannot turn reference itself as void *ab initio*. [S. 92C]**

Dismissing the petition the Court held that in terms of section 92CA, before making reference to TPO, assessee has to be given an opportunity of being heard on question as to whether transaction entered into by it is an international transaction or not. However,

failure to supply satisfaction note to assessee before making reference to TPO is at highest a mere irregularity and, it cannot turn reference itself as void *ab initio.*
Shri Vishnu Eatables (India) Ltd. v. DCIT (2016)389 ITR 385 / 243 Taxman 446 / 289 CTR 337 (P&H)(HC)

S. 92CA : Reference to transfer pricing officer – Mere existence of Technical Collaboration Agreement – For use of brand name, cannot imply arrangement with foreign AE regarding AMP expense for promoting brand of foreign AE. [S. 92C] 1529

The TPO had benchmarked the AMP expenses of the assessee by applying the Bright line test (BLT) and compared the percentage of such expenses incurred to total sales of the Appellant with that of comparable companies. The DRP further sustained the adjustment made by the TPO. Aggrieved assessee filed an appeal before the Tribunal which was disposed of and ruled against the assessee.
The High Court held that the Revenue had been unable to demonstrate with tangible material the existence of an international transaction involving AMP expenses between assessee and foreign AE, thus the question of determining ALP did not arise. The High Court relying on Co-ordinate Bench ruling in Maruti Suzuki India Ltd. (ITA No. 110/2015) dated 11 December, 2015, held that assessees' cases were not covered by Delhi HC decision in Sony Ericson Mobile Communications India P. Ltd. (374 ITR 118) (Del) since the assessees in that case were distributors who were receiving subsidies / subventions from their respective AEs, and none of them appeared to have questioned existence of international transaction on account of AMP expenses, as regards to the question on existence of international transaction of AMP expenses, HC observed that although, under section 92B read with Section 92F(v) of the Act an international transaction could include an arrangement, understanding or action in concert but this could not be a matter of inference, HC held that there had to be a tangible evidence on record to show that two parties 'acted in concert'.
Further the HC had additionally held that mere existence of Technical Collaboration Agreement whereby licence granted for use of brand name, cannot imply arrangement with foreign AE regarding AMP expense for promoting brand of foreign AE. Further, HC noted that the condition in the licence agreement that technology would be used for sale of goods in designated jurisdictions/specified territories was not an unusual arrangement and thus, recharacterization of assessee as "contract manufacturer" was unwarranted. HC also observed that the Revenue could not controvert assessee's submission that substantial turnover of assessee was from manufacturing activity as compared to distribution activity and contention that market development in India is function of AE was factually incorrect. Thus the High Court ruled in favour of the Assessee. (AY. 2008-09)
Honda Siel Power Products Ltd. v. Dy. CIT (2016) 237 Taxman 304 / 283 CTR 322 / 130 DTR 241 (Delhi)(HC)
Editorial : SLP is granted Dy. CIT v. Honda Siel Power Products Ltd. (2016) 240 Taxman 576 (SC).

S. 94. Avoidance of tax by certain transactions in securities.

1530 **S. 94 : Transaction in securities – Loss arising in course of dividend stripping can be set off against other capital gains. [S. 45]**
The loss arising in the course of dividend stripping transaction before the introduction of claim under section 94(7) with effect from April 1, 2002, could not be disallowed. Therefore, the loss can be set off against other capital gains. (AY. 2004-05)
ACIT v. Gimpex Ltd. (2016) 48 ITR 347 (Chennai)(Trib.)

1531 **S. 94 : Transaction in securities – Dividend stripping – Assessee sold securities within three months on which dividend was received, loss on securities was liable to be restricted to extent of dividend received.**
Assessee adjusted short-term capital loss on sale of securities against short term capital gains. Assessing Officer disallowed said loss on securities which were sold within a period of three months since dividend was claimed from above securities. Commissioner (Appeals) restricted disallowance to extent of dividend received. Order of Commissioner (Appeals) had no infirmity since it was in accordance with law. (AY. 2005-06)
ACIT v. Pawan Kumar Jhunjhunwala (2016) 157 ITD 667 (Kol.)(Trib.)

S. 94A. Special measures in respect of transactions with persons located in notified jurisdictional area.

1532 **S. 94A : Transactions with persons located in notified jurisdictional area – Exchange of information – International transactions – Double taxation avoidance agreements – Legislative powers – Parliament – Deduction at source – Provision empowering Government to notify specified territory outside India for certain purposes is held to be valid – DTAA-India-Cyprus. [S. 9(1)(i), 90, 94, 201(1), (1A), Art. 28 Constitution of India, Art. 226]**
Dismissing the petition, challenging the Notification No. 86 of 2013 dated 1-11-2013 (2013) 359 ITR 8 (St.), on the ground that, Parliament cannot be curtailed by execution of Double Taxation Avoidance Agreement with that territory Notification of Cyprus as specified jurisdiction upon failure by that country to share information in terms of Double Taxation Avoidance Information is held to be valid. Provision mandating deduction of tax at source at 30 per cent in case of transactions with persons in notified territory – Share purchase agreement with Cyprus party providing for burden of tax to be borne by Cyprus party. Assessees not entitled to contend provisions invalid. Section 94A(1) of the Income-tax Act, 1961, Notification dated November 1, 2013, issued thereunder specifying Cyprus as a notified jurisdictional area for the purpose of section 94A(1) of the Act and Press Release dated November 1, 2013 are valid. Notification issued notifying Cyprus as notified under S. 94A is held to be valid.
K. Dhanakumar v. UOI (2016) 383 ITR 385 / 239 Taxman 283 / 286 CTR 28 (Mad.)(HC)
T. K. Dhanashekar v. UOI (2016) 383 ITR 385 / 239 Taxman 283 / 286 CTR 28 (Mad.)(HC)
T. Rajkumar v. UOI (2016) 383 ITR 385 / 239 Taxman 283 / 286 CTR 28 / 134 DTR 225 (Mad.)(HC)

CHAPTER XII
DETERMINATION OF TAX IN CERTAIN SPECIAL CASES

S. 112 : Tax on long term capital gains.

S. 112 : Tax on long term capital gains – Non-resident – Rate applicable would be 10% and not 20%. [S. 48, 112(1), Proviso] 1533

Dismissing the appeal of revenue the Tribunal held that; as per the mandate of proviso to S. 112(1), where the tax is payable in terms of long-term capital gains exceeds 10 per cent before computation under second proviso to S. 48, then such excess shall be ignored and the tax rate will be restricted to 10 per cent. The Tribunal decided in favour of assessee and held that second proviso to s. 48 not being applicable to capital gains arising to a non-resident from the transfer of shares of an Indian Company, such case is restricted to first proviso alone and capital gain in such case is covered by the proviso to 112(1) and consequently, tax rate of 10 per cent should be applied. (AY. 2010-11)

DIT v. Mitsubishi Motors Corporation (2016) 179 TTJ 25 (UO) (Delhi)(Trib.)

S. 112 : Tax on long-term capital gains – Mutual fund – Merely because it had not filed details of capital gain in return of income filed, it could not be denied benefit of provisions. [S. 45] 1534

Assessee invested certain amount in mutual fund units of HSBC. It earned long-term capital gain on redemption of HSBC Mutual Fund. It had not declared said gain in return of income filed. The A.O. added amount of long-term capital gain to total income of assessee and brought it to tax at special rate of 20 per cent without giving benefit of cost inflation indexation. Long-term capital gain earned by assessee was chargeable to tax u/s. 112(1)(a) read with first proviso to section 112(1). Merely because assessee had not filed details of long-term capital gain in return of income filed, it could not be denied benefit of provisions of section 112(1)(a). (AY. 2010-11)

Sanju Verma v. Dy. CIT (2016) 158 ITD 837 / 182 TTJ 909 (Mum.)(Trib.)

S. 112 : Tax on long term capital gains – Trust became non-exempt u/s. 11 due to contravention of s. 13(1)(c), such capital gain would be taxed at maximum marginal rate in terms of S. 164(2) and benefit of section 112 could not be given to it. [S 11, 13, 164(2)] 1535

Assessee Trust earned capital gains on sale of land and claimed same as exempt income. As there was violation of section 13(1)(c), exemption u/s. 11 was denied to assessee and its income was assessed under section 164(2). Since capital gain became non-exempt as a consequence of contravention of provisions of section 13(1)(c) or (d), said income would be subject to tax at maximum marginal rate and benefit of section 112 could not be given to assessee. (AY. 2007-08)

Dy. DIT v. India Cements Educational Society (2016) 157 ITD 1008 / 46 ITR 80 (Chennai) (Trib.)

S. 115A : Tax on dividends, royalty and technical service fees in the case of foreign companies.

1536 **S. 115A : Foreign companies – Tax – Technical services fees – Beneficial rates of tax available under DTAA should be granted – DTAA-India-Singapore [S. 9(1)(vii), Art. 11, 12]**

The benefits available under the Treaty should be granted to the assessee based on valid TRC was the proposition approved by the Hon'ble Supreme Court in *Azadi Bachao Andolan (2003) 263 ITR 706* and further the Hon'ble Punjab & Haryana High Court in *Serco BPO (P.) Ltd. v. AAR (2015) 379 ITR 256.*

The interest income earned by the assessee was also received by it being its beneficial owner and which in turn, has been remitted though not in the instant year, is taxable at concessional rate of taxes. (AY. 2010-11)

Imerys Asia Pacific (P) Ltd. v. DDIT (IT) (2016) 140 DTR 177 / 180 TTJ 544 (Pune)(Trib.)

S. 115BBC. Anonymous donations to be taxed in certain cases.

1537 **S. 115BBC : Anonymous donations – Charity box – Donation received by assessee – Trust in charity boxes was not taxable. [S. 2(24)(iia)]**

The assessee was registered as charitable trust with object of helping people like disabled persons, orphans, widows by providing them food, shelter etc. It received donations in golaks (charity boxes) installed at different places. The Assessing Officer brought to tax said receipts treating them as anonymous donations. CIT(A) held that such donations cannot be taxed. On appeal by the revenue, dismissing the appeal the Tribunal held that legislature intended to tax unaccounted money which was brought in books of charitable trusts in bulk and this law was not meant for taxing small and general charities collected by genuine charitable trusts. Anonymous donation to wholly religious trusts or institutions will not be taxed in view of the Circular No. 14 dated 28-12-2006. (AY. 2010-11, 2011-12)

Dy. CIT v. All India Pingalwara Charitable Society (2016) 141 DTR 153 (Amritsar)(Trib.)

1538 **S. 115BBC : Anonymous donations – Charity received by the assessee was not taxable as anonymous donation.**

The assessee was a charitable society with the object of serving disabled, aged, orphans, destitute, etc. The charity received by it through golaks, kept at different places like gurdwaras, bus stands, etc., was duly accounted for in its books of account. The AO treated the same as anonymous donations and taxed it u/s. 115BC. The ITAT deleted the addition made by the AO and held that s. 115BC was introduced to catch unaccounted money and not petty charities. Further, it was also observed that the concept and importance of charity existed in Indian society in all religions and hence the charity received by the assessee could not be taxed as anonymous donation. (AY. 2010-11, 2011-12)

DCIT v. All India Pingalwara Charitable Society (2016) 158 ITD 410 / 47 ITR 1 / 178 TTJ 602 (Amritsar)(Trib.)

S. 115BBC : Anonymous donations – Donations could not be taxed. [S. 12AA] 1539

Dismissing the appeal of revenue the Tribunal held that where assessee trust was established for charitable and religious purposes and anonymous donation was received by it without any specific direction that such donation was for any university or other educational institutions or any hospital or other medical institutions run by assessee-trust, such donation could not be taxed by invoking provisions of section 115BBC. (AY. 2009-10)

ITO(E) v. Satyug Darshan Trust (2016) 156 ITD 524 (SMC) (Delhi)(Trib.)

CHAPTER XII-B
SPECIAL PROVISIONS RELATING TO CERTAIN COMPANIES

S. 115J. Special provisions relating to certain companies.

1540 **S. 115J : Book profit – Depreciation claimed after revaluing its fixed assets – Adjustment by the AO was held to be not justified.**
Appeal of the revenue was dismissed on the ground that the accounts of the assessee is in accordance with provisions of section 350 of Companies Act. (AY. 1988-89)
CIT v. J. K. Synthetics Ltd. (2016) (2016) 243 Taxman 441 (All.)(HC)
Editorial : SLP of revenue is dismissed; CIT v. J. K. Synthetics Ltd. (2016) 242 Taxman 178 (SC)

1541 **S. 115J : Book profit – Assessing Officer has no power to rework net profit arrived at by company.**
Dismissing the appeal the Court held that the Appellate Tribunal was right in confirming the order passed by the Commissioner (Appeals) directing the Assessing Officer to compute the book profits under section 115J based on the separate profit and loss account furnished by the assessee.
CIT v. Cornerstone Brands Ltd. (2016) 387 ITR 455 (Guj.)(HC)

1542 **S. 115J : Book profit – Depreciation on revalued asset – Assessing Officer cannot make adjustment. [Companies Act, S. 350]**
Assessee-company claimed depreciation after revaluating its fixed assets. Assessing Officer while computing income of assessee under section 115J held that though net profit shown in profit and loss account was in accordance with provisions of Parts II and III of Schedule VI to Companies Act, 1956, but method of computation of profit and loss was not in consonance with provisions of section 350 of Companies Act, consequently he disallowed excess depreciation and added that amount in profit and loss account. Tribunal relying upon decision of Supreme Court rendered in case of *Apollo Tyres Ltd. v. CIT (2002) 255 ITR 273* allowed appeal of assessee. On appeal by revenue, dismissing the appeal the Court held that controversy involved in instant appeal filed by revenue was squarely covered by decision of Supreme Court rendered in case of Apollo Tyres Ltd, therefore, there was no substantial question of law arising for consideration. (AY. 1988-89)
CIT v. J.K. Synthetics Ltd. (2016) 243 Taxman 411 (All.)(HC)

1543 **S. 115J : Book profit – Powers of Assessing Officer – No power to go behind duly certified books of account. [S. 115JA]**
Dismissing the appeal of revenue, the Court held that Once there was no dispute that the books of account were maintained in accordance with law and were duly certified, it was not open to the Assessing Officer within his limited jurisdiction, to disallow a debit entry made by the assessee. The Tribunal's order setting aside a similar disallowance for the assessment year 1998-99 was also confirmed.
Both the provisions for doubtful debts and diminution in the value of investment were covered by clause (g) of the Explanation to sub-section (2) of section 115JA of the Act.

Clause (g) was introduced with effect from April 1, 1998. Disallowances were made in the assessment year 1997-98. Therefore, the amendment which became operative from April 1, 1998 was not applicable to the assessment year 1997-98. The disallowances were deleted. (AY. 1997-98, 1998-99)
CIT v. Peerless General Finance and Investment Co. Ltd. (2016) 385 ITR 130 (Cal.)(HC)

S. 115JA. Deemed income relating to certain companies.

S. 115JA : Book profit – No disallowance of actual expenditure for computing MAT just because it was shown as deferred expenditure for shareholders, SLP of revenue was dismissed. 1544
The Honourable Apex Court dismissed the special leave petition filed against the order of the Karnataka High Court in the case of *CIT v. Karnataka Soaps and Detergents Ltd.* wherein it was held that the assessee is entitled to deduct the entire revenue expenditure as claimed in the profit and loss account prepared in accordance with the provisions of Part II of Schedule VI of Companies Act 1956 for the purposes of computation of book profits under Section 115JA of the Act and whereas, in the published accounts to show to the shareholders, such expenditure was deferred and recognized in the balance sheet. (AY. 1999-00, 2000-01, 2006-07)
CIT v. Karnataka Soaps and Detergents Ltd. (2016) 236 Taxman 395 (SC)
Editorial : CIT v. Karnataka Soaps and Detergents Ltd. (2015) 59 taxmann.com 43 (Karn) (HC)

S. 115JA : Book profit – Lease equalization charges is not to be added back to the income for the purpose of computation of book profits. 1545
The Assessing Officer disallowed the lease equalization charges for the purpose of computation of book profits, which was upheld by the CIT(A) but rejected by the Tribunal. Upholding the order of the Tribunal and agreeing with the view taken by the Delhi High Court in the case of *CIT v. Virtual Soft Systems Ltd. (2012) 341 ITR 593 / 205 Taxman 257 / 18 taxmann.com 119*, it was held that the lease equalization charge is a method of recalibrating the depreciation claimed by the assessee in a given accounting period and that the method employed by the assessee, therefore, over the full term of the lease period would result in the lease equalization amount being reduced to a naught, as the debits and credits in the profit and loss account would square off with each other. Under the circumstances, the same is neither in the form of a reserve nor a deduction. (AY. 2000-01)
PCIT v. Sun Pharmaceuticals Industries Ltd. (2016) 240 Taxman 686 / (2017) 148 DTR 332 / 293 CTR 489 (Guj.)(HC)

S. 115JA : Book profit – Debenture redemption reserve – Amount retained by way of providing for a known liability is not a reserve, consequently, amount which is set apart as a Debenture redemption reserve is not a reserve, allowable as deduction. [S. 115JB] 1546
Adjustment claimed by assessee for debt redemption fund was declined with a observation that debt redemption fund was an appropriation for purpose of creating

a reserve and was a below a line adjustment and it did not fall in any category of adjustments provided u/s. 115JB.
Tribunal held that an amount which is retained by way of providing for a known liability is not a reserve and, consequently, amount which is set apart as a Debenture Redemption Reserve is not a reserve within meaning of Expl. (b) to s. 115JA. Allowable as deduction. (AY. 2006-07)
ACIT v. Genus Electrotech Ltd. (2016) 161 ITD 644 (Ahd.)(Trib.)

1547 **S. 115JA : Book profit – Capital receipts – Such as subsidy & carbon credits which have no income element, have to be excluded from book profits even if credited to the P&L A/c. [S. 115JB]**
Capital receipts – such as subsidy & carbon credits which have no income element, have to be excluded from book profits even if credited to the P&L A/c. (ITA No. 417 & 418/LKW/2013, dt. 09.02.2016) (AY. 2008-09, 2009-10)
ACIT v. L. H. Sugar Factory Ltd. (Luck)(Trib.); www.itatonline.org

1548 **S. 115JAA : Book profit – Tax credit – Surcharge and education cess – Form which is contrary to law is to be ignored – MAT credit under section 115JAA brought forward from earlier years is to be set off against tax on total income after taking into account amount of surcharge and cess.**
Dismissing the appeal of the assessee the Court held that; the Tribunal was right in confirming the set off of MAT Credit under section 115JAA brought forward from earlier years against tax on total income including surcharge and education cess instead of adjusting the same from tax on total income before charging such surcharge and education cess. Form of income-tax return for relevant assessment year 2008-09 suggested that MAT credit under section 115JAA had to be allowed before making addition of surcharge and cess. Said form had subsequently been corrected in assessment year 2012-13. (AY. 2008-09)
Srei Infrastructure Finance Ltd. v. DCIT (2016) 289 CTR 412 / (2017) 244 Taxman 197 (Cal.)(HC)

S. 115JAA. Tax credit in respect of tax paid on deemed dividend income relating to certain companies.

1549 **S. 115JAA : Book profit – Deemed income – Tax credit – MAT credit to be given before levy of surcharge and education cess.**
The AO first computed the tax payable after giving MAT credit (inclusive of surcharge and education cess) and thereafter, on the resultant figure, surcharge and education cess was levied. However, *vide* order u/s. 154 tax was calculated after giving credit of MAT without surcharge and education cess and thereafter on the resultant figure, surcharge and education cess was levied. The ITAT upheld the order of the CIT(A) and held that credit for MAT should be given before levy of surcharge and education cess. (AY 2007-08, 2008-09)
DCIT v. J.K. Cement (2016) 45 ITR 50 (Luck)(Trib.)

S. 115JB. Special provision for payment of tax by certain companies.

S. 115JB : Book profit – When the books of account is prepared by the assessee as per the Companies Act, AO cannot determine the book profit ignoring the books of account. 1550
Dismissing the appeal of the revenue, the Court held that in the instant case, there was no determination of the AO that the final accounts of the assessee were not prepared in accordance with the Schedule-VI of the Companies Act and that the determination of liability for payment of MAT under Section 115JB of the I.T. Act, by ignoring the profit and loss account was not through due process. When the corrected return in consonance with the audited profit and loss account was submitted, those figures should have been the basis for determination of MAT under Section 115JB of the I.T. Act. (AY. 2006-07)
CIT v. Jajodia Engineering (P) Ltd. (2016) 289 CTR 208 / (2017) 79 taxmann.com 385 (Gau.)(HC)

S. 115JB : Book profit – Provision for unascertained bad and doubtful debts – Effect of insertion of clause (i) to Explanation (1) Section 115JB(2) of the Act – Conflict in two judgments of Gujarat High Court as regards issue as to whether unascertained bad and doubtful debt would be added in computation of income for MAT provisions under section 115JB of the Act – Matter was to be referred to Larger Bench. [S. 36(1)(viii)] 1551
The issue before the High Court was in relation to the effect of insertion of clause (i) to Explanation (1) of sub-section (2) of section 115JB of the Act with effect from 1-4-2001 in computation of the assessee's liability under MAT provisions. The issue was whether as per clause (i) to Explanation (1), for the purpose of Section 115JB, any provision for bad and doubtful debts would have to be added while computing income of the assessee for MAT provisions.
In respect of addition of provision for unascertained bad and doubtful debt while computing book profit under Section 115JB of the Act, there were two views amongst the Gujarat High Court.
The question considered by the Gujarat High Court in case of *CIT v. Deepak Nitrite Ltd. [TA No. 1918/2009, order dated 17.8.2011]* was whether the decision of Supreme Court in case of *HCL Comnet Systems & Services Ltd. (2008) 305 ITR 409 (SC)*, would continue to hold the field. The High Court took a view that by virtue of insertion of clause (i) to explanation (1) of sub-section (2) of section 115JB of the Act, any provision for bad and doubtful debts would have to be added while computing the income of the assessee for MAT provisions. The said decision was rendered without considering the observations of the Supreme Court in case of *Vijaya Bank v. CIT (2010) 323 ITR 166 (SC)*.
Subsequently a similar issue came up before the Gujarat High Court in case of *CIT v. Indian Petrochemicals Corporation Ltd. [T A No. 1773/2008] dated 19 July 2017* and connected appeals. In the said case, the High Court took a view that provision for bad and doubtful debts not being ascertained, liability cannot be added back with the aid of clause (c) to explanation (1) of sub-section (2) of section 115JB of the Act as it is not an ascertained liability. In the said case, the High Court had not noticed the judgement in case of Deepak Nitrite Ltd. (supra).
Considering the controversy between the rulings of the same High Court on similar issues, the High Court held that the said controversy is required to be resolved by the Larger Bench. Thus, the appeal was referred to a Larger Bench.
CIT v. Vodafone Essar Gujarat Ltd. (2016) 242 Taxman 352 / (2017) 151 DTR 204 (Guj.)(HC)

1552 **S. 115JB : Book profit – Provision for gratuity cannot be treated as unascertained liability and be added back to the book profit when such provision was based on actuarial valuation.**
The High Court, followed its judgment in case o*f Dy. CIT v. Inox Leisure Ltd. (351 ITR 314)* and held that provision for gratuity based on actuarial valuation cannot be treated as unascertained liability and be added back to the book profit. (AY. 2007-08)
PCIT v. Gujarat State Electricity Corporation Ltd. (2016) 242 Taxman 357 (Guj.)(HC)
Editorial : SLP is granted to the Revenue; CIT v. Gujarat State Electricity Corporation Ltd. (2016) 242 Taxman 257 (SC)

1553 **S. 115JB : Book profit – Provision for diminution in value of investment not allowed in earlier year – Write back of part of sum in later year – No increase in book profits in earlier year – Write back cannot be allowed as sum withdrawn from reserve.**
Dismissing the appeal of the assessee the Court held that under the statutory provisions deduction could have been claimed, provided the book profits had actually been increased but since the book profits of the assessee had never been increased, the question of any deduction on account of any credit from the reserve did not arise. The deduction could have been claimed provided the amount of provision had been added to the book profits during the assessment year 2001-02, when it was created. Admittedly, such addition had not been made and therefore, there was no scope for deduction as claimed. The amendment to section 115JB of the Act by the Finance Act, 2009 had not created any legal fiction. It had only said that if any amount of the book profits had been increased, corresponding deduction might be availed of in future. The view taken by the Tribunal, disallowing the deduction, was correct. (AY. 2006-07)
Stone India Ltd. v. CIT (Appeals) (2016) 385 ITR 542 (Cal.)(HC)

1554 **S. 115JB : Book profit – Fringe benefit tax, securities transaction tax and prior period expenses to be excluded.**
When the Board has issued the circular and the fringe benefit tax was found to be allowable while computing book profit, the Tribunal was correct in allowing it. (AY. 2008-09)
CIT v. Sansera Engg. P. Ltd. (2016) 386 ITR 349 (Karn.)(HC)

1555 **S. 115JB : Book profit – Refund of excise subsidy – Reserve not created by debit to profit and loss account – AO has no power to scrutinise except as provided in Explanation – Sum cannot be added to book profits.**
In the computation of income under Section 115JB, the AO added to the book profits the sum received by the assessee on account of excise duty refund subsidy. Held, the pronouncement in the decision of the Supreme Court was binding and therefore, the AO and the Commissioner (Appeals) had erred in not following the judgment. The sum was not taxable since the reserve was not created by debiting the profit and loss account and the AO had no power to go behind the accounts. (AY. 2004-05)
CIT v. Shyam Century Ferrous Ltd. (2016) 386 ITR 477 (Cal.)(HC)

S. 115JB : Book profit – Accounts prepared in accordance with provisions of Companies Act – Assessing Officer has no power to correct accounts. 1556

Dismissing the appeal of revenue, the Court held that when the accounts produced by an assessee are found to be maintained in accordance with the requirements of the Companies Act, it is not open to the Assessing Officer to embark upon a fresh inquiry in regard to the entries made in the books of account of the company. The Assessing Officer has limited power of making appropriate correction in accordance with the Explanation to section 115JB. To put it differently the Assessing Officer does not have the jurisdiction to go behind the net profit reflected in the profit and loss account except to the limited extent permitted by the Explanation to section 115JB. (AY. 2006-07)

CIT v. Jajodia Engineering P. Ltd. (2016) 384 ITR 364 / 141 DTR 243 (Gauhati)(HC)

S. 115JB : Book profit – Sale of land – profit directly credited to capital reserve – Audit report qualified to this extent – Held, no power to embark upon a fresh enquiry in regard to the entries made in the books of account once the accounts are audited and approved by the company in general body meeting and thereafter filed before the Registrar of Companies – Held, no adjustment of Book Profit required. 1557

Assessee sold the land and credited the capital gain arising out of the sale of the land directly to capital reserve and not to profit and loss account. The auditor's report certified with a qualification that the profit and loss account and balance sheet referred to in the report complied with substantially in all material respects with the applicable accounting standards referred to in section 211(3C) of the Companies Act except that the land and building was sold during the year and the capital gain had been transferred directly to capital reserve account instead of crediting to profit and loss account. The AO held that, as per Clause 3(XII)(b) and (c) of Part II of Schedule VI and as per the accounting standards applicable, the capital gains should be routed through Profit and loss account. Further, even the auditors' report was qualified and therefore, the AO held that the amount of capital gain should have been credited to profit and loss account. High Court, after considering the judgment in case of *Apollo Tyres Ltd. v. CIT (2002) 255 ITR 273 (SC),* held that AO had no power to embark upon a fresh enquiry in regard to the entries made in the books of account. It was also held that AO had no power to recompute the book profit and had to rely upon the authentic statements of accounts of the company, the accounts being scrutinized and certified by the statutory auditors though with a qualification, approved by the company in general body meeting and thereafter filed before the Registrar of Companies, who had a statutory obligation to examine and be satisfied that the accounts of the company are maintained in accordance with the requirements of the Companies Act. (AY. 2002-03)

Sri Hariram Hotels (P.) Ltd. v. CIT (2016) 237 Taxman 564 / 285 CTR 190 / 133 DTR 102 (Karn.)(HC)

S. 115JB : Book profit – Addition made to book profit of assessee on account of disallowance of expenses made under s. 14A is unsustainable – Provisions of S. 14A could not be imported into S. 115JA(1)(f). [S. 14A, 115JA(1)(f)] 1558

Addition made to book profit of assessee computed under s. 115JB on account of disallowance of expenses made under S. 14A of the Act is unsustainable. Provisions of S..14A could not be imported into S. 115JA(1)(f) of the Act. (AY. 2008-09)

ACIT v. Tata Metalics Ltd. (2016) 48 ITR 272 (Kol.)(Trib.)

1559 **S. 115JB : Book profit – Second proviso to section 115JB(2) which was inserted by the Finance Act, 2006, with effect from 1-4-2017 is not claiicatory in nature and cannot be applied retrospectively. Matter was remanded.**
Allowing the appeal of the assesses the Tribunal held that; Second proviso to section 115JB(2) which was inserted by the Finance Act, 2006, with effect from 1-4-2017 is not claiicatory in nature and cannot be applied retrospectively. Matter was remanded. (AY. 2005-06)
Voltas Ltd. v. ITO (2016) 161 ITD 199 (2017) 183 TTJ 788 / (2017) 148 DTR 84 (Mum.) (Trib.)

1560 **S. 115JB : Book profit – Assessee not a company within the meaning of Companies Act, 1956, provision is not applicable.**
The Tribunal held that the assessee was not a company established under the Companies Act, 1956. In the assessee's case for the assessment year 2002-03, the Tribunal had held that in view of the legislative change brought about by the introduction of Explanation 3 in section 115JB by the Finance Act, 2012, section 115JB is applicable only to entities registered and recognised to be companies under the 1956 Act. Since the assessee was not a company within the meaning of the 1956 Act, section 211(2) of that Act and the proviso thereto was not applicable and therefore consequently the provisions of section 115JB were also not applicable. (AY. 2009-10)
UCO Bank v. Dy. CIT (2016) 49 ITR 34 (Kol.)(Trib.)

1561 **S. 115JB : Book profit – Unabsorbed depreciation is available as deductible expenditure to calculate book profits. [Sick Industrial Companies (Special Provisions) Act, 1985]**
Tribunal held that restructuring credits brought into profit & loss account against accumulated debit balance while giving effect to rehabilitation scheme would not extinguish loss therefore and depreciation from accounts of assessee in actual terms. And loss occurred not eligible as per accounts prepared under Parts-II and III of Schedule-VI of Companies Act and, therefore, assessee will be entitled to claim reduction of loss/unabsorbed depreciation, whichever is lower, from book profit. (AY. 2012-13)
Surat Textile Mills Ltd. v. Dy. CIT (2016) 159 ITD 373 / 181 TTJ 181 / (2017) 148 DTR 297 (Ahd.)(Trib.)

1562 **S. 115JB : Book profit – If amount of brought forward loss or unabsorbed depreciation is nil, then no deduction will be allowed under clause (iii) of section 115JB for computing book profit.**
Dismissing the appeal of the assessee, the Tribunal held that; if either the loss brought forward or unabsorbed depreciation is nil, then the assessee will not be allowed any deduction under clause (iii) of the Explanation 1 for computing the book profit under section 115JB. (AY. 2008-09)
Indian Furniture Products Ltd. v. ACIT (2016) 161 ITD 148 (Panaji)(Trib.)

S. 115JB : Book profit – Provision of section 115JB shall apply even to companies getting deduction u/s. 80IC. [S. 80IC] 1563

Assessee engaged in the business of manufacturing of homeopathic medicines which is getting deduction u/s. 80IC is also liable for tax on its book profits in respect of its income eligible for deduction. (AY. 2008-09 to 2011-12)

SBL (P.) Ltd. v. ITO (2016) 161 ITD 379 (Jaipur)(Trib.)

S. 115JB : Book profit – Provision of gratuity on basis of report of actuarial valuation and it could not be said that liability of assessee on account of gratuity was unascertained liability, said sum could not be added to book profits. 1564

Held that the provision of gratuity was made by the assessee in the books of account on the basis of the report of actuarial valuation and it cannot be said that liability of the assessee on account of gratuity was unascertained liability. Therefore, the said sum cannot be added to the book profits as per clause (c) of Explanation 1 to section 115JB of the Act.

JCIT v. Kanco Enterprises Ltd. (2016) 156 ITD 926 (Kol.)(Trib.)

S. 115JB : Book profit – ITR-6 format followed by assessee – Assessing Officer cannot follow different methods. [S. 115JAA, 143(1)] 1565

Where assessee relied on ITR-6 format to arrive at total liability as well as MAT credit calculations, AO. could not overlook said format and proceed to calculate MAT credit to complete assessment u/s. 143(1) by applying different methods. (AY. 2012-13)

Virtusa (India) (P.) Ltd. v. DCIT (2016) 157 ITD 1160 / 139 DTR 72 / 179 TTJ 527 (Hyd.) (Trib.)

S. 115JB : Book profit – Income from SEZ to be excluded. 1566

The income relating to the special economic zone unit was to be excluded while computing book profits under section 115JB. (AY. 2009-10)

DCIT v. Gebbs Healthcare Solutions Pvt. Ltd. (2016) 46 ITR 551 (Mum.)(Trib.)

S. 115JB : Book profit – Disallowance u/s. 14A cannot be added back to book profits. [S. 14A, R. 8D] 1567

The Assessing Officer added back the disallowance made under section 14A of the Act read with Rule 8D, to the book profit of the assessee. The Commissioner (Appeals) confirmed the order of the Assessing Officer. The Tribunal held that the disallowance made under section 14A read with Rule 8D could not be added while computing the book profits under section 115JB of the Act since the disallowance was only for the purpose of computing the taxable income of the assessee in the normal course. There was no provision in the Act to add this kind of disallowance while computing the book profits under section 115JB and it could not change the book profits on this count. Therefore, even if there is an addition in view of provision under section 14A read with Rule 8D, that cannot be added back to compute the book profit under section 115JB. (AY. 2005-06, 2008-09, 2009-10)

Brakes India Ltd. v. DCIT (2016) 46 ITR 212 (Chennai)(Trib.)

1568 **S. 115JB : Book profit – Manner of computation – Profits of S. 10AA unit of assessee should be excluded for purpose of computing book profits as per Profit and Loss account. [S. 10AA, 10B]**

Assessee was a 100% Export Oriented Unit and claimed benefits under sections 10B and 10AA. Method of computation of book profits is provided by Section 115JB of the Act. It lays down where a company's income-tax liability on the total income under the Act, is less than a particular percentage of its book profit, such book profit shall be deemed to be the total income of the assessee and the tax liability would be calculated on such income shall be at the rate prescribed for such income. S. 115JB(6) however lays down that income of the SEZ should be excluded from the profits as per P&L account for the purpose of computing "book-profits".

AO held that the Assessee was a unit in Special Economic Zone and therefore the provisions of S. 115JB(6) of the Act were not applicable. The Tribunal held that this conclusion of the AO is not correct and profits of the S. 10AA unit of the assessee should be excluded for the purpose of computing book profits u/s. 115JB of the Act from the profit as per Profit and Loss account referred to in that section. (AY. 2009-10)

ITO v. Last Peak Data (P) Ltd. (2015) 155 ITD 1099 / (2016) 175 TTJ 65 / 131 DTR 31 (Kol.)(Trib.)

1569 **S. 115JB : Book profit – Corporation established under Damodar Valley Corporation Act, 1948, provisions relating to book profit would not apply – Explanation 3 to section 115JB inserted by Finance Act, 2012, has prospective effect and, thus, it is applicable only with effect from assessment year 2013-14 onwards.**

Provisions relating to book profit is applicable only to entities registered and recognised to be companies under Companies Act, 1956 and, therefore, in case of assessee-corporation established under Damodar Valley Corporation Act, 1948, provisions. Explanation 3 to section 115JB inserted by Finance Act, 2012, has prospective effect and thus it is applicable only with effect from assessment year 2013-14 onwards. (AY. 2008-09, 2009-10)

Damodar Valley Corporation v. Add. CIT (2016) 157 ITD 415 / 139 DTR 201 / 180 TTJ 82 (Kol.)(Trib.)

1570 **S. 115JB : Book profit – Disallowance of expenditure – Exempt income – Added back for arriving book profit. [S. 14A, R. 8D]**

In terms of clause (f) to Explanation 1 to section 115JB(2), disallowance made by Assessing Officer under section 14A, read with Rule 8D of 1962 Rules, has to be added back for purpose of arriving at figure of book profit. (AY. 2008-09)

Dy. CIT v. Viraj Profiles Ltd. (2016) 156 ITD 72 / 135 DTR 169 / 46 ITR 626 / 177 TTJ 466 (Mum.)(Trib.)

1571 **S. 115JB : Book profit – Banking company – Provision is not applicable – Expl. 3 thereto by the Finance Act, 2012 is applicable w.e.f. A.Y. 2013-14 only. [Companies Act, S. 211(2)]**

Assessee being a nationalized bank and not a company within the meaning of the companies Act, 1956. S. 211(2) and proviso thereto of that Act are not applicable to it and, therefore, the provisions of S. 115JB are also not applicable. Amendment made to S. 115JB r.w. Expl. 3 thereto by the Finance Act, 2012 is applicable w.e.f. A.Y. 2013-14 only. (AY. 2002-03)

UCO Bank v. Dy. CIT (2016) 156 ITD 146 / 175 TTJ 607 / 130 DTR 113 (Kol.)(Trib.)

CHAPTER XII-D
SPECIAL PROVISIONS RELATING TO TAX ON DISTRIBUTED PROFITS OF DOMESTIC COMPANIES

S.115O. Tax on distributed profits of domestic companies.

S. 115O : Domestic companies – Tax on distributed profits – Interest on delay in payment – When dividend declared – Mere provision for dividend does not amount to declaration of dividend – Interest not payable on such provision. [S. 115P] 1572

The assessee, a public limited company, made a provision for payment of dividend in its books of account at the end of each of the financial years relevant for assessment years 2003-04 and 2009-10. After the accounts were finalised and approved by the board, the shareholders of the company in the annual general meeting declared final dividend. Dividend distribution tax was paid within 14 days of the declaration. The Assessing Officer levied interest treating the provision for payment of dividend as declaration of dividend. The Commissioner (Appeals) and the Tribunal deleted the interest. On appeals:

Held accordingly, dismissing the appeals, that it was not in dispute that the dividend distribution tax, under section 115O of the Income-tax Act, 1961, was paid by the assessee well within 14 days of declaration of dividend by the shareholders in the annual general meeting. Interest could not be levied under section 115P. (AY. 2003-04, 2009-10)

CIT v. NMDC Ltd. (2016) 383 ITR 56 (T&AP)(HC)

CHAPTER XII-F
SPECIAL PROVISIONS RELATING TO TAX ON INCOME RECEIVED FROM VENTURE CAPITAL COMPANIES AND VENTURE CAPITAL FUNDS

S. 115U. Tax on income in certain cases.

1573 **S. 115U : Venture capital companies – Venture capital Funds – Tax on income – VCF is given status of pass through vehicle for purpose of treatment of income received on account of investment made in venture capital undertaking; therefore, assessee, which invested in a VCF, would be entitled to book expenditure incurred by VCF as if same had been incurred by assessee directly in VCF. [S. 115O]**

Assessee-company had invested in a SEBI registered Venture Capital Fund (VCF). Said VCF was invested in a company. The AO taxed interest income received by assessee from VCF under head 'other income' on gross basis without giving deduction of assessee's share of expenses incurred by VCF for earning said income. The ITAT held that venture capital company and venture capital fund are given status of pass through vehicle for purpose of treatment of income received on account of investment made in venture capital undertaking and, therefore, assessee-company would be entitled to book expenditure incurred by VCF as if same had been incurred by assessee directly in VCF. (AY. 2006-07, 2007-08)

Japan International Cooperation Agency v. DDIT (2016) 158 ITD 62 / 139 DTR 185 / 180 TTJ 152 (Delhi)(Trib.)

CHAPTER XII-G
SPECIAL PROVISIONS RELATING TO INCOME OF SHIPPING COMPANIES

S. 115VB. Operating ships.

S. 115VB : Shipping business – "Tonnage Tax" income earned on "slot charters" is also held to be eligible for tonnage on slot charter related income. [S. 115VD, 115VG] 1574

It is only income from the business of operating qualifying ship that has to be computed in accordance with the provisions of Chapter XIIG. As per Section 115VB of the Act, a company is regarded as operating a ship if it operates any ship which is owned by it or a ship which is chartered by it and it also includes a case where even a part of the ship has been chartered by it in an arrangement such as slot charter, space charter or joint charter etc. The question that has arisen for consideration pertains to 'slot charter' i.e., should the 'slot charter' operations of a 'Tonnage Tax Company' be carried on only in 'qualifying ships' to include the income from such operations to determine the 'tonnage income' under 'TTS' in terms of the provisions of Chapter XIIG of the Act? In other words, is the income derived from 'slot charter' operations of a 'Tonnage Tax Company' liable to be excluded while determining the 'Tonnage Income' under the 'TTS' if such operations are carried on in ships which are not 'qualifying ships' in terms of the provisions of that Chapter of the Act and the relevant provisions of the Income Tax Rules, 1962. HELD by the Supreme Court:

(i) When the scheme of the aforesaid special provision for computation of income under TTS is exempted, we find the balance tilted in favour of the assessee as that was the precise purpose in introducing TTS in India. It may be stated in brief that in view of the stiff competition faced by the Indian shipping companies *vis-a-vis* foreign shipping lines, and in order to ensure an easily accessible, fixed rate, low tax regime for shipping companies, the Rakesh Mohan Committee in its report (of January, 2002) recommended the introduction of the TTS in India, which was similar to, and adopted some of the best global practices prevalent. The whole purpose of introduction of the Scheme was to make the Indian shipping industry more competitive in the global space by rationalising its tax cost. For the reason that it is impossible to cater to all shipping routes on owned ships, it is an accepted and widely prevalent practice globally and in India that shipping companies engage in slot charter operations. If such slot charter arrangements are not entered into, then Indian shipping companies will not be able to take up contract of affreightments and these contracts would have fallen to only foreign shipping lines thereby making Indian shipping industry uncompetitive. Such slot charter arrangements being with a shipping company but not in relation to or for a particular ship, it is impossible for the Indian shipping company to identify the cargo ship, which carried the goods.

(ii) We would also like to refer to Circular No. 05/2005 dated 15.07.2005 explaining the need and essence of the introduction of these provisions which was issued contemporaneously by the Central Board of Direct Taxes (CBDT). The Circular clarifies that the Scheme is a "preferential regime of taxation". It also clarifies that

"charging provision is under Section 115VA read with Section 115VF and Section 115VG." Circulars of CBDT explaining the Scheme of the Act have been held to be binding on the Department repeatedly by this Court in a series of judgments including *Azadi Bachao Andolan v. Union of India 263 ITR 706, Navnit Lal Jhaveri v. K.K. Sen 56 ITR 198 SC*, and *UCO Bank v. CIT 237 ITR 889 (SC)*. (AY. 2005-06, 2008-09)

CIT v. Trans Asian Shipping service Pvt. Ltd. (2016) 385 ITR 637 / 138 DTR 1 / 240 Taxman 669 / 287 CTR 113 (SC)

CHAPTER XII-H
INCOME-TAX ON FRINGE BENEFITS

S. 115WA. Charge of fringe benefit tax.

S. 115WA : Fringe benefits – Charge of tax – Concessional rate of tax as per Rule 8 for tea manufacturers would be available for levy of FBT. 1575

The assessee was engaged in the business of growing and manufacturing tea and claimed the concessional rate of tax of 40% under Rule 8 for determining the taxable value of fringe benefits. The AO alleged that same was not allowable since FBT was payable even when income-tax is not payable and determined the taxable value of fringe benefits at 100%. The ITAT allowed the claim of the assessee and held that the FBT would fall within the ambit of the Income-tax Act and since there was no *non-obstante* clause in the charging section, and consequently the benefit of rule 8 would be available. (AY. 2008-09, 2009-10)

Mcleod Russel India Ltd. v. ACIT (2016) 45 ITR 182 (Kol.)(Trib.)

CHAPTER XIII
INCOME-TAX AUTHORITIES

S. 116 : Income-tax authorities.

1576 **S. 116 : Income tax authorities – Promotion of CIT(A) – Based on Annual Confidential Reports (ACRs) of CIT(A), promotion denied – representation made by the CIT(A) against the ACR – Competent authority confirmed ratings in report without adverting to the representation – CAT directed competent authority to decide the representation of the CIT(A) afresh in the light of the directions issued – Held, competent authority to dispose of the objections raised by CIT(A) in light of directions issued by CAT failing which the CIT(A) shall be considered for promotion.**

CIT(A)'s Annual Confidential Reports (ACRs) were assessed by the reporting authority as 'good' as a result of which promotion was denied to the CIT(A). CIT(A) submitted his representation against recording of his ACR as 'good'. The competent authority rejected the representation and confirmed the ratings in the ACR. Central Administrative Tribunal ('CAT') directed the competent authority to decide the representation of the CIT(A) afresh in the light of the directions issued by the CAT. High Court directed the competent authority to dispose of the representation made by the CIT(A) in an objective manner in the light of the directions issued by the CAT within one month from the date of the judgment, failing which the respondent would be considered for promotion irrespective of such an entry found in the ACR.

UOI v. Subhash Kumar (2016) 237 Taxman 547 (P&H)(HC)

S. 119 : Instructions to subordinate authorities.

1577 **S. 119 : Central Board of Direct Taxes – Powers – Discretion to admit claim made beyond period specified is to be exercised on sound lines – Delay of one day in filing return – Application for condonation of delay – Rejection of application by Central Board of Direct Taxes was held to be not proper. [S. 139]**

Dismissing the appeal of the revenue, against the single judge order, the Court held that Once an authority had been conferred discretion to condone delay, an application by the assessee seeking condonation of delay of one day could not be rejected for reasons assigned by it. The Central Board of Direct Taxes had not exercised its discretion properly in the matter and in keeping with the legal principles relevant for such consideration. One could take judicial note of the fact that uploading of return required not only an effort but was also time consuming. If the assessee had encountered certain hardship or difficulty in uploading its return, as alleged by it due to technical snags in the website of the Department due to the last hour rush of filing of returns, the delay deserved to be condoned. The AO would process the return of the assessee for the assessment year 2010-11. (AY. 2010-11)

CBDT v. Regen Infrastructure and Services P. Ltd. (2016) 389 ITR 138 / (2017) 244 Taxman 39 (Mad.)(HC)

Editorial : Decision of the single judge of the Madras High Court in Regen Infrastructure and Services Pvt. Ltd. v. CBDT (2016) 384 ITR 407 (Mad.) is affirmed.

S. 119 : Central Board of Direct Taxes – Instructions – Waiver of interest – Declaring sale of property but not disclosing capital gains thereon – Failure to disclose not due to unavoidable circumstances – Denial of waiver was held to be proper. [S. 234B] 1578

The assessee filed a return disclosing the sale of property in the previous year relevant to the AY in question. The computation of capital gains on the transaction resulted in an assessment order and consequential levy of interest under section 234B of the Act. The assessee applied to the Chief Commissioner seeking waiver of interest but his request was turned down. On a writ petition, a single judge affirmed the order of the Chief Commissioner. On appeal: Held, dismissing the appeal and affirming the order of the single judge, (i) that the assessee's case was not an instance where the return of income was not filed due to unavoidable circumstances, which was the context taken into account by clause 2(d) of the notification. The assessee had filed a return disclosing the sale of landed property in the previous year relevant to the AY but had not returned any liability to tax on capital gains. The order issued by the Central Board of Direct Taxes in exercise of the powers conferred under sub-section (2)(a) of section 119 of the Act contains directions to the Chief Commissioners and Directors General and was a statutory order and would apply. The assessee was not entitled to waiver of interest.
Arun Sunny v. CCIT (2016) 382 ITR 533 (Ker.)(HC)

S. 119 : Central Board of Direct Taxes – The assessee failed to explain 'Genuine Hardship' for delay of 30 months in filing return of income therefore, application for condonation of delay in filing return of income was to be rejected [S. 139] 1579

Assessee filed return of income for the year on 18.01.2012 declaring total income of ₹ 2,30,667 and claiming refund of ₹ 1,29,126. There was a delay of 30 months in filing return of income therefore, an application was made by the assessee under section 119(2) for condonation of delay in filing return of income. The assessee explained that he was the only cable operator in the State and due to the difficult field job, personally, he used to stay very disturbed. Secondly, he also submitted that TDS certificates were misplaced therefore the return of income could not be filed in time. The application was rejected by the Commissioner holding that no specific reason is given by the assessee for delay. On Writ Petition, the High Court held that the assessee has failed to prove the 'genuine Hardship' as he has not produced any evidence to support the explanation furnished to the Commissioner. (AY. 2009-10)
Shyam Sundar Nirankari v. CIT (2016) 236 Taxman 591 (P&H)(HC)

S. 119 : Central Board of Direct Taxes – The Assessee was allotted PAN in the status of the firm in the year 2005 however, application for rectification in the status was made only in the year 2014. The High Court denied the relief under section 119 as it was not a case of "genuine hardship". [S. 139A] 1580

Assessee, an association of person, was carrying on the business managing properties. It did not file any return of income as income earned by the AOP was offered by the members in their proportionate interest. On 13.10.2011, the assessee received a notice to file the return of income in the status of a "firm". The assessee pointed out that the department has inadvertently issued a PAN in the status of the firm instead of in the status of the AOP and income earned by the AOP was offered to tax by the members

in the proportion of their share. The assessee, however, under protest filed the return of income in the status of the firm and requested the Assessing Officer to process the return of income and give credit to the tax deducted at source since the members of the AOP had not received the credit for the same. The assessee also made an application to Commissioner for condonation of delay and suitable direction to Assessing Officer. The application was rejected by the Commissioner. On Writ Petition filed by the assessee, the High Court held that PAN was allotted way back in the year 2005 however, assessee did not take any action to rectify the same. The assessee made the application for relief under section 119 only in the year 2014. Therefore, there was a clear lapse on the part of the assessee and hence the case does not fall within the scope of "genuine hardship". (SCA No. 8193 of 2015 dt. 04/12/2015)
Tulsi Mall (Association of Person) v. CIT (2016) 236 Taxman 586 (Guj.)(HC)

S. 124 : Jurisdiction of Assessing Officers.

1581 **S. 124 : Jurisdiction of Assessing Officer – Principal place of business Lucknow till assessment year 2011-12 – Change of principal place of business to Delhi from Assessment Year 2012-13 – Formalities for shifting place of business and PAN details amended – Notice under section 143(2) for assessment year 2012-13 by Assessing Officer in Lucknow was held to be not valid – Existence of alternate remedy is Not an absolute bar for issue of writ. [S. 143(2), Art. 226]**
Allowing the petition the Court held that (i) admittedly, on receiving the notice under section 143(2) of the Act, the assessee tendered his reply. The pendency of the writ petition was mentioned. The proceedings ignoring the objections were not justified. The writ petition could be considered.
(ii) That the notice dated September 11, 2013, which was computer generated, revealed that the Delhi address of the assessee was scored out and the local address had been added in handwriting. Therefore, it was incorrect to say that the Delhi address was not in the knowledge of the respondents and there was force in the submissions of the assessee that local address was inserted deliberately to create jurisdiction. The entire proceedings were ab initio illegal.
(ii) The rule of exclusion of the writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not of compulsion. In an appropriate case, in spite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely (a) where the writ petition seeks enforcement of any of the fundamental rights; (b) where there is failure of principles of natural justice; or (c) where the orders or proceedings are wholly without jurisdiction or the vires of an Act are challenged. In these circumstances, an alternative remedy does not operate as a bar. (AY. 2011-12)
Prashant Chandra v. CIT (2016) 387 ITR 88 / (2017) 292 CTR 481 (All.)(HC)

S.127. Power to transfer cases.

S. 127 : Power to transfer cases – Transfer from one Assessing Officer to another under two different jurisdictions – Agreement between two jurisdictional Commissioners – Absence of disagreement not same as agreement – Positive state of mind required – The transfer of the income-tax assessment file of the assessee from Assessing Officer, Tamil Nadu to the Assessing Officer, Kerala was not justified. 1582

Where the assessee's case is transferred from one Assessing Officer to another and the two are not subordinate to the same Commissioner, under section 127(2)(a) of the Income-tax Act, 1961 an agreement between the Commissioners of the two jurisdictions is necessary. Section 127(2)(a) contemplates a positive state of mind of the two jurisdictional Commissioners. Held accordingly, that as the file of the assessee had been transferred from an Assessing Officer in Tamil Nadu to an Assessing Officer in Kerala and the two Assessing Officers were not subordinate to the same Director General or Chief Commissioner or Commissioner, under Section 127(2)(a) of the Act, an agreement between the Director General, Chief Commissioner or Commissioner, as the case may be, of the two jurisdictions was necessary. The counter affidavit filed on behalf of the Department did not disclose that there was any such agreement. In fact, it had been consistently and repeatedly stated in the counter affidavit that there was no disagreement between the two Commissioners. Absence of disagreement was not tantamount to agreement as visualised under the section. The transfer of the income-tax assessment file of the assessee from Assessing Officer, Tamil Nadu to the Assessing Officer, Kerala was not justified or authorised under section 127(2)(a) of the Act and was to be set aside.

Noorul Islam Educational Trust v. CIT (2016) 388 ITR 489 / 243 Taxman 519 / 144 DTR 339 (2017) 291 CTR 230 (SC)

Editorial : Decision of the Madras High Court in CIT v. Noorul Islam Educational Trust [2015] 375 ITR 226 / 231 Taxman 407 / (2017) 291 CTR 232 (Mad) is reversed.

S. 127 : Power to transfer cases – Transfer order issued transferring the case of the assessee from Ahmedabad to Moradabad without hearing the assessee is null and void. 1583

The High Court held that the order of transfer of case of the assessee from Ahmedabad to Moradabad as a result of the search proceedings in the case of the director of the assessee-company is null and void as no opportunity was given to the assessee to place its submissions and order was passed without hearing the assessee.

Genus Electrotech Ltd. v. UOI (2016) 242 Taxman 336 / (2017) 152 DTR 93 (Guj.)(HC)

S. 127 : Power to transfer cases – Transfer order issued transferring the case of the assessee from Ahmedabad to Surat without hearing the assessee is null and void. 1584

The High Court held that the order of transfer of case of the assessee from Ahmedabad to Surat as a result of the search proceedings in the case of one HVK International Group, Surat is null and void as no opportunity was given to the assessee to place its submissions and order was passed without hearing the assessee.

Lalabhai Kamabhai Bharwad v. CIT (2016) 140 DTR 153 / 289 CTR 36 72 taxmann.com 184 (Guj.)(HC)

1585 **S. 127 : Power to transfer cases – Transfer order issued transferring the case from Bharuch to Kolkata is null and void.**

The High Court held that the order of transfer of case of the assessee from Bharuch to Kolkata is null and void as no search was carried out in the case of the assessee and that mere declaration of the kind of web woven by the taxpayers is too general statement not supported by any materials on record and can therefore, not form a basis for transfer of assessment proceedings.

Hindustan M-I Swaco Ltd. v. CIT (2016) 241 Taxman 239 (Guj.)(HC)

1586 **S. 127 : Power to transfer cases – Where assessee had challenged the assessment proceedings on the ground that the proceeding was initiated with *mala fide* intentions and the same is pending before the appellate authorities, the writ petition is to be dismissed.**

The High Court held that where assessee had challenged the assessment proceedings on the ground that the proceeding was initiated with *mala fide* intentions and the same is pending before the appellate authorities, the writ petition is to be dismissed. (AY. 2008-09 to 2014-15)

Jayanthi Shri, S. v. M. Kalpalatha Rajan, ACIT (2016) 288 CTR 354 / 241 Taxman 15 / (2017) 148 DTR 355 (Mad.)(HC)

D. Ramgopla v. M. Kalpalatha Rajan, ACIT (2016) 288 CTR 354 / 241 Taxman 15 (Mad.) (HC)

1587 **S. 127 : Power to transfer cases – Assessment was made and appeal was filed, assessee had already pursued a remedy, hence writ was dismissed. [S. 148, 246A, Art. 226]**

Assessee had closed down its business. CIT sent notice for transfer of case at wrong address. Case transferred to another place and assessment made. Appeal filed against the transfer and assessment. Simultaneously, writ filed. Writ petition was dismissed on the ground that the assessee had already pursued a remedy by filing an appeal before CIT(A). (AY 2001-02)

Dev Bhumi Industries v. CIT & Ors. (2016) 143 DTR 273 / 290 CTR 317 (HP)(HC)

Editorial : SLP of assessee is dismissed Dev Bhumi Industries v. CIT (2017) 247 Taxman 8 (SC).

1588 **S. 127 : Power to transfer cases – Power cannot be delegated – Notice should be specific based on material facts – Notice by Deputy Commissioner – No proper consent by transferee Commissioner – Notice vague – Order of transfer was held to be not valid.**

Allowing the petition the Court held that; the show-cause notices involved in the petitions were issued by and under the signature of the Deputy Commissioner (Headquarters) and not under the signature of the Commissioner. The Commissioner, Jaipur had "no objection" to transfer of the cases to Jodhpur. In that view of the matter, there was lack of "agreement between two competent authorities" as required under the statutory provisions. The orders were not in compliance with the provisions of law as there were no specific reasons mentioned in the orders for effecting transfer of cases nor did there appear to be any material fact mentioned even in the show-cause notices requiring transfer, which otherwise could have given an opportunity to the assessees to

put forth the grounds, if any, in a meaningful manner. Custody of part of the documents with the Assistant Commissioner, Jodhpur could not be the reason for transfer of cases in as much as there were equal number of documents in the custody of the income-tax authorities at Nagpur. The custody of documents could not be a consideration for deciding whether a case should be transferred or not. The orders of transfer of cases were not valid.

Ramswaroop v. CIT (2016) 388 ITR 208 / 241 Taxman 21 / 290 CTR 520 / 143 DTR 367 (Bom.)(HC)

Sudhir v. CIT (2016) 388 ITR 208 / 241 Taxman 21 / 290 CTR 520 / 143 DTR 367 (Bom.) (HC)

S. 127 : Power to transfer cases – Notice on ground that transfer necessary for coordinated investigation of connected cases – No material furnished regarding connected cases – Furnishing of few documents subsequently is not sufficient hence the order of transfer was held to be not valid. 1589

Court held, that the notice issued consequent to the order of the Court was bereft of any particulars, save and except that the transfer was required for the sake of co-ordinated investigation along with other connected cases for administrative convenience. The show-cause notice did not indicate the reasons for the proposed transfer, thus, making it impossible for the assessee to effectively respond to the show-cause notice. It was the show-cause notice which was to refer to the documents and the inferences drawn from the documents by the Commissioner supporting the proposed transfer. By mere giving of the documents relied upon without the party knowing what inference was being drawn therefrom, the requirement of natural justice was not met. This itself would lead to a breach of the principles of natural justice. The order of transfer of case was not valid. (AY. 1996-97)

Zodiac Developers P. Ltd v. PCIT (No. 2) (2016) 387 ITR 223 / 241 Taxman 230 (Bom.)(HC)

S. 127 : Power to transfer cases – Order passed by the Commissioner was proper reasoned and public interest was discernable, order so passed did not require any interference by the Court. 1590

Dismissing the petition, the Court held that the reason for transfer, which was, conduct of co-ordinated post search investigation and meaningful assessment, was valid reason for transfer of cases. The High Court further held that, the order u/s. 127 could be sustained only if there was real public interest and the reasons given by revenue for transfer are not vague.

Chaudhary Skin Trading Co. v. Pr. CIT (2016) 290 CTR 533 / 76 taxmann.com 169 (Delhi) (HC)

S. 127 : Power to transfer cases – Order was passed without application of mind was held to be in valid. 1591

Allowing the petition, the Court held that a transfer order passed which is not based on any cogent material, shows no application of mind and which does not disclose the reasons for transfer of case, is not in consonance with compliance of principles of natural justice and is liable to be struck down.

Anuben Lalabhai Bharwad v. PCIT (2016) 289 CTR 49 / 241 Taxman 511 (Guj.)(HC)

1592 **S. 127 : Power to transfer cases – Petition was not entertained as there was delay in filing the petition and also the petitioner has participated in the proceedings. [S. 153A, Constitution of India, Art. 226]**

Dismissing the petition the Court held that a person moving to the Court for exercise of writ jurisdiction, should move writ petition expeditiously. The petitioner moved writ petition against order with unreasonable delay and no sufficient reason was given for delay. Petitioner also participated in assessment proceedings pursuant to transfer of cases, thus, the writ petition so filed before the HC was liable to be dismissed. (AY. 2007-08 to 2012-13)

Akshata Mercantile (P.) Ltd. v. Dy. CIT (2016) 290 CTR 381 / 143 DTR 360 / 76 taxmann.com 228 / (2017) 391 ITR 236 (Bom.)(HC)

1593 **S. 127 : Power to transfer cases – Notice must show application of mind and give reasons – Principles of natural justice must be followed at every step – Defect in notice cannot be cured by additional reasons in order.**

Allowing the petition the Court held that proper application of mind by the competent authority at Guwahati was lacking and because of this, the abdication of responsibility was discernible. It further appeared from the show-cause notice that the Commissioner had acted on the proposal of the investigation wing but what was that proposal and the nature of the approval to such proposal or even the gist thereof, was not disclosed in the show-cause notice issued by the Principal Commissioner. The notices and consequent orders under section 127 were not valid.

Mul Chand Malu v. UOI (2016) 383 ITR 367 / 285 CTR 89 / 69 taxmann.com 4 / 132 DTR 297 (Gauhati)(HC)

1594 **S. 127 : Power to transfer cases – Addl. CIT passed assessment order, however, no order conferring concurrent jurisdiction to Addl. Commissioner of Income-tax over cases of Income-tax Officer was available, assessment being without jurisdiction was void ab initio – Notice served on old address could not be quashed if assessee did not intimate the new address to department. [S. 142, 143(3), 282]**

Assessee contended that there was no order u/s. 127 transferring case to Addl. Commissioner of Income-tax in exercise of concurrent jurisdiction vested in her and hence order passed by Addl. CIT was without jurisdiction. Revenue however submitted that Addl. CIT was provided concurrent jurisdiction over cases through order of Commissioner of Income-tax and, therefore, no separate order u/s. 127 was required to be passed. However, no such order conferring concurrent jurisdiction to Addl. CIT over cases of Income-tax Officer was either available on assessment record, or was produced by revenue. Thus, in absence of any such order, assessment completed by Addl. CIT being without jurisdiction was void *ab initio*. Tribunal also held that the notice served on old address could not be quashed if assessee did not intimate the new address to department. (AY. 2007-08)

Harvinder Singh Jaggiv. ACIT (2016)157 ITD 869 / 179 TTJ 232 (Delhi)(Trib.)

S. 131 : Power – Survey – Communication sent to assessee showing that investigation not completed and statements recorded yet to be used – Department willing to furnish copies of sworn statement as and when proposed to be used in evidence – Investigation process cannot be interdicted in exercise of writ jurisdiction – No interference warranted [Art. 226] 1595

The plea that all the individuals who had given statements were connected with the company was not a ground to accede to the prayer as it would hamper the investigation. Further, it had been communicated to the assessee's principal officer that the copies of the sworn statements of the directors as well as the employees of the company taken during the course of survey proceedings, would be provided, as and when they were proposed to be used as evidence against the assessee or its directors or its employees. Thus it was evident that till date the investigation was yet to be completed and their statements were yet to be used against any person. The plea of *mala fides* had not been specifically pleaded or established. What the assessee had sought to indirectly achieve was to injunct a summon, which could not be done, that too in exercise of jurisdiction under Article 226 of the Constitution of India.

Advantage Strategic Consulting P. Ltd. v. UOI (2016) 389 ITR 87 (Mad.)(HC)

S. 131 : Powers regarding discovery, production of evidence, etc.

S. 131 : Power – Discovery – Production of evidence – Summons can be issued u/s. 131(1A) even after the search proceedings are initiated. [S. 132] 1596

HC upheld the validity of the summons issued u/s. 131(1A) after the search proceedings initiated u/s. 132. HC held that summons can be issued before or even after the search proceedings are initiated. HC held that the words 'referred to in sub-section (1) of section 132 before he takes action under clauses (i) to (v) of that sub-section' in S. 131(1A) qualify the words 'authorised officer' only and not the other specified authorities named in the section.

Emaar Alloys (P) Ltd. v. DGIT (Inv) & Ors. (2015) 235 Taxman 569 (2016) 138 DTR 54 / 288 CTR 413 (Jharkhand)(HC)

S. 131 : Power – Discovery – Production of evidence – The Assessing Officer is empowered to visit the house of the assessee for the purpose of examining him on oath, by camping at the residence of the assessee. [S. 131(IA), 132] 1597

During the search proceedings, cash of ₹ 40 lakhs was found from the residence of the Assessee. The Assessing Officer drew the Punchnama on the same day and issued notice to assessee to be present at his residence for examination on oath. The assessee challenged the action of the Assessing Officer before the High Court in a Writ Petition. The Single Judge held that action of the Assessing Officer amounts to "trespass" and the Assessing Officer is to be prosecuted. On appeal by the department, the Division bench held that the Assessing Officer under section 131(1A) empowers the Assessing Officer to appear before him at his office or he can go to the place of such person and examine him on oath.)

DCIT (Inv.) v. Prakash V. Sanghavi (2016) 236 Taxman 176 (Karn.)(HC)

S. 132. Search and seizure.

1598 **S. 132 : Search and seizure – Supreme Court granted leave to appeal against the High Court order holding that the Tribunal is bound to consider the validity of search for determining the jurisdiction for making a block assessment. [S. 158BC]**
The assessee challenged the block assessment order on the ground that the search was illegal and contrary to law and therefore the order was void *ab initio*. Tribunal held that it had no jurisdiction to examine the authorisation of the search as such authorisation does not result in any tax demand on the assessee and as the appeal was with reference to the tax liability imposed on the assessee, the Tribunal could not go into the validity of the authorization of search. High Court remitted the matter to the Tribunal to look into the validity of search for determining jurisdiction for making a block assessment. Supreme Court has granted leave to appeal against the said judgment of the High Court. (Special Leave to Appeal (C) No. 10472 of 2014 dt. 30-11-2015)
Dy. CIT v. V. Ram Prasad (2016) 236 Taxman 479 (SC)
Editorial : V. Ram Prasad v. Dy. CIT (2012) 210 Taxman 102 (Karn.)(HC)

1599 **S. 132 : Search and seizure – Survey – Survey showing undisclosed cash and documents – Warrant of authorisation issued by competent authority, search was valid. – No material or information in possession of authorities giving rise to existence of any circumstances as specified in section 132 – Search illegal and unauthorized. [S. 133A]**
On Writ the Court held that (i) that the competent authority had reason to believe and formed his opinion for taking action under section 132 of the Act, based on relevant materials. The conditions for conducting search under section 132 of the Act were fully satisfied in the case of assessees in two of the petitions. The search was valid.
(ii) That with regard to the assessees in the third petition, there was no material or information in the possession of the income-tax authorities as required under section 132(1) of the Act giving rise to the existence of any circumstances as specified in clauses (a), (b), (c) of sub-section (1) of section 132 of the Act and the search was illegal and unauthorised.
D. S. (India) Jewelmart P. Ltd. v. UOI (2016) 387 ITR 593 (All.)(HC)
Mayank Chaturvedi v. UOI (2016) 387 ITR 593 (All.)(HC)
Mridul Garg v. UOI (2016) 387 ITR 593 (All.)(HC)

1600 **S. 132 : Search and seizure – Court order for release of money and gold bars seized 11 years ago as no assessment was done till date. [S. 143(3)]**
The High Court ordered for release of 6 kgs of gold bars and also the Indian currency to the tune of ₹ 1,49,000/- as it was seized by the department 11 years ago in 2005 and no assessment/reassessment proceedings were initiated till date.
Gauri Shankar & Ors. v. DIT (2016) 289 CTR 203 (Delhi)(HC)

1601 **S. 132 : Search and seizure – Search proceedings initiated cannot be declared illegal if there is sufficient material before the IT authorities on the basis of which satisfaction is arrived at that the assessee has huge undisclosed income [S. 131]**
Writ petition was filed by the assessee challenging the legality and validity of the search and seizure operations carried out by the IT Authorities under section 132. HC

dismissed the writ petition and upheld the validity of the search operations on several counts. HC observed that there was sufficient material before the IT authorities that the assessee had not disclosed huge income. Further, before the issuance of the warrant of authorization by the Director of IT to carry out search and seizure, the procedure prescribed under section 132 had been followed. HC further observed that it need not approve the subjective satisfaction arrived at by the lower authorities. It was sufficient if there are supporting documents with a satisfaction note which is approved before the issuance of a warrant of authorization for carrying out search and seizure operations.
Emaar Alloys (P) Ltd. v. DGIT (Inv) & Ors. (2015) 235 Taxman 569 / (2016) 138 DTR 54 / 288 CTR 413 (Jharkhand)(HC)

S. 132 : Search and seizure – Retention of seized articles – No justification for search even after eleven years – No proceedings for assessment in respect of assets seized – Retention of seized articles not valid. 1602
Held, that the premises of the petitioners were raided on July 11, 2005 nearly 11 years ago. 6 kilograms of gold bars and currency were seized therefrom. Till date, there was no justification forthcoming for either the conduct of the raid or for seizure of the articles. There was nothing on record to show that any proceedings for assessment or reassessment were initiated till date against the petitioners in respect of the articles seized in 2005. There was no justification for any further retention of the seized gold bars as well as the currency amounting to ₹ 1,49,000/-.
DIT v. Gauri Shankar (2016) 384 ITR 545 / 137 DTR 84 (Delhi)(HC)

S. 132 : Search and seizure – Settlement commission – Addition made by the Assessing Officer on account of discrepancy in the physical value and book value of the stock – Amount was offered by the partner of the assessee before the Settlement Commission which was accepted – No addition can be made in the hands of the assessee – Method of valuation of stock. [S. 245C, 245D] 1603
During the course of the search carried out in the premises of the firm, certain materials were seized. It was also found that there was a discrepancy in the physical value of the stock and the book value of the stock as on the date of search. The partner of the assessee-firm approached the settlement commissioner under section 245C of the Act and disclosed the said difference which was also accepted by them. In the meantime, the addition was made in the hands of the firm by the Assessing Officer which was deleted by CIT(A) and confirmed by the Tribunal. On appeal before the High Court, it was held that the addition cannot be made in the hands of the assessee as the amount was disclosed by the partner of the assessee-firm before the Settlement Commission and was also accepted by it which was never questioned by the Department. Therefore, addition cannot be made in the hands of the assessee-firm. Further, in respect of method to be adopted for valuation of stock, it was held by the High Court that it is a well-settled principle of accountancy that the stock has to be valued at cost or market price whichever is lower. (BP. 1996-97 to 2001-02)
CIT v. Jever Jewellers (2015) 236 Taxman 282 / (2016) 286 CTR 528 / 133 DTR 159 (Jharkhand)(HC)

1604 **S. 132 : Search and seizure – Seized diary had some scribbling regarding the assessee – Nothing could be deciphered from the noting in that documents – Buyer denying cash payment to assessee – No concrete information elicited by AO – Merely because the stamp value was more, no conclusive inference that there was exchange of cash – Addition not sustainable. [S. 133A]**

The Tribunal found that seized accountant's diary had some scribbling therein. However, it could not be deciphered clearly from the noting that there was some receipt of cash by the assessee. During examination of the accountant by the AO, no concrete information could be elicited by him which could have thrown some light about the nature and details of the scribbling. The AO also examined the purchaser who denied having paid any amount in cash. No further corroboration had been done by the lower authorities, which could have indicated exchange of cash. Thus it was held that no conclusive inference could be drawn that merely because the stamp value was more, there was exchange of cash between the parties, unless some more cogent contrary material was brought on record. The addition made by the Assessing Officer was not sustainable. (AY. 2007-08)

Arvik Properties and Investments P. Ltd. v. DCIT (2016) 52 ITR 74 (Mum.)(Trib.)

1605 **S. 132(4) : Search and seizure – Statement on oath – Addition can be made if Evidence/material found during Search – Statement recorded under section 132(4) to have nexus with such evidence/material – On facts when source of cash were not substantiated addition on undisclosed income on account of cash purchase of immoveable property would be justified. [S. 158B(b), 158BA, 158BB]**

During search on a person it was found that assessee purchased a property from the person for ₹ 86 Lakhs out of which ₹ 12 Lakhs was through cheque and balance in cash as per agreement found during search. The AO was noticed that the returned income of assessee was insufficient and did not accept the claim that cash paid was received as advances from group concerns and accordingly made the addition of total 86 Lakhs. The CIT(A) deleted the addition of ₹ 12 Lakhs on account of cheques as the same was not encashed. On appeal by assessee, the Tribunal deleted entire addition on the ground that AO has not made valid case for Block assessment of such investment as unexplained income. On appeal by revenue High Court dealt with various contentions of department. High Court accepted that contention of Assessee that Block assessments can be made on the basis of incriminating material found during the search and the statement under section 132(4) must be relatable to the material found in Search. Statement cannot be sole basis for making Block Assessment. On facts of the case it was held that since assessee had paid cash which was not recorded in books seized at material time and also diary was found showing undisclosed sales and purchases therefore department had incriminating material which was relatable to statement and upheld the Block Assessment. On merits also it was held that since source of income was not disclosed the addition was justified. (BP AY. 1988-89 to 1999-00)

CIT v. Harjeev Aggarwal (2016)241 Taxman 199 / 133 DTR 122 (Delhi)(HC)

S. 132(4) : Search and seizure – Statement on oath – Mere voluntary disclosure of undisclosed income by assessee cannot form basis of addition if no evidence is detected in search. Fact that retraction of statement is late is irrelevant. CBDT Circular No. F.No.286/2/2003-IT (In) dated 10.03.2003 bars addition on the basis of confession. 1606

It is a normal presumption that statement under Section 132(4) is given voluntarily unless it is proved otherwise. There is no evidence on record to show that this statement was given in any coercion. But this statement was subject to variation on either side after verification i.e., assessee could reduce the disclosure made or the Assessing Officer could enhance the same if the facts and evidence so warranted. May be, even if this fact is not mentioned in the statement itself, the point will still remain since it is no body's case to get say any extra tax than is due. The reality remains that there is no evidence what-so-ever with the department even in consequence of a serious action like search and seizure followed by detailed security which could support the earning of speculation income of ₹ 10,50,000/- in this year. In other words, there is no evidence to support the very existence of this income except the so called statement u/s. 132(4) of the Act. It defies logic that an assessee will or should admit any income which he had not earned and which the department had not found out. I do not find anything against the arguments that disclosure u/s. 132(4) was subject to variation and once the assessee had access to seized documents and he realised subsequently that there was no occasion to make this disclosure, he was having an inherent right to clarify the situation so that he could be taxed only on real income and not on an income which was not there at all, since there was no evidence to prove otherwise too. In addition, the very important fact that remains that inspite of the search, no material/evidence was found to show that the assessee was having any other undisclosed assets which could be linked with this disclosure. (AY. 1994-95)

Chetnaben J. Shah v. ITO (2016) 140 DTR 235 / 288 CTR 79 (Guj.)(HC)

S. 132(4) : Search and seizure – Statement on oath-Statement of person actively involved in business and competent to depose about business activities best evidence – Statement cannot be discarded for want of confrontation – Addition made on basis of statement justified. [S. 132, 18BC] 1607

Dismissing the appeal the Court held that the statement recorded under section 132(4) was attested by two witnesses. The statement was also not retracted in any manner. The Assessing Officer, the Commissioner (Appeals) and the Tribunal were satisfied that the person who gave the statement was actively involved in and was fully conversant with the business activities of the firm. The statement was taken from a person who was competent to depose about the business activities of the firm. The statement recorded under section 132(4) of the Act was the best evidence and absence of confrontation would not necessarily require eschewing or discarding such a statement. Thus the assessment based on the statement under section 132(4) of the Act was proper. (AY. 2007-08, 2008-09)

Classy The Antique Defend Furniture v. Dy. CIT (2016) 387 ITR 212 / 242 Taxman 469 / (2017 293 CTR 373 (Ker.)(HC)

1608 **S. 132(4) : Search and seizure – Statement on oath, such oath statement had not been withdrawn and/or retracted – No occasion for authorities to come to conclusion that the undisclosed jewellery belongs to father or late mother, addition was held to be justified. [S. 132]**

Dismissing the appeal of assessee, the Court held that response filed by the assessee after the search do not indicate that the statements are being retracted or that the statements made under oath were incorrect. Further, there was no allegation of any ill treatment. High Court held that the valuation report by itself does not indicate, in the absence of any other corroborative evidence, that the jewellery belongs to the father and the later mother and/or the minor children of the assessees and accordingly, the tribunal order was affirmed.

Paras Shantilal Shah v. Dy. CIT (2016) 282 CTR 291 (Bom.)(HC)

1609 **S. 132(4) : Search and seizure – Statement on oath – absence of corroborative material merely on the basis of statement additions cannot be made. [S. 69B, 132, 158B]**

The High Court held that the statement recorded from the son of the assessee under Section 132(4) of the Act was not corroborated by any material document. The Revenue had also not confronted the assessee, with the said statement of his son. Accordingly the High Court held that it could be safely concluded that, there was no material documentary evidence, to substantiate and corroborate the statement of the son of the assessee. The High Court held that if the assessee makes a statement under Section 132(4) of the Act, and if there is any incriminating documents found in his possession, then the case is different. If mere statement made under Section 132(4) of the Act, without any corroborative material, has to be given credence, than it would lead to disastrous results. The High Court concluded that mere statement without there being any corroborative evidence, should not be treated as conclusive evidence against the maker of the statement. (AY 1990-91 to 2000-01)

CIT v. S. Jayalakshmi Ammal (2016) 242 Taxman 449 / (2017) 390 ITR 189 (Mad.)(HC)

1610 **S. 132(4) : Search and seizure – Statement on oath – Discrepancies in stock in trade were found at the time of search and the Director made a voluntary offer of certain sum of amount to tax as income – Held the voluntary income is part of the discrepancy in stock and not an additional income. [S. 132]**

Consequent to a search in the business premises of the Assessee, the Director of the company, in his sworn statement u/s. 132(4), voluntarily agreed to offer certain sum of money as income. Certain discrepancies in stock as per books of accounts and physical verification were also noted by the Department. However, when the return was filed pursuant to the notice issued u/s. 153A, the same was not offered. The AO held that the amount surrendered was independent of the difference in stock and taxed the same. The Assessee alleged that the statement of the Director was obtained in coercion. On appeal, the ITAT held that the statement was obtained under duress and the search officials were posing questions for 4 days and the search was concluded immediately after the Director surrendered the additional income. Thus, the disclosure made by the Director was not voluntary. Further, since no incriminating material was seized during

the search except for the discrepancies in stock, the additional income confessed by the Director pertained to the difference in stock. (AY. 2009-10, 2010-11)
Tribhovandas Bhimji Zaveri (Delhi) P. Ltd. v. ACIT (2016) 45 ITR 636 / 177 TTJ 306 (Mum.)(Trib.)

S. 132A. Powers to requisition books of account, etc.

S. 132A : Powers – Requisition of books of account – Undisclosed income – Assessment of third person – Agreement on basis of which addition made not signed by company and cannot be relied upon. [S. 132] 1611
Dismissing the appeal of revenue the Court held that Agreement on basis of which addition made not signed by company and cannot be relied upon. Hence, Tribunal deleting addition on basis of facts. Decision of Tribunal does not raise question of law. (AY. 2007-08)
CIT v. V. M. Reality P. Ltd. (2016) 388 ITR 225 (P&H)(HC)

S. 132A : Power to requisition books of account – Cash seized from third person – Third person stating that cash belonged to assessee and assessee admitting it – Amount included in return filed by assessee – Request to adjust tax dues and return balance to assessee – Request cannot be refused on ground that cash had been seized from third person. [S. 132B, 153C] 1612
In proceedings under Section 132A, VS from whom the cash had been seized had clearly stated that it belonged to the assessee and the assessee had also in proceedings under Section 153C admitted this. The Department had treated the cash as belonging to the assessee. There was no dispute as regards the title to the seized assets (cash). The Department was, therefore, not justified in not releasing the balance amount to the assessee on the ground that the cash had been seized from VS.
Hemal Dilipbhai Shah v. ACIT (2016) 386 ITR 91 (Guj.)(HC)

S. 132A : Powers – Requisition of assets – Where the tax department had not gathered information regarding the ownership of the assets seized, the Trial Court was justified in demanding security deposit from the tax department for obtaining custody of the assets. [S. 132B] 1613
The Tax Department received information from the Ujjain police station that they had seized cash of ₹ 27.80 lakh and silver bullion items valued at ₹ 2.05 crore from the assessee. The Tax Department as well as the assessee filed an application with the Trial Court for obtaining the assets. The Trial Court directed the Police Authorities to deliver the cash and jewellery to the Tax Department subject to payment of security deposit. The Tax Department filed a writ challenging the restrictions placed by the Trial Court for obtaining the assets whereas the assessee filed a writ petition demanding the release of assets as the property could not be retained post 120 days as per section 132B if there was no outstanding demand of tax, interest or penalty. High Court held that the Trial Court was wrong in entertaining the application of the Tax Department under section 132A because neither the police nor the CIT had gathered any information on record regarding the ownership of silver. However, as the assessment proceedings in

the assessee's case were ongoing, the Trial Court was right in considering the payment of security on production of silver. High Court set aside the Trial Court's order and allowed the assessee to move a fresh application and the Tax Department to move an application under Section 132-A if it has any fresh information regarding the ownership of the silver bullion etc.
Dy. DIT(I) v. Nayan Kothari (2016) 383 ITR 276 / 236 Taxman 398 (MP)(HC)
Rupam and Ors v. CIT (2016) 383 ITR 276 (MP)(HC)

S. 132B. Application of seized or requisitioned assets.

1614 **S. 132B : Application of seized or requisitioned assets – Release of seized assets other than cash – Directed to release the Gold ornaments. [S. 132]**
Allowing the petition the Court held that Since the assessee had deposited the amount of ₹ 20,40,101 pursuant to a promise made by the Department to release such ornaments, if the Department was not in a position to return the ornaments, it was duty bound to return the amount so deposited by the assessee. It could be safely presumed that auctioning the seized ornaments did not appear to be a very feasible option to the Department. In these circumstances, when the circular dated January 21, 2009 provided that replacement of the seized assets with cash made it easier for the Department to adjust the cash against the tax liability and also provided for release of the ornaments subject to payment of the price in accordance with the valuation of the assets, it would be in the interest of the Revenue to retain the amount and release the ornaments, in as much as, at least to that extent, the dues of the assessee would stand recovered.
Kalpesh Laxminarayan Thakkar v. Dy. CIT (2016) 388 ITR 245 (Guj.)(HC)

1615 **S. 132B : Application of seized or requisitioned asset – Read with Article 226 of the Constitution – Writ could not be issued for release of jewellery and petitioner had to avail remedies under Income-tax Act. [Art. 226]**
Jewellery was seized from petitioner's locker. In the statement/panchanama, the petitioner's son stated that jewellery seized belonged to the petitioner. Basis the same, the petitioner contended that a presumption should be drawn that jewellery seized from her locker is owned by her. However, Department's case was that during assessment proceeding of petitioner's son, he stated that jewellery belonged to petitioner's sons, daughters, daughter-in-law.
Considering the disputed questions of facts, the High Court opined that it is unable to consider granting the relief to the petitioner under the said Writ Petition of mandamus and thus dismissed the writ petition. However, the High Court directed the Commissioner of income-tax to consider the petitioner's representations and pass appropriate orders on merits and in accordance with law. (AY. 1997-98)
V. Reginakantham v. CIT (2016) 242 Taxman 466 (Mad.)(HC)

S. 132B : Application of seized or requisitioned assets – Attitude of the revenue in not returning seized assets despite assessee having succeeded in appeal is clearly arbitrary and shows an attitude of undue harassment to the assessee in the garb of public Revenue, court awarded cost of ₹ 25,000 and directed the revenue to pay interest at 18%. [S. 132] 1616

Pursuant to search and seizure FDRs etc. were seized. Block Assessment was made but on petitioner's appeal, same was set aside by Commissioner of Income Tax (Appeals), Kanpur, *vide* order dated 21.2.2008 and that order was confirmed by Tribunal by rejecting Revenue's appeals. Tribunal also relied on this Court's judgment in Income Tax Appeal No. 506 of 2008 filed by revenue which was dismissed. In spite of the order of the Tribunal the petitioner was not refunded the FDR. On writ allowing the petition the Court held that the Respondents are directed to release all FDRs seized during seizure and also refund the amount in question, if not already released or refunded. In case FDRs and amount in question are not returned or refunded so far, they shall be returned/refunded forthwith without any further delay along with interest @ 18% per annum from the date of seizure till the date of actual returned/refund. Respondents shall be at liberty to recover the said amount of interest from the official(s) concerned who is/are found responsible for such negligence and illegal act, after making enquiry as permissible under law. Petitioner shall also be entitled to cost which we quantify to ₹ 25,000. (WT No. 805 of 2013, dt. 14.09.2016)

Shreemati Devi v. CIT (All)(HC); www.itatonline.org

S. 132B : Application of seized or requisitioned assets – Strictures – Jewellery seized was directed to be released with cost of ₹ 3000. [S. 132, Constitution of India Art, 300-A] 1617

Allowing the petition the Court held that Department's recalcitrance to release the assessee's seized jewellery, even though it is so small as to constitute "stridhan" and even though no addition was sustained in the assessee's hands, is not "mere inaction" but is one of "deliberate harassment. The respondents shall also pay costs quantified at ₹ 30,000/- to the petitioner, within four weeks, directly.

Sushila Devi v. CIT (2017) 292 CTR 116 (Delhi)(HC)

S. 132B : Application of seized or requisitioned assets – Application for release of seized articles within time specified – Explanation furnished regarding articles seized – Department has no authority to retain seized articles if no dispute raised within 120 days – Direction to authorities to immediately release seized assets. [S. 132] 1618

Held, allowing the petition, that when an application was made for the release of the assets under the first proviso to section 132B(1)(i) of the Act explaining the nature and source of the seized assets and if no dispute was raised by the Department during the permissible time of 120 days, it had no authority to retain the seized assets in view of the mandate contained in second proviso to section 132B(1)(ii) of the Act. The authorities were directed to release the seized assets of the assessees immediately.

Mul Chand Malu (HUF) v. ACIT (2016) 384 ITR 46 / 286 CTR 448 / 241 Taxman 189 / 136 DTR 12 (Gau.)(HC)

1619 **S. 132B : Application of seized or requisitioned assets – Application filed for release of asset – disposed off by the AO after more than 1 year – Held, not valid and the cash ordered to be released along with interest. [First proviso and second proviso to S. 132B(1)(i)]**

On 25.3.2014, certain cash was seized by the competent authority. Application was filed by the assessee on 17.4.2014 for release of such cash. Despite repeated reminders, the authority failed to dispose off such application and it was disposed off, denying such release, only on 20.7.2015 i.e. after the expiry of more than 1 year. High Court held that if an application is made under first proviso to Section 132B(1)(i) then the same should be disposed off within the time limit given in the second proviso which is 120 days from the date on which of the last of the authorizations for the search was executed. Second proviso though speaks of releasing the assets as referred to in first proviso within the time limit prescribed, still the question of not releasing the asset would arise only upon the decision on the application is taken by the AO. If no decision is taken within the time limit, then the releasing of assets becomes imminent. Further, it was held that such time limit cannot be said to be directory in nature.

Nadim Dilip Bhai Panjvani v. ITO (2016) 383 ITR 375 / 237 Taxman 480 (Guj.)(HC)

1620 **S. 132B : Application of seized or requisitioned assets – Seized cash can be adjusted against self-assessment tax and not advance tax. [S. 153A]**

A search was conducted and cash to the extent of ₹ 20 lakhs was seized by the Department. On completion of assessment u/s. 153A, the AO adjusted the seized cash against the self-assessment tax. However, this was rectified u/s. 154 as there was no existing liability. The ITAT held that seized cash ought to be adjusted against the tax liability pursuant to assessment u/s 153A which is an existing liability. Without prejudice to the fact that Section 132B was prospective in nature and would be inapplicable to the impugned case, the ITAT held that adjustment of seized cash against self-assessment tax was allowed, but against advance tax was not allowed. Further, the ITAT also held that the issue being debatable could not be rectified by the AO u/s. 154. (AY. 2006-07)

ACIT v. Narendra N. Thacker (2016) 45 ITR 188 (Kol.)(Trib.)

S. 133 : Power to call for information.

1621 **S. 133 : Power to call for information – Production of evidence – After 1995 amendment, by virtue of second proviso to S. 133(6), an Income tax authority below rank of Commissioner could exercise power of enquiry u/s. 133(6), in a case where no proceeding was pending, with prior approval of Director or Commissioner. [S. 131(1)]**

Provisions of s. 133(6) could be invoked only in cases where proceedings were pending and not otherwise, however, after 1995 amendment, by virtue of second proviso to s. 133(6), an Income tax authority below rank of Commissioner could exercise power of enquiry u/s. 133(6), in a case where no proceeding was pending with prior approval of Director or Commissioner. (AY. 2006-07)

Gurpal Singh v. ITO (2016) 159 ITD 797 (Amritsar)(Trib.)

S. 133 : Power to call for information – Constitutional validity of section 133(6) upheld insofar as the word "any inquiry" and the second proviso is concerned. [S. 133(6)] 1622
The Constitutional validity of section 133(6) in so far seeking of information in respect of "any inquiry" under the Act is concerned and also the second proviso to section 133, is upheld as it does not invade any privacy of an individual and that all decisions which have espoused the right to privacy have been cautious in pointing out that such rights would not extend to militate against right of the State to gather information under its fiscal administration
Pattambi Services Co-operative Bank Ltd. v. UOI (2016) 387 ITR 299 / 240 Taxman 593 / 289 CTR 559 / 142 DTR 48 (Ker.)(HC)

S. 133A. Power of survey.

S. 133A : Power of survey – Disclosure – Voluntarily offering income to tax over and above regular income but claiming cash expenditure against it – Additions was held to be sustainable. 1623
Dismissing the appeal of the assessee Court held that; according to the statement of the assessee during the survey operations, no registers or records were maintained by him in so far as the expenditure incurred by him up to that point. Only sales and purchase details were maintained in the computer. Therefore, the sudden booking of huge expenditure in a month's time, that too, after survey operations were carried out, would lead any reasonable and prudent man to an inference that it was deliberately booked to neutralise the obligation to report the additional income over and above the normal income. When expenditure was incurred in cash, receipts or vouchers ought to have been maintained accurately and produced before the Assessing Officer. No explanation was forthcoming as to why expenditure was shown to have been incurred for the first time during the assessment year in question towards the payment of commission, while similar expenditure was not reflected in the preceding four years, particularly when there was no change in the line of business activity of the assessee, all these years. Therefore, the inference drawn by the Assessing Officer could not be construed to be perverse, but was a reasonable and deducible inference which was confirmed by the Appellate Tribunal. (AY. 2008-09)
H. Gouthamchand Jain v. ITO (2016) 388 ITR 148 / 243 Taxman 198 (Mad.)(HC)

S. 133A : Power of survey – Statement Surrender of undisclosed income – Retraction after three months – Retraction does not absolve assessee from tax liability – Documents establishing assessee in possession of assets over and above those disclosed in books – Addition was held to be justified. [S. 145] 1624
Dismissing the appeals the Court held that the appellate authorities adjudicated the issues against the assessee on appreciation of material on record. The Tribunal's finding was that the assessee had not explained the evidence found against it. Once the assessee was unable to offer any plausible explanation for the sum surrendered during the survey, merely relying on the retraction made on a later date, the assessee was not absolved of its liability. It was the finding of the Commissioner (Appeals) that voluntary surrender was made by the assessee based on the material allegedly in the possession

of the Assessing Officer collected during the course of survey. Even the bills, cash and supporting documents found with the assessee established that the assessee was in possession of assets over and above the assets declared in the books of account against which the surrender was made. There was no illegality or perversity in the concurrent findings of fact recorded by the appellate authorities warranting interference. A retraction of a statement, to be effective, has to be made at the earliest opportunity when the pressure or coercion or undue influence on the person making the confession ceases to be operative. Whenever there is delay in retracting from a confessional statement the onus lies upon the person retracting to show the circumstances that existed for him not to retract earlier. (AY. 2006-07)
Gurdev Agro Engineers v. CIT (2016) 387 ITR 218 (P&H)(HC)

1625 **S. 133A : Power of survey – While an assessment cannot be made on the basis of a statement recorded u/s. 133A, if the maker of the statement has re-affirmed the statement and nothing has been produced to show that the contents of the statement are incorrect, the assessment is valid. [S. 131, 143(3)]**
Dismissing the appeal of the assessee the Court held that However, in so far as this case is concerned the assessments made is not based only on the statement under Section 133A of the Act. On the other hand, the assessment order itself reveals that the Revenue has placed reliance on the proceedings initiated against the appellant for imposition of penalty under Section 67 of the KVAT Act based on an inspection held on 17.08.2006. It is seen that the Revenue relied on letter dated 18.09.2007 issued by V. Ahammed to the Assistant Director of Income Tax (Investigation) clarifying his statement under Section 133A of the Act. This shows that the maker of the statement himself has reaffirmed the statement and nothing has been produced by the assessee to show that the contents of the statement are incorrect. In such a situation, we cannot accept the contention now raised by the learned counsel for the assessee and hold the assessments to be illegal. The Court has directed to grant consequential relief as per the orders passes by VAT authorities. (AY. 2002-03, 2008-09)
Kottakkal Wood Complex v. DCIT (2016) 386 ITR 433 / 72 taxmann.com 63 (Ker.)(HC)

1626 **S. 133A : Power of survey – Unexplained money – Surrendering amount during survey – Retraction from surrender and declaring a loss in the return of income – Addition solely on basis of admission given by Managing Director during survey was not justified. [S. 69C]**
On appeal, the Tribunal held that relying only on the statement made by the managing director of the assessee at the time of survey, the authorities could not made the addition in the light of the retraction made by the managing director wherein he had reconciled the receipts found during the survey. The AO had not bothered to enquire into the veracity of the explanation given by the assessee. The order of the authority was not sustainable. (AY. 2007-08)
Sahil Study Circle Pvt. Ltd. v. Dy. CIT (2016) 46 ITR 182 (Delhi)(Trib.)

CHAPTER XIV
PROCEDURE FOR ASSESSMENT

S. 139. Return of income.

S. 139 : Return – Return declared invalid – Non-payment of admitted tax – Liability to tax does not cease to exist – Assessee is not entitled to refund of tax already paid – Attachment was held to be valid. [S. 4, 139(9), 226(3), 240] 1627

Assessing Officer held that, due to non-payment of tax and interest, as shown in the return of income, constituted a "defect" under Explanation (aa) to the proviso to section 139(9) of the Act. The assessee was therefore, required to rectify the defect within the specified period, failing which the return of income was to be treated as invalid. As the defect was not rectified, the Department issued a letter dated November 3, 2014 declaring the return of income filed by the assessee for the assessment year 2013-14 an invalid return under section 139(9) of the Act. After declaring the return of income invalid, the Department invoking coercive action for recovery of the tax and interest shown in the invalid return of income, issued notice dated March 12, 2015 under section 226(3) of the Act, thereby attaching various bank accounts of the assessee maintained by the respondent-bank, without any prior or even any subsequent notice to it. On a writ petition against the notice, the assessee contended that because of the declaration of the Assessing Officer under section 139(9), the amounts paid or deposited by it, were refundable and that the return was in effect a nullity and that consequently the Department had no authority to claim the amounts that it did.

Held, dismissing the petition, that the assessee had admitted its tax liability. Moreover, the assessment was at large, given that the search resulted in a notice to the assessee under section 153A. No doubt, it had claimed refund; yet those issues were to be adjudicated. Therefore, its claim could not succeed. Referred *CIT v. Shelly Products (2003) 261 ITR 367 (SC)*, the Supreme Court held that the liability to pay tax arises because of section 4(1) of the Income-tax Act, 1961, which does not depend on an assessment order, but upon the rate or rates applicable for a given assessment year. The liability to pay tax arises on the total income on the publication of rates; such tax is to be computed by the assessee in accordance with the provisions of the Act. (AY. 2013-14)

Shakti Bhog Foods Ltd. v. Dy. CIT (2016) 388 ITR 280 / (2017) 244 Taxman 206 (Delhi)(HC)

S. 139 : Return of income – Belated return – Reason given by assessee was not genuine and satisfactory reason that was required for condonation of delay. 1628

The assessee filed late return. Later on, the assessee filed a revised return and moved an application stating reasons for late filing of return on ground of severe illness of his wife.The Assessing Officer rejected the claim stating that there was no genuine and satisfactory reason for late filing of return. Both the Commissioner (Appeals) and the Tribunal affirmed the order of the Assessing Officer. On appeal to the High Court, dismissing the petition the Court held that the assessee did not specify nature of illness, its duration and kind of treatment. Further, operation of assessee's wife took place long after due date of filing of return. Reason given by assessee was not genuine and satisfactory reason that was required for condonation of delay. (AY. 2011-12)

Laljibhai Mohanbhai Ghori v. CIT (2016) 243 Taxman 535 (Guj.)(HC)

1629 **S. 139 : Return – Revised return – Voluntary retirement – Delay in filing revised return to be condoned. [S. 10(10C), 119(2)(b)]**

The assessee had filed her revised return after expiry of limitation for such filing. The assessee made an application under section 119(2)(b) of the Act to the Principal Commissioner of Income-tax, claiming that the revised return income though filed beyond a period of limitation, be entertained, as otherwise it would cause genuine hardship to her. The Commissioner rejected the application for condonation of delay. On a writ petition:

Held, allowing the petition, that the Principal Commissioner was satisfied that the assessee would face genuine hardship if the revised application was not entertained. However, it was rejected on the ground that the Central Board of Direct Taxes (CBDT) had not issued specific instructions, directing the Department to extend the period of limitation where revised return was filed beyond a period of limitation in case of erstwhile employees of the bank. Under section 119(2)(b) of the Act, the authority concerned had to apply his mind to the application before him and if he found that non-granting of the application would result in genuine hardship, the application was to be allowed by condoning the delay. There was no requirement of specific instructions being issued by the Board to the Department to entertain the revised return in case an erstwhile employee of the bank filed the application after expiry of the period of limitation. Therefore, the delay in filing revised return was to be condoned. (AY. 2008-09)

Leena R. Phadnis (Mrs.) v. CIT (2016) 387 ITR 721 / 241 Taxman 34 / (2017) 293 CTR 175 (Bom.)(HC)

1630 **S. 139 : Return of income – Condonation of delay in filing return – Delay of 1 day – due to technical snags in the Departments website return uploaded only in midnight and hence date of filing reckoned by Department as the next day – Held, reason for delay satisfactorily explained – Delay to be condoned. [S. 80, 119]**

The assessee company was engaged in the business of execution and commissioning of wind turbine generators. The due date of filing of return was 15-10-2010. Due to technical snag in the Departments website, assessee could not upload the return and it could be filed only in midnight of 15-10-2010 and, hence, the date of filing had been reckoned by the Department as 16-10-2010. The assessee approached the CBDT for condonation of delay. CBDT rejected the said application. High Court held that the assessee had satisfactorily explained the delay in filing the return and it cannot be stated that the delay in filing the return had occurred deliberately or on account of culpable negligence or on account of *mala fides*. High Court directed the CBDT to condone the delay. (AY. 2010-11)

Regen Infrastructure & Services (P.) Ltd. v. CBDT (2016) 384 ITR 407 / 238 Taxman 530 / 141 DTR 20 / 289 CTR 220 (Mad.)(HC)

1631 **S. 139 : Return of income (Defective return) – Return of income could not be declared as invalid for belated receipt of Form ITR-V for denying benefit of carry forward losses. [S. 80]**

AO declared return of income filed by assessee as invalid for non-receipt of ITR-V within prescribed time and, accordingly, denied benefit of carry forward losses. Since

AO had not intimated any defect in return of income filed, to assessee, he was not justified in treating original return of income as invalid for belated receipt of Form ITR-V and denying benefit of determined business losses for future years. (AY. 2008-09 2009-10)
Fibres & Fabrics International (P.) Ltd. v. DCIT (2016) 160 ITD 102 / 182 TTJ 374 (Bang.) (Trib.)

S. 139 : Return of income – Revised computation – Remission – Refusal to consider the revised computation was held to be not valid. [S. 143(3)] 1632
Tribunal held that the Assessing Officer could not refuse to consider revised computation wherein deduction was claimed on account of remission by bank under one time settlement taking a view that assessee should have filed revised return for raising such a claim (AY. 2007-08)
Furniture Concepts (I) Ltd. v. ACIT (2016) 156 ITD 233 (Mum.)(Trib.)

S. 139 : Return – Revised return filed electronically – CIT(A) was directed to redecide the issue. [R. 12] 1633
Allowing the appeal of the assessee, the Tribunal held that when the assessee furnished revised return electronically but had not submitted Form ITR-V and Commissioner (Appeals) without dealing with issue as to whether in absence of verification in Form ITR-V alleged revised return could be treated as a valid revised return dismissed assessee's appeal, said issue required determination by Commissioner (Appeals) (AY. 2008-09)
Ganesh Metal Industries. v. ITO (2016) 157 ITD 828 (Amritsar)(Trib.)

S. 139A. Permanent account number.

S. 139A : Permanent account number – Two PAN cards – Second PAN Card was directed to surrender to service provider. 1634
The dispute was as regard which of the two factions of the Society should be recognised as being competent and authorised to operate the said PAN Card would depend on the orders pending suit. Court held that were two PAN Cards were allotted in name of assessee to two factions within management of assessee, it was held that question as to, which of two actions should be authorized to operate PAN CARD would depend on orders of pending suit; till that time, holder of second PAN CARD should Surrender said second PAN Card to PAN Service provider. till that time, order of Deputy Director of Income-tax could not be said to be invalid.
Sri Ram Chandra Mission v. CIT (2016) 239 Taxman 170 / 289 CTR 439 (Delhi)(HC)

S. 142. Inquiry before assessment.

1635 **S. 142(2A) : Inquiry before assessment – Special audit – Notice was not given to the assessee before the order was passed – Order was set aside – Fresh notice was issued – For computing the limitation period from date of interim order till date was excludible. [S. 158BE]**

Court held that as a general rule, therefore, when there is no stay of the assessment proceedings passed by the Court, Explanation 1 to Section 158BE of the Act may not be attracted. However, this general statement of legal principle has to be read subject to an exception in order to interpret it rationally and practically. In those cases where stay of some other nature is granted than the stay of the assessment proceedings but the effect of such stay is to prevent the Assessing Officer from effectively passing assessment order, even that kind of stay order may be treated as stay of the assessment proceedings because of the reason that such stay order becomes an obstacle for the assessing officer to pass an assessment order thereby preventing the Assessing officer to proceed with the assessment proceedings and carry out appropriate assessment. For an example, if the court passes an order injuncting the Assessing Officer from summoning certain records either from the assessee or even from a third party and without those records it is not possible to proceed with the assessment proceedings and pass the assessment order, even such type of order may amount to staying the assessment proceedings. The special audit is an integral part of the assessment proceedings, i.e., without special audit it is not possible for the Assessing Officer to carry out the assessment and so, stay of the special audit may qualify as stay of assessment proceedings and, therefore, would be covered by the said explanation.(AY. 1994-95 to 1998-99)

VLS Finance Ltd. v. CIT (2016) 384 ITR 1 / 286 CTR 146 / 134 DTR 305 / 239 Taxman 404 (SC)

Editorial: Decision in VLS Finance Ltd. v. CIT (2007) 289 ITR 286 (Delhi)(HC) is affirmed.

1636 **S. 142(2A) : Inquiry before assessment – Special audit – Assessing Officer is not competent to extend period for filing audit report on request of nominated auditor – Period for filing audit report can be extended only on request made on behalf of assessee. [S. 142(2A), (2C), 288(2)]**

Dismissing the appeal of revenue, the Court held that under proviso to section 142(2C) of the Income-tax Act, 1961, the Assessing Officer *suo motu* can extend the time for filing audit report prior to April 1, 2008. That power was subsequently provided by amending the proviso by the Finance Act, 2008 and the amendment was prospective in nature. In terms of section 142(2A), special audit is conducted under an order passed by the Assessing Officer, by an accountant as defined in the Explanation below section 288(2) of the Act who is nominated either by the Commissioner and such nominated auditor is permitted to furnish an audit report in the prescribed form. When the provision is read with the Explanation below section 288(2) of the Act, the nominated auditor is not expected to be in a relationship of an agent of the assessee or in any other capacity except as a nominee of the Commissioner. For this reason, the section 142(2C) specifically states that the extension of time for submitting the audit report can be made by the Assessing Officer "on an application made in this behalf by the assessee". If the

legislative intent was to permit the application to be made by the auditor nominated by the Commissioner, that would have been expressly provided for in the proviso to section 142(2C) of the Act. The Assessing Officer was not competent to extend the period for filing the audit report on the request of the nominated auditor. It could be done only on the request made on behalf of the assessee. (AY. 2005-06)
PCIT v. Nilkanth Concast P. Ltd. (2016) 387 ITR 568 / 241 Taxman 194 (Delhi)(HC)
Editorial: Order in Nilkanth Concast P. Ltd. v. Deputy CIT [2016] 48 ITR (Trib.) 264 (Delhi) is affirmed. SLP is granted to the revenue, PCIT v. Nilkanth Concast (P) Ltd. (2017) 246 Taxman 371 (SC)

S. 142(2A) : Inquiry before assessment – Special audit – The assessment was barred by limitation – The power to extend the time limit for submission of Audit report was available from A.Y. 2008-09 onwards. [S.153A] 1637
A search and seizure operation was conducted under section 132 of the Income-tax Act, 1961, in the premises of the assessee and notice under section 153A of the Act was issued. During the course of assessment proceedings, the Assessing Officer directed a special audit under the provisions of section 142(2A) of the Act and at the request of the auditor, the Assessing Officer extended the due date for furnishing of the audit report. The audit report was furnished within the extended period and the Assessing Officer passed the assessment order. On appeal, the assessee raised additional grounds against the special audit and it was held that there was no evidence on record suggesting that the assessee sought extension of time for submission of audit report under section 142(2A) of the Act. The Assessing Officer extended the time for submission of the special audit report *suo motu*. At the relevant point of time, the Assessing Officer had no power of *suo motu* extension of submission of the audit report under the provisions of section 142(2A) of the Act and such power was granted by the statute to the Assessing Officer only from the assessment year 2008-09. The assessment framed was barred by limitation. (AY. 2005-06)
Nilkanth Concast P. Ltd. v. DCIT (2016) 48 ITR 264 (Delhi)(Trib.)

S. 143 : Assessment.

S. 143(1) : Assessment – Order for processing of refund even after scrutiny assessment notice was issued under section 143(2) and refund to be granted at the earliest. [S. 143(1)(d), 143(2)] 1638
The High Court had directed the Assessing Officer to consider and expedite the process of issue of refund to the assessee within 8 weeks and the application was pending since April 2016 and more so, when no reasons were forthcoming as to why it could not be processed before 31st March 2017 i.e. the time limit prescribed under section 143(1)(d). (AY 2015-16)
Group M. Media India (P) Ltd. v. UOI (2016) 142 DTR 267 / 289 CTR 622 (2017) 77 taxmann.com 106 (Bom.)(HC)

1639 **S. 143(1D) : Assessment – Refund – AO cannot rely on Instruction No. 1/2015 dated 13.01.2015 to withhold refunds as the same has been struck down by the Delhi High Court.**

Allowing the petition, the Court held that the; AO cannot rely on Instruction No.1/2015 dated 13.01.2015 to withhold refunds as the same has been struck down by the Delhi High Court in Tata Teleservices & the same is binding on all AOs across the Country. Action of the AO in not giving reasons for not processing the refund application is "most disturbing" and stating that he will wait till the last date is "preposterous". Action of the AO suggests that it is not enough that the deity (Act) is pleased but the priest (AO) must also be pleased.(AY. 2015-16)

Group M. Media India Pvt. Ltd v. UOI (2016) 388 ITR 594 (Bom.)(HC)

1640 **S. 143(1D) : Assessment – Refund – Instruction No.1 of 2015 dated 13.01.2015 which curtails the discretion of the AO by 'preventing' him from processing the return and granting refund, where notice has been issued to the assessee u/s. 143(2), is unsustainable in law and quashed. [S. 143(2), 237]**

Assessee was entitled huge amount of refund due to deduction of tax at source. The assessee was not granted the refund in view of Instruction No. 1 of 2015 dated 13-1-2015 curtailed the discretion of the AO by preventing from him from processing the return and granting refund where notice has been issued to the assessee u/s. 143(2) of the Act. On writ allowing the petition the Court held that instruction being unsustainable in law and liable to be quashed. (AY. 2012-13, 2013-14, 2014-15)

Tata Teleservices Limited v. CBDT (2016) 386 ITR 30 / 136 DTR 145 / 240 Taxman 182 / 286 CTR 465 (Delhi)(HC)

1641 **S. 143(2) : Assessment – Validity of notice – Assessee participating in assessment proceedings without raising any objection in respect of service of notice – Annulment of assessment proceedings by Commissioner (Appeals) on ground no evidence to prove service of notice – Tribunal finding notice valid – Finding of fact based on record. [S. 133A, 292BB]**

Dismissing the appeal of the assessee, the Court held that the notice dated August 20, 2013 was declared valid by the Appellate Tribunal by recording findings based on facts produced before it, which included speed post entries, copies of the dispatch register of the Department and the actual notice dated August 20, 2013 issued under section 143(2). The fact that the same number was allotted in the dispatch register to two notices under different provisions to the same assessee could not lead to a conclusive determination that the two notices could not be dispatched under the same number. The only objection taken by the assessee was in respect of the earlier refused notice dated September 28, 2012 and not to any notice issued after the filing of the return by the assessee including the notice dated August 20, 2013. The Tribunal had determined on questions of fact and therefore its order could not be termed as perverse warranting interference. (AY. 2011-12)]

Josh Builders and Developers P. Ltd. v. PCIT (2016) 389 ITR 314 (P&H)(HC)

S. 143(2) : Assessment – Notice – Search and seizure – Issuance of notice under section 143(2) not required – Limitation of one year thereunder does not apply. [S. 153C] 1642

That there was no requirement of a notice under section 143(2) for completing assessment under section 153C and the question of time limit prescribed under the proviso to section 143(2) did not have any relevance for assessments under section 153C. (AY. 2001-02 to 2007-08)

CIT v. Promy Kuriakose (2016) 386 ITR 597 / (2017) 148 DTR 287 / 293 CTR 440 (Ker.)(HC)

S. 143(2) : Assessment – Limitation – Amendment of proviso to section 143(2) with effect from 1-4-2008 – Return filed on 24-7-2007 – Proviso as amended not applicable – Notice had to be issued within twelve months – Months means calendar months – Notice issued on 26-9-2008 – Barred by limitation. [S. 143(3)] 1643

Held, allowing the petition, that the proviso to section 143(2) has been amended with effect from April 1, 2008. In the instant case, the return was filed on July 24, 2007. According to the law as it stood then, i.e, prior to the amendment, the period for issue of notice was twelve months from the end of the month in which the return was furnished. "Twelve months" means twelve calendar months and not the AY. In the instant case, twelve months period from the end of the month in which the return was filed, expired on July 31, 2008, so a notice should have been served on or before August 1, 2008, but it was given on September 26, 2008. It was barred by limitation. (AY. 2007-08)

Tulsi Food Products v. Dy. CIT (2016) 380 ITR 192 (All.)(HC)

S. 143(2) : Assessment – Notice – Where notice is issued u/s. 143(2) beyond the period of limitation, the assessment order cannot be sustained and is to be quashed – Substantial question of law can be raised first time before the High Court. [S.260A, 292BB] 1644

The issue before the HC was that whether the AO was justified passing an assessment order without serving a notice u/s. 143(2) within the stipulated period as prescribed under the Act. The HC held that the jurisdiction of AO starts only if the notice u/s. 143(2) is issued within the prescribed time. It has nothing to do with service of the notice which is contemplated u/s. 292BB. Therefore, the order of the Tribunal, first appellate authority and the assessment order cannot be sustained and are to be quashed. Further, the assessee had raised the aforesaid question for the first time before the HC to which the Revenue raised objection for admission. The HC held that a substantial question of law which is based on records and does not require any investigation of any facts can be entertained in appeal before the HC even if the same is not taken before the lower authorities. (AY. 1997-98)

U P Hotels Ltd. v. CIT (2016) 131 DTR 99 / 283 CTR 417 (All.)(HC)

S. 143(2) : Reassessment – Participation in assessment proceedings and no objection raised by Assessee regarding non-service of notice under section 143(2) – Section 292BB, which cures defect squarely applicable – "Service" & "Issue" are interchangeable – Reassessment valid. [S. 147, 292BB] 1645

The Tribunal held that the assessee neither disputed the fact that it participated in the assessment proceedings nor raised any objection before completion of the assessment

about non-service of notice under section 143(2). Therefore, the provisions of section 292BB were squarely applicable and the assessee was precluded from taking this objection at a later stage. It could not be presumed that no notice under section 143(2) was served. Even otherwise also, law applicable to service of notice is equally applicable to issue of notice as the expression "serve" and "issue" are interchangeable as has been noticed in section 27 of the General Clauses Act, 1897. Therefore, there was a valid issue of notice and service under section 143(2) as well as service of notice on the assessee. (AY. 2009-10)
DCIT v. Indo American Hybrid Seeds India P. Ltd. (2016) 52 ITR 201 / (2017) 147 DTR 265 / 183 TTJ 474 (Bang.)(Trib.)

1646 **S. 143(2) : Assessment – Notice – Reassessment – Order passed without issuing notice u/s.143(2) is held to be bad in law, failure to issue notice cannot be cured by invoking the provision of section 292BB. [S. 147, 148, 292BB]**
Allowing the appeal of the assessee, the Tribunal held that in case of reassessment, issuance of statutory notice u/s. 143(2) cannot be dispensed with merely taking plea that there was co-operation of assessee during procedure. Once an assessee files return in pursuance of notice u/s. 148, which is deemed to be filed u/s. 139, in case AO wants to proceed with return filed by assessee, he has to issue a notice u/s. 143(2); any assessment framed without issue of notice u/s.143(2) will not be valid. Failure to issue notice u/s. 143(2) couldn't be cured by resorting to deeming fiction of s. 292BB. (AY. 2011-12)
Sanjeev Aggarwal v. Dy.CIT (2016) 159 ITD 302 (Chd.)(Trib.)

1647 **S. 143(2) : Assessment – Notice – Where assessee did not file return under section 139(1); or under section 139(4); or in response to section 148; or in response to section 142(1); Assessing Officer was not required to issue notice under section 143(2) before completing assessment under – Reassessment was held to be valid. [S. 139(1), 142(10), 148]**
During relevant year, assessee filed its return beyond time limit available under scheme of Act and it was therefore non est and invalid return in eye of law. Assessing Officer reopened assessment by issuance of notice under section 148 and made certain additions. Assessee questioned legality and validity of assessment order on ground that assessment order passed under section 143(2), read with section 147, was without jurisdiction in absence of service of statutory notice under section 143(2). CIT(A) affirmed the order of AO. On appeal Tribunal held that since assessee had not filed return under section 139(1); or under section 139(4); or in response to section 148; or in response to section 142(1); provisions of section 143(2) did not get triggered at all, therefore, assessee's objection was held to be not valid. (AY. 2004-05)
Chawara Educational Trust v. ITO (2016) 157 ITD 281 (Pune)(Trib.)

1648 **S. 143(2) : Assessment – Notice – Absence of notice entire reassessment is vitiated. [S.292BB]**
Mere order sheet entry mentioning that notice u/s. 143(2) has been issued cannot substitute the mandatory requirement of law in respect of issue of notice. Sec. 292BB

is prospective in operation and is applicable from asst. yr. 2008-09 onwards. Entire reassessment proceedings are vitiated for non-issuance of s. 143(2) notice by the AO. (AY. 2004-05)
Dy. CIT v. Dharampal Satyapal Ltd. (2016) 130 DTR 241 / 175 TTJ 663 (Delhi)(Trib.)

S. 143(3) : Assessment – A firm can be partner in another firm and it cannot be held that only natural legal persons can be partners in partnership firm. 1649
Allowing the petition, the Court held that; the fact that the assessee has been assessed in the status of a partnership firm was not in dispute. Further, even the assessment order passed by the AO under section 143(3) of the Act treated the assessee as a partnership firm. However, the court held that a fundamental error was done by CIT(A) by stating that a firm cannot be a partner in another firm and only legal persons can be partners in a partnership firm. The Court held that there is no such law which says that a firm cannot be a partner in another firm and without expressing any opinion on the power of the CIT(A), the court allowed the Writ and held that a partnership firm can be a partner in another firm. (AY. 2012-13)
Megatrends Inc. v. CIT & Anr. (2016) 287 CTR 687 (Mad.)(HC)

S. 143(3) : Assessment – Amalgamation – Assessee not bringing factum of amalgamation to notice of AO – Filing return for subsequent period in name of amalgamating company – Assessment order passed after amalgamation effected – Not a nullity. [S. 2(IB)] 1650
The assessee filed its return for the AY 2002-03. The assessment was completed under section 143(3) by an order dated March 31, 2005. The order was challenged by the assessee mainly on the ground that the order passed was a nullity since the assessee had merged with another company by virtue of an order passed by the High Court in March, 2003. The Commissioner (Appeals) held against the Department. In the remand report obtained by the Commissioner (Appeals) the AO had stated that the assessee by filing of return for the AY 2003-04 and by going along with the assessment proceedings as an unamalgamated entity to the extent of filing of appeal against the assessment order also, it had asserted its claim to be an assessable entity. The Tribunal also held against the Department. On appeal: Held, allowing the appeal, that the liability that arose out of the order became the liability of the amalgamated company because according to the definition of the expression "amalgamation" in section 2(1B), all the liabilities of the amalgamating company immediately before the amalgamation became the liabilities of the amalgamated company. The assessment pertained to the financial year which had ended on March 31, 2002, whereas the amalgamation had taken place with effect from November, 2002. It was the liability of the amalgamating company which had accrued prior to amalgamation. The assessee had not only had not brought to the notice of the Department, in particular the AO, the fact about the amalgamation sanctioned by the High Court on March 26, 2003, but it had also filed its return for the subsequent AY 2003–04. Therefore, the assessee itself had not acted upon the amalgamation. Therefore, the assessment order passed on March 31, 2005 pertaining to the AY 2002-03 did not become a nullity, by reason of the amalgamation.(AY. 2002-03)
CIT v. Shaw Wallace Distilleries Ltd. (2016) 386 ITR 14 / 240 Taxman 348 (Cal.)(HC)

1651 **S. 143(3) : Assessment – Fall in gross profit rate – Reasonable explanation for such fall – No addition to income can be made.**
Since the AO had assigned no reason for rejecting the books of account and had not controverted the quantity or value of the closing and opening inventory, addition on account of fall in GP ratio could not be made when the assessee duly explained the same. The books of account were properly maintained by the assessee. It had maintained all the stock registers required for the purposes of the payment of excise duty. (AY 2005-06)
PCIT v. Talbros Engineering Ltd. (2016) 386 ITR 154 (P&H)(HC)

1652 **S. 143(3) : Assessment – Firm – Assessee signing documents as partner – No evidence that assessee was only an employee of firm – Assessment as partner was held to be justified – Findings of fact cannot be set aside unless perverse. [S. 182, 184, 260A]**
Dismissing the appeal, the Court held that the Appellate Tribunal, the Commissioner (Appeals) and the Assessing Officer, had rightly placed reliance upon the unrebutted documents to record findings of fact that B was a partner of B and Co. A finding of fact can only be set aside if it is perverse or arbitrary, is contrary to law or has been recorded by ignoring relevant evidence. A perusal of the orders and the material on record showed that the finding that B was a partner was not in any manner, perverse or arbitrary, contrary to record or in violation of any legal principle. The Tribunal was justified in holding that B was a partner of B and Co. The finding of fact did not suffer from any legal flaw. The questions of law were mere questions of fact. (AY. 1985-86, 1986-87)
Baldev Singh and Co. v. CIT(2015) 60 taxmann.com 30/ (2016) 384 ITR 91 (P&H)(HC)
Editorial: The Supreme Court has dismissed special leave petition filed by the assessee against this judgment, Baldev Singh and Co. v. CIT [2016] 382 ITR 2 (St.)

1653 **S. 143(3) : Assessment – Service of assessment order – Assessee intimating change of address to Department – Assessee receiving all notices and orders in new address except final assessment order and penalty order – Assessment order containing date written by hand – Assessee not allowed to inspect entry in despatch register – Presumption that final assessment order not passed within specified time – Assessment order and consequent penalty order to be quashed. [S.144C(3), (4), 271(1)(c)]**
On a writ petition : Held, allowing the petition, that despite several opportunities given to the Department, no record was produced to reveal proof of dispatch of the assessment order soon after it was passed. The entire assessment order contains the date only in one place and that date was written by hand, but on the notice issued to the assessee on the same date under section 274 of the Act, the date was typewritten. In the circumstances, it was essential for the Department to demonstrate that the final assessment order was in fact passed on April 22, 2013 and the failure to demonstrate it, strengthened the doubts whether the final assessment order was passed on that date. It was not clear why the address shown in the final assessment order was the old address of the assessee when the Department already had the changed address with it and except the final assessment order, all the notices and orders issued to the assessee were sent to the changed address. Thus the Department failed to prove even

on preponderance of probabilities that the final assessment order was passed on the date written by hand therein. Further, when the assessee sought to inspect the file to see whether there was any entry in the despatch register, he was not allowed such inspection. Therefore, it was incumbent on the Department to demonstrate that the Assessing Officer who passed the assessment order ceased to have any control over such order and that it left his hands soon after it was passed. The Department having failed to do so, a presumption was to be drawn that the final assessment order was not passed within the time period specified under section 144C(4) read with section 144C(3) of the Act. Therefore, the assessment order dated April 22, 2013 under section 143(3) of the Act and the consequent penalty order dated June 26, 2013 under section 271(1)(c) of the Act and the notice dated April 22, 2014 under section 221 of the Act were to be quashed. (AY. 2009-10)
ST Microelectronics P. Ltd v. Dy. CIT (2016) 384 ITR 550 / 72 taxmann.com 203 / 137 DTR 352 / 287 CTR 324 (Delhi)(HC)

S. 143(3) : Assessment – Admission – Admission of undisclosed income by assessee is not conclusive if no evidence is found to support the admission. A retraction, though belated, is valid. Failure to provide cross–examination to assessee of persons whose statements are relied up is fatal to the addition. CBDT Directive F.No.286/98/2013 IT (INV.II) dated 18-12-2014 prohibits additions on the basis of confession.[S. 132(4)] 1654
In view of *Andaman Timber Industries v. CCE (2015) 62 taxmann.com 3 (SC)* and *CIT v. Chandrakumar Jethmal Kochar [2015] taxmann.com 292 (Gujarat)* we are of the view that the admission made by the assessee is not a conclusive proof and such admission can be used as an evidence unless it is not retracted. The assessee in this case has already retracted the statement which in our opinion is a valid retraction. Although there had been search in the case of Gokul Corporation and its partner Shri Suresh A Patel on which the Revenue has relied for making the additions in the case of the assessee but the Revenue could not bring any evidence or material except the statement of the assessee which was recorded on 8.1.96 and also the statements of Shri Subhash Pandey and Shri Kashyap Thakore and these statements were although recorded at the back of the assessee. When the assessee has asked for their cross-examination, the cross examination of Shri Subhash Pandey was not given to the assessee, although the statement of the assessee was recored in consequence of the statement of Shri Subhash Pandey recorded on 1.1.96 u/s. 131. The statements of Shri Suresh A Patel and Shri Kashyap Thakore nowhere state the name of the assessee. Thus the Revenue has not brought any evidence. The onus, in our opinion, is on the Revenue to prove that the assessee has earned the income. It gets shifted on the assessee once the assessee claims the exemption of income.(ITA No. 210 of 2008, dt. 20.07.2016)(AY. 1991-92)
CIT v. Ramanbhai B. Patel (Guj.)(HC) www.itatonline.org

S. 143(3) : Assessment – Duty of the Assessing Officer is to allow deduction even if not claimed in return – Unavailed MODVAT credit cannot be construed as income and there is no liability to pay tax on such unavailed MODVAT credit. [S.139] 1655
Once the return is filed the Assessing Officer commences the assessment proceedings, the assessing authority is not the taxpayer's opponent, in the strictly procedural sense

of the term. The Central Board of Direct Taxes Circular No 14 (XL.35) dated April 11, 1955 states that it is the duty of the Assessing Officer to make available to the assessee any legitimate and legal tax relief to which the assessee is entitled, but has omitted to claim one reason or another. Merely because the assessee in the return filed under section 139(1) has not put forth a claim for relief, he cannot be estopped from getting the tax relief if he entitled to it in law. Accordingly following the ratio in *CIT v. Indo Nippon Chemicals Co Ltd. (2003) 261 ITR 275 (SC)*, that the unavailed MODVAT credit cannot be construed as income and there is no liability to pay tax on such unavailed MODVAT credit.(AY. 2001-02 to 2004-05)
Dy. CIT v. Wipro Ltd. (2016) 382 ITR 179 / 236 Taxman 209 / 282 CTR 346 (Karn.)(HC)

1656 **S. 143(3) : Assessment – Source of payment – Matter was remanded to the AO to examine the seller of the property.**
Allowing the appeal of the assessee, the Tribunal held that; just because the assessee had made the admission, the additions were to follow inexorably, as a natural consequence of the admission made by assessee. Sellers of the property ought to have been called and examined. Matter was accordingly remitted to AO. AO was directed to call the seller of the property to verify the fact of sale rate mentioned in the alleged sale agreement and the rate as was settled between the seller and the purchaser at the time of execution of sale deed. (AY. 2002-03)
Arvind Kumar v. ITO (2016) 180 TTJ 52 (UO)(Asr.)(Trib.)

1657 **S. 143(3) : Assessment – Amalgamation of companies – Order of assessment against amalgamating company invalid. [S. 292B]**
Allowing the appeal the Tribunal held that; order of assessment against amalgamating company invalid. Amalgamating company ceases to exist on date of effect. Passing of order is not a procedural defect that can be cured u/s 292B but jurisdictional defect, hence liable to be set aside. (AY. 2006-07)
Instant Holdings Ltd. v. ACIT (2016) 49 ITR 32 (Mum.)(Trib.)

1658 **S. 143(3) : Assessment – Search – Stock – Surrender of income – Deletion of addition was held to be justified. [S. 132(4)]**
The revenue is aggrieved by the decision of learned CIT(A) in deleting the income surrendered by the assessee in the statement given under section 132(4) of the Act in both the years. The Tribunal held that in the instant case the learned CIT has given a dear finding that the alleged excess stock pointed out by the search officials has since been reconciled by the assessee and the AO did not make any addition on account of alleged excess stock meaning thereby, he was also satisfied with the reconciliation statement furnished by the assessee. The Tribunal further held that the assessee has maintained books of account and further the difference in stock has been duly reconciled. In the circumstance the CIT(A) was justified in deleting the additions made by the AO. (AY. 2009-10, 2010-11)
CIT v. Tribhovandas Bhimji Zaveri (2016) 45 ITR 636 / 177 TTJ 306 (Mum.)(Trib.)

S. 143(3) : Assessment – Revised computation of income should be used for completing the assessment which was based on the audited books of accounts. 1659

The assessee being a Government Company was audited by the Comptroller of Auditor General (CAG). Based on the audit accounts, revised computation of income was filed during the course of assessment. However, the AO completed the assessment based on the original return of income which was filed prior to the finalization of accounts by the CAG. The ITAT held that the assessment should be completed, like in previous AYs, based on the revised computation of income. The purpose of assessment was to arrive at the proper figure of income and it would be travesty of justice if audited accounts are ignored during the course of assessment though they are available. (AY. 2001-02, 2003-04 to 2008-09)

West Bengal Infrastructure Development Finance Corporation v. ACIT (2016) 45 ITR 285 (Kol)(Trib.)

DCIT v. West Bengal Infrastructure Development Finance Corporation (2016) 45 ITR 285 (Kol)(Trib.)

S. 143(3) : Assessment – In an AIR scrutiny assessment, the AO is not entitled to widen the scope of scrutiny without approval of the CIT as per CBDT's Instruction. Such an assessment order is not sustainable.[S. 119] 1660

Allowing the appeal of assessee the Tribunal held that (i) The AIR information was regarding transaction of ₹ 25 lakhs dated 31.3.2011 Para 2 of the CBDT Instruction dated 08.09.2010 states that the scrutiny of cases selected on the basis of information received through AIR returns would be limited only to the aspects of information received through AIR;

(ii) As seen, the AIR information in the present case was regarding cash deposits of ₹ 25 lakhs by the assessee in her savings bank account with OBC. Meaning thereby, that the assessee was required to explain the source of such cash deposits. The assessee explained the same as sale proceeds of her residential house amounting to ₹ 32.25 lakhs received from Smt. Naunihal Kaur, the purchaser. Her this assertion was duly supported by a copy of the concerned sale deed;

(iii) Now, as per the CBDT Instruction, nothing further was to be gone into by the AO, since the information received through AIR was the cash deposits. However, the AO as noted in paras 3.1 & 3.3 of the assessment order itself asked the assessee *vide* letter dated 13.12.2013 to produce Smt. Balbir Kaur and Smt. Kamaljit Kaur, with whom the assessee had entered into a separate agreement to sell and from whom, the assessee had received a sum of ₹ 3 lakhs at the time of agreement "for their examination in order to ascertain whether the agreement, was finalized or cancelled". The AO observed that this proceeding was limited to the extent of the AIR information;

(iv) Evidently, the matter of the other agreement to sell does not stand covered in the AIR information, which was regarding the cash deposits of ₹ 25 lakhs, which the assessee had adequately explained, as above. So, it was obviously not within the purview of the AO to ask the assessee to produce Smt. Balbir Kaur and Smt. Kamaljit Kaur, or to make addition of ₹ 3 lakhs, as was done;

(v) In fact, what the AO did was to widen the scrutiny. Now, para 2 of CBDT Instruction is specific when it states that where it is felt that apart from the AIR information, there

is potential escapement of income more than ₹ 10 lakhs, the case may be taken up for wider scrutiny with the approval of the administrative Commissioner.
(vi) So, the proper course for the AO before making these additional enquiries would have been to take approval from the administrative Commissioner to widen the scrutiny. This, however, was not done and therefore, the action of the AO is violative of the CBDT Instruction.(ITA No.87(Asr)/2016, dt. 24.03.2016)(AY. 2011-12)
Gurpreet Kaur v. ITO (Asr.)(Trib.); www.itatonline.org

S. 144. Best judgment assessment.

1661 **S. 144 : Best judgment assessment – Estimation of net profit rate of 1 per cent of turnover was held to be justified. [S. 145(3)]**
Dismissing the appeal of assessee the Court held that; Appellate Tribunal applying net profit rate of 1 per cent considering identical cases of traders in same area of business is a finding of fact on basis of material evidence on record, which does not warrant interference. (AY. 1997-98, 2000-01)
Bhura Ram (Dantaramgarh Group) v. CIT (2016) 388 ITR 259 (Raj.)(HC)
Bhura Ram (Phulera Group) v. CIT (2016) 388 ITR 259 (Raj.)(HC)
Rajaram Rajendra Bhandari (Ajmer Group) v. CIT (2016) 388 ITR 259 (Raj.)(HC)

1662 **S. 144 : Best judgment assessment – Estimate based on consideration of similar cases and submissions of assessee – Estimate valid. [S. 145(3)]**
Dismissing the appeal of assessee the Court held that admittedly the books of account had been found to be defective even on the admission of the assessee. The books of account were rightly rejected for the reasons assigned by all the three authorities. The Tribunal's findings were elaborate and considered the submissions of both the sides. When the books of account were to be rejected under section 145(3) and in a best judgment assessment under section 144 some guess work was required to be applied to come to a reasonable conclusion and it should be on some basis or reasoning. However, the Tribunal had not gone by assumptions or presumptions but after considering other identical similarly situated traders, dealing in the same line of business. Therefore, the Tribunal had basis to apply a particular gross profit rate in both the country liquor account as well as Indian made foreign liquor/beer account. Its orders were justified. (AY. 2000-01, 2001-02)
Chaturbhuj Manoj Kumar v. CIT (2016) 388 ITR 194 (Raj.)(HC)
Rajaram and Ors v. CIT (2016) 388 ITR 194 (Raj.)(HC)
Hazariram and Ors v. CIT (2016) 388 ITR 194 (Raj.)(HC)

1663 **S. 144 : Best judgment assessment – Unbiased and rational guess work – No interference.**
Dismissing the appeal, the Tribunal had adopted a plausible view based on appreciation of material on record. It was categorically recorded by the Tribunal that the moot question was the justification of estimation of seats. The Tribunal deemed it appropriate to estimate the occupancy at 22 seats in each bus. For the best judgment assessment some guess work based on rational basis had to be adopted. The assessee had not

proved that the Tribunal's approach in arriving at its conclusion was arbitrary or irrational. Moreover, the assessee had failed to furnish requisite information compelling the Assessing Officer to have recourse to section 144 of the Income-tax Act, 1961 in framing the best judgment assessment. There was no illegality or perversity in the order of the Tribunal warranting interference. (AY. 2001-02)
Tara Singh v. ITO (2016) 387 ITR 587 (P&H)(HC)

S. 144 : Best judgment assessment – Failure to produce books of account best judgment assessment was held to be justified. 1664
Allowing the appeal of the Revenue, Tribunal held that assessee failed to produce books of account and various details required for confirmation of balance sheet and profit and loss account, AO was justified to proceed with a best judgment assessment. (AY. 2008-09)
Dy. CIT v. JSR Constructions (P.) Ltd. (2016) 159 ITD 749 (Bang.)(Trib.)

S. 144C. Reference to Dispute Resolution Panel.

S. 144C : Reference to dispute resolution panel – Dispute Resolution Panel – Superior to Assessing Officer – Assessing Officer bound by decision of Dispute Resolution Panel. 1665
Allowing the petition the Court held that the language used by the Assessing Officer while disagreeing with the binding order of the Dispute Resolution Panel was wholly unacceptable. The draft assessment order dated March 28, 2014 and the final assessment order dated January 28, 2015, passed by the Assessing Officer were void *ab initio* and liable to be quashed on that basis. (AY. 2010-11)
ESPN Star Sports Mauritius S. N. C. et Compagnie v. UOI (2016) 388 ITR 383 / 241 Taxman 38 / 290 CTR 49 / 142 DTR 296 (Delhi)(HC)
ESS Distribution (Mauritius) S. N. C. et Compagnie v. UOI (2016) 388 ITR 383 / 241 Taxman 38 / 290 CTR 49 / 142 DTR 296 (Delhi)(HC)

S. 144C : Reference to dispute resolution panel – Transfer pricing – Arms' length price – In terms of section 144C(12), prescribed period of nine months within which DRP can issue directions, has to be computed from date of actual service of draft assessment order on assessee – Matter remanded. [S.92C] 1666
Allowing the petition the Court held that in terms of section 144C(12), prescribed period of nine months within which DRP can issue directions, has to be computed from date of actual service of draft assessment order on assessee - Matter remanded, the order of the Dispute Resolution Panel, Bengaluru, dated 22-6-2015 is set aside and the DRP, Bengaluru is directed to take up Form 35A filed by the assessee for a consideration on merits. (AY. 2008-09)
Rain Cements Ltd. v. DCIT (2016) 243 Taxman 496 (AP&T)(HC)

S. 144C : Reference to dispute resolution panel – It is mandatory on the part of the Assessing Officer to pass the draft assessment order before passing the final assessment order under section 143(3) of the Act. [S. 143(3)] 1667
The High Court had held that in the case of a foreign company, it is mandatory to pass the draft assessment order first before passing the final assessment order under section

143(3) of the Act in view of section 144C(15) which defines eligible assessee to whom section 144C(1) applies to, *inter alia*, mean any foreign company. (AY. 2012-13)
International Air Transport Association v. DCIT (2016) 142 DTR 293 / 241 Taxman 249 / 290 CTR 46 (Bom.)(HC)

1668 **S. 144C : Reference to dispute resolution panel – Petitioner not a foreign company – TPO did not propose any variation – AO is not competent to pass draft assessment order. [S.92C]**
The petitioner, an Indian company has a subsidiary in Japan with which it had International transactions. On reference to TPO order was passed without proposing any variation to the returned income. The AO passed a draft assessment order and made certain disallowances. On writ against draft assessment order it was held that neither of the two conditions for applicability of section 144C i.e. Assessee is a foreign company or where TPO has suggested variation to return of income on reference, gets satisfied therefore the AO was not competent to pass draft order. The Assessee was not an eligible assessee under 144C(15)(b). (AY. 2011-12)
Honda Cars India Ltd. v. Dy. CIT (2016) 382 ITR 88 / 285 CTR 39 / 133 DTR 48 / 240 Taxman 707 (Delhi)(HC)

1669 **S. 144C : Dispute resolution panel – Filing of scanned application form – objections in an application before DRP in Form No. 35A , same was a scanned copy but otherwise it was in order in all respects– could not treat said application as 'non-est'. [S.292B]**
In transfer pricing proceedings, TPO made certain addition to assessee's ALP. Assessee filed its objections in an application before DRP in Form No. 35A same was only a scanned copy containing signature of connected persons, DRP treated said application as 'non-est' and dismissed same in limine. The ITAT held that revenue authorities did not issue any defect notice to assessee at appropriate time calling for removal of defect, failed to provide written reasons for rejecting original application. Otherwise in order in all respects bearing correct signature of person who was duly authorised to file same therefore the same application could not be said as 'non-est' and dismissed same in limine. (AY. 2009-10)
MSM Satellite (Singapore) Pte. Ltd. v. DIT (2016) 161 ITD 602 (Mum.)(Trib.)

1670 **S. 144C : Reference to dispute resolution panel – The AO should compulsorily pass a draft assessment order and any final order passed without passing the draft order will be void in nature. [S.92CA]**
Consequent to a reference u/s 92CA, the TPO rejected the transfer pricing study report maintained by the assessee and carried out his own study and proposed to make an adjustment to the income of the assessee. The AO made the addition as proposed by the TPO. On appeal before the CIT(A), relief was granted to the assessee on merits of the issue, while the legal issue regarding the validity of the AO's order was dismissed. The Department filed an appeal before the ITAT and the assessee filed a CO. The ITAT allowed the assessee's CO and held that the order of the AO was without jurisdiction since he had failed to pass a draft order and directly passed the final assessment order. (AY 2008-09)
ACIT v. Getrag Hi Tech Gears Pvt. Ltd. (2016) 47 ITR 545 / 69 taxmann.com 35 (Chd.) (Trib.)

S. 144C : Reference to dispute resolution panel – The AO should compulsorily pass a draft assessment order and any final order passed without passing the draft order will be void in nature. 1671

Consequent to a reference u/s. 92CA, the TPO rejected the transfer pricing study report maintained by the Assessee and carried out his own study and proposed to make an adjustment to the income of the Assessee. The AO made the addition as proposed by the TPO. On appeal before the CIT(A), relief was granted to the assessee on merits of the issue, while the legal issue regarding the validity of the AO's order was dismissed. The Department filed an appeal before the ITAT and the assessee filed a CO. The ITAT allowed the Assessee's CO and held that the order of the AO was without jurisdiction since he had failed to pass a draft order and directly passed the final assessment order. (AY. 2008-09)

Getrag Hi Tech Gears Pvt. Ltd. v. ACIT (2016) 47 ITR 545 / 69 taxmann.com 35 (Chd.) (Trib.)

S. 144C : Reference to dispute resolution panel – Non-passing of draft assessment order and later on rectifying the final assessment order would negate the entire proceedings. 1672

AO issued the order u/s. 143(3) along with the demand notice. Thereafter, he wrote a letter that the said order was actually a draft assessment order passed u/s. 143(3) r.w.s. 144C and the demand notice was issued inadvertently. A rectified draft assessment order was issued to the Assessee. The ITAT held that the entre proceedings was illegal and it was sine qua non for the AO to pass a draft assessment order and in the instant case the AO had passed an order, consequent to which demand was computed and penalty proceedings were initiated. This mistake could not be rectified by s. 292B since the intention of passing such an order was not to pass a draft order, but a final assessment order. Since the issue was taken up as an additional ground in the second round of proceedings, the ITAT observed that additional grounds of appeal could be taken in the second round of proceedings, if it went to the root of the issue and if decided, could render other grounds as academic and infructuous. (AY. 2007-08)

Jazzy Creations (P) Ltd. v. ITO (2016) 176 TTJ 393 / 133 DTR 1 (Mum.)(Trib.)

S. 145. Method of accounting.

S. 145 : Method of accounting – Valuation of stock – So long as the assessee adopted such change bona fide and employed the new method regularly, it could not be faulted. [S.144] 1673

On a reference the Court held that The assessee had changed the method of ascertaining the cost for the purpose of stock valuation and not the method of accounting employed by it for the purpose of stock valuation as such. The method, as before, continued to be "cost or market value whichever was lower". It was only for determining the cost instead of "lower purchase price", that the "weighted average cost" was adopted on the footing that the latter was a more scientific basis for accounting the closing stock. So long as the assessee adopted such change *bona fide* and employed the new method regularly, it could not be faulted. (AY. 1976-77, 1977-78)

Bajaj Auto Ltd. v. CIT (2016) 389 ITR 259 / (2017) 244 Taxman 31 (Bom.)(HC)

1674 **S. 145 : Method of accounting – Rejection of books of account not valid merely for the reason that day-to-day stock register is not maintained. [S. 144]**
The High Court held that the rejection of the books of accounts merely for the reason that the day to day stock register is not maintained is not valid and that the books of account maintained by it are tallying and the excise duty is paid on that basis and The stock register is not tallying with the other books of account only because some of the items were not deleted from the stock register. Moreover, it was also held that the change in the method of accounting in respect of MODVAT could not be a reason to reject books of account particularly when there was nothing to hold that change in method of accounting was not a *mala fide* act on assessee's part.
Jaytick Intermediates (P.) Ltd. v. ACIT (2016) 242 Taxman 319 (Guj.)(HC)

1675 **S. 145 : Method of accounting – Switch over from one method of accounting to another method in midst of an accounting year is not permitted.**
Dismissing the appeal of the assessee, the Court held that switch over from one method of accounting to another method in midst of an accounting year could lead to skewed results as assessee could then avoid paying correct advance tax by following cash system at first and then justify non-payment by switching over to mercantile system and further, assessee could do this at least more than once leaving entire assessment in a state of uncertainty and confusion which would fragment an assessment year. Such a switch over in midst of financial year should be permitted by authorities only in exceptional cases where same poses no difficulty in computing income and switch-over was justified. (AY. 1984-85)
Munjal Sales Corpn. v. CIT (2016) 243 Taxman 523 / (2017) 393 ITR 248 / 150 DTR 293 (P&H)(HC)
Editorial: Refer Munjal Sales Corpn v. ITO (1994) 49 ITD 361 (Chd.)(Trib.)

1676 **S. 145 : Method of accounting – Business income – Failure by assessee to maintain books of account – Presumption that assessee following cash system of accounting – Amount received in one year cannot be spread over several years – Failure by assessee to produce vouchers as proof of expenditure – No basis for estimation of expenditure. [S. 28(i), 37(1)]**
Allowing the appeal of revenue, the Court held that; Since no books of account were maintained by any of the three assessees, it was to be presumed that they followed the cash system of accounting. Therefore, the question of income accruing or the right to earn income accruing only upon the performance of a service at the end of a period did not arise. The matching principle or the application of AS-9 issued by the Institute of Chartered Accountants of India which dealt with the principle of revenue recognition appeared to apply only to companies and not individuals. Once it was clear that it was the cash system of accounting that was followed, the amount received in one year could not be spread over several years. Thus the Commissioner (Appeals) was right in affirming the order of the Assessing Officer to the extent of bringing the entire amount received by the assessees to tax in the year in question. There was no reason to interfere with the order of the Commissioner (Appeals) to the extent that he had disallowed expenditure at an estimated 35 per cent., since there was no basis for estimation of

expenditure with the assessees not maintaining accounts and being unable to produce vouchers or bills as proof of any expenditure. (AY. 2006-07)
CIT v. Aman Khera (2016) 387 ITR 33 / 288 CTR 381 / 76 taxmann.com 185 / 140 DTR 1 (Delhi)(HC)
CIT v. Jyoti Khera (2016) 387 ITR 33 / 288 CTR 381 / 76 taxmann.com 185 / 140 DTR 1 (Delhi)(HC)
CIT v. Raman Khera (2016) 387 ITR 33 / 288 CTR 381 / 76 taxmann.com 185 / 140 DTR 1 (Delhi)(HC)
Editorial: SLP of assessee is dismissed; Aman Khera v. CIT (2017) 245 Taxman 71 (SC)

S. 145 : Method of accounting – Fall in gross profit rate – Rejection of accounts was held to be not valid. 1677
Dismissing the appeal of revenue the Court held that, mainly because of fall in gross profit rate rejection of books of account was held to be not justified. (AY. 2003-04 to 2009-10)
CIT v. Micro Instruments Company. (2016) 388 ITR 46 / 289 CTR 152 / 75 taxmann.com 304 (P&H)(HC)

S. 145 : Method of accounting – Rejection of accounts was held to be not justified. 1678
Dismissing the appeal of revenue the Court held that The Commissioner (Appeals) and the Tribunal after appreciating the material on record, recorded concurrent findings of fact and gave detailed, cogent and convincing reasons for holding that the Assessing Officer was not justified in rejecting the books of account of the assessee. Therefore, the order was based upon concurrent findings of fact recorded by the Tribunal after appreciating the material on record. The Department was not in a position to dislodge the findings of fact recorded by the Tribunal by pointing out any material to the contrary, nor was it the case of the Department that the Tribunal had placed reliance upon any irrelevant material or that any relevant material had been ignored. Under the circumstances the accounts could not be rejected.
PCIT v. Garden Silk Mills Ltd. (2016) 388 ITR 237 (Guj.)(HC)

S. 145 : Method of accounting – Accrual – Mercantile system of accounting – Non convertible unsecured debentures issued by group company– Resolution passed by board of directors of assessee to waive interest on debentures for six years – Tribunal holding that even though assessee following mercantile system of accounting interest did not accrue – Neither perverse nor arbitrary, notional interest cannot be brought to tax. [S.4] 1679
Dismissing the appeals of revenue, the Court held that the order of the Tribunal was based on the facts and its findings were not found to be perverse or arbitrary. It found that the various resolutions passed by the company and the communications exchanged between the parties established the fact that the interest on the debentures was waived for six years and that there was no reason to disbelieve the resolution waiving the interest. Amalgamation of the issuing company with the assessee also established the fact that it was in financial difficulties. Moreover, for the assessment years prior to 2007-08 no additions were made by the Department on account of notional interest. No question of law arose. (AY. 2007-08, 2009-10)
CIT v. Neon Solutions P. Ltd. (2016) 387 ITR 667 (Bom.)(HC)

1680 **S. 145 : Method of accounting – Best judgment assessment – Gross profit rate – Determination of, a question of fact. [S.144]**
Dismissing the appeal of the revenue, the Court held that the estimation of gross profit is a question of fact. (AY. 2006-07)
CIT v. Satish Bala Malhotra (Smt.) (No.2) (2016) 387 ITR 408 (P&H)(HC)

1681 **S. 145 : Method of accounting – Estimation of income – Even after search sales and sales price were accepted gross profit rate could not be increased.**
After the search was conducted, Assessing Officer computed gross profit on sales at rate of 10% and accordingly made the addition, despite fact that sales were recorded in regular books and sale price was accepted by the department. In earlier years 6% gross profit was shown and after reducing cost price, net profit came to 5.66%. The issue before the court was whether addition was to be made in gross profit and appropriate deductions were to be given after considering 5.66 per cent profit rate of the earlier years.
The High Court held that the assessee cannot be punished since sale price is accepted by the revenue. Therefore, even if 6% gross profit is taken into account, the corresponding cost price is required to be deducted and tax cannot be levied on the same price and we have to reduce the selling price accordingly as a result of which profit comes to 5.66%. Therefore, the court held that considering the rate of 5.66% as appropriate, necessary deductions should be accordingly made. In the result, the said question was answered partially in favour of the assessee and partially in favour of the revenue.
N. K. Industries Ltd. v. Dy. CIT (2016) 142 DTR 162 / 72 taxmann.com 289 / (2017) 292 CTR 354 2 (Guj.)(HC)

1682 **S. 145 : Method of accounting – Where books of account of assessee had not been rejected and assessment having not been framed under section 144 estimation of income cannot be made. [S. 144]**
Dismissing the appeal of assessee the court held that; neither the AO nor the Commissioner (Appeals) had rejected the books of account maintained by the assessee in the course of the business. The Tribunal had rightly rejected or set aside the partial addition made by the AO for arriving at gross profit and sustained by the Commissioner (Appeals) and rightly held that the entire addition made by the AO was liable to be deleted. The finding was based on sound appreciation of facts and it did not give rise to a substantial question of law. (AY. 2006-07)
CIT v. Anil Kumar & Co. (2016) 386 ITR 702 / 67 Taxman.com 278 (Karn.)(HC)

1683 **S. 145 : Method of accounting – Cash system – Advances/deposits to electricity board and other market committee – AO taxed accrued interest – Held, cannot tax accrued interest without any receipt. [S.5]**
The assessee was a market committee. It made advances/deposits to electricity board and other market committees. The AO assessed accrued interest on said advances. High Court held that, assessee was following cash system of accounting and therefore, accrued interest cannot be taxed in absence of any receipt. (AY. 2006-07)
CIT v. Market Committee, Shahabad (2016) 240 Taxman 535 (P&H)(HC)

S. 145 : Method of accounting – Rejection of accounts – Finding that assessee had been consistently following project completion method for booking revenue – Rejection of accounts is not justified. 1684

For the assessment year 2009-10 the assessee in its reply to the query raised by the Assessing Officer, *inter alia,* claimed that it had been consistently following the method of booking of revenue on the completion of the flat when full payment had been made to it by the person concerned and possession was delivered to him. Though the Assessing Officer rejected the plea of the assessee, the Commissioner (Appeals) accepted it. This was confirmed by the Tribunal. On appeals: Held, dismissing the appeals, that the assessee had been consistently following one of the recognized methods of accountancy, i.e. the project completion method, for computation of its income. In the absence of any prohibition or restriction under the Act for doing so, it could not be held that the approach of the Commissioner (Appeals) and the Tribunal was erroneous or illegal in any manner so as to call for interference by this court. No substantial question of law arose. (AY. 2009-10)

CIT v. Principal Officer, Hill View Infrastructure (P) Ltd. (2016) 384 ITR 451 (P&H)(HC)

Editorial: Order in Hill View Infrastructure P. Ltd. v. Deputy CIT (2014) 34 ITR 128 (Chandigarh)(Trib.) is affirmed.

S. 145 : Method of accounting – Consistently following project completion method – Expenses of construction not debited to profit and loss account of assessee and shown as cost of construction of block of buildings – Assessee offering tax in subsequent financial year – No actual loss to revenue – Order of Tribunal was set aside. 1685

Held, the method of accounting followed by the assessee in the present case, i.e., project completion method was certainly one of the recognised methods and was consistently followed by it. There was no good reason for the Tribunal to reverse the finding of the Commissioner (Appeals). The reason that "risks and rewards" of ownership were transferred to the buyers who had paid the booking advance amounts and in some cases these rights were transferred to third parties, would not in any manner affect the treatment of the amounts in the books of the assessee. The expenses of construction were not debited to the profit and loss account of the assessee and were shown as cost of construction or block of buildings. Only when a conveyance deed was executed or possession delivered was the receipt shown as income. The Tribunal failed to take note of the explanation added by way of notes to the accounts, when it came to the conclusion that the percentage completion method should apply to the assessee. The assessee offered to tax in the subsequent financial year the amounts received and therefore there was no actual loss to the Revenue. Therefore, the order of the Tribunal was to be set aside. That for the AY 2006-07, the advances received by the assessee were in respect of a project that never took off. A part of the advance amount was returned in the following financial year since the transaction itself fell through. Therefore, the sum could not be treated as income in the hands of the assessee. No purpose would be served in remanding the matter to the Assessing Officer for a fresh determination. (AY. 2005-06, 2006-07)

Paras Buildtech India P. Ltd. v. (2016) 382 ITR 630 / (2017) 145 DTR 313 / 291 CTR 549 / 80 taxmann.com 335 (Delhi)(HC)

1686 **S. 145 : Method of accounting – Inability of the assessee, an Advocate, to reconcile the professional receipts with the TDS certificates and to give a detailed party-wise breakup of fees receipts does not mean that the difference can be assessed as undisclosed income. [S.69, 194J]**

The assessee challenged the order of the Commissioner of Income Tax in confirming the addition of ₹ 47,37,000 made by Assessing Officer on account of non-reconciliation of professional receipts with TDS certificates. Insofar as that aspect is concerned, the Tribunal considered this submission of both sides and found that the assessee was engaged as an Advocate to argue the matters by what is popularly known as Advocates on record or instructing Advocates method, meaning thereby the client does not engage the assessee directly but a professional or the Advocate engaged by the client requests the assessee to argue the case. The brief is then taken as the counsel brief. That being the practice, the assessee gave an explanation that the breakup as desired cannot be given and with regard to all payments. It is pointed out that at times, assessee receives fees directly from the clients or from the instructing Advocates or Chartered Accountants if such professionals have collected the amounts from the clients. Under these circumstances, the breakup as desired cannot be placed on record. An explanation which has been given by the assessee and accepted in the past has been now accepted by the Tribunal once again. On appeal by revenue dismissing the appeal the Court held that since it is accepted for the Assessment Year 2006-07, in the peculiar facts, in relation to the present assessee, we are of the view that this Appeal does not deserve to be entertained. It does not give rise to any substantial question of law. (ITA No. 1930 of 2011, dt. 18.03.2014) (AY. 2006-07)

CIT v. S. Ganesh (Bom)(HC); www.itatonline.org

1687 **S. 145 : Method of accounting – Minor discrepancies in the books of account cannot lead to rejection of books of account and Best judgment assessment should be based on some material, *ad hoc* addition to the income cannot be made.**

Assessee was carrying on the business of manufacturing edible oil and oil cake and sale thereof. During the course of assessment, the Assessing Officer noticed that stock register is not maintained quality-wise and does not contain day-to-day shortage of lots in the production. Accordingly, books of account were rejected and income was estimated at 1.98% of turnover. The CIT(A) upheld the rejection of books of account however, reduced the addition to 1.75%. The Tribunal held that rejection of books of account was invalid and consequentially, addition made to the income was deleted. On appeal, High Court held that the books of account were properly maintained by the assessee and minor discrepancies in the stock register cannot lead to rejection of books of account under section 145(3). The High Court also held that Best judgment assessment should be based on some material and addition to the income cannot be made on *ad hoc* basis. (AY. 2008-09, 2009-10)

Pr. CIT v. Bhawani Silicate Industries (2016) 236 Taxman 596 (Raj.)(HC)

S. 145 : Method of accounting – Valuation of closing stock – Change of method – New system of accounting was followed by the assessee in the subsequent assessment year as well, Tribunal was not right in rejection of change in method. [S.145 (2)] 1688
Court held that the change in the method of accounting was *bon fide* and the assessee has followed the same method, in the subsequent assessment year as well, Tribunal was not right in rejection of change in method. (AY. 1976-77, 1977-78)
Bajaj Auto Ltd. v. CIT (2016) 389 ITR 259 / (2017) 244 Taxman 31 / 146 DTR 210 (Bom.) (HC)

S. 145 : Method of accounting – Valuation of Stock – Interest on working capital loan, such interest could not go into cost of work-in-progress or inventory. [AS. 2] 1689
Dismissing the appeal of the revenue, the Tribunal held that assessee was contractor for road construction and interest cost was attributed to loans taken for financing its normal trading activity, such interest could not go into cost of work-in-progress or inventory. (AY. 2008-09)
Dy. CIT v. JSR Constructions (P.) Ltd. (2016) 159 ITD 749 (Bang.)(Trib.)

S. 145 : Method of accounting – Estimate of net profit was held to be justified. 1690
Dismissing the appeal of the revenue, the Tribunal held that estimate of net profit was held to be justified. (AY. 2000-01)
ITO v. Brij Fertilizers Pvt. Ltd. (2016) 48 ITR 125 (Agra)(Trib.)

S. 145 : Method of accounting – Rejection of accounts on account of unverifiable nature of account, estimation at 8% reasonable as generally applicable in works contract cases. 1691
The AO invoked section 145(3) and on account of unverifiable nature of account, estimated net profit at 10% of gross contract receipts, allowing salary and interest to partners therefrom to determine taxable income. The ITAT allowed determination of net profit at 8% of gross receipts which is generally applicable in case of works contracts.
B. Banamber and Co. v. ITO (2016) 48 ITR 41 (Cuttack)(Trib.)

S. 145 : Method of accounting – Civil contract business – Rejection of books of account without pointing out specific defects was held to be not justified. Matter was remanded. [S. 44AD] 1692
Allowing the appeal of the assessee the Tribunal held that rejection of books of account without pointing out specific defects was held to be not justified. Matter was remanded. (AY. 2008-09)
Amarjit Singh v. ITO (2016) 48 ITR 622 (Amritsar)(Trib.)

S. 145 : Method of accounting – Books of account duly audited and no defects pointed out regarding sales, purchase or profit – No basis for adopting rate of profit at 3 per cent – Addition in excess of declared profits to be deleted. 1693
Allowing the appeal of the assessee, the Tribunal held that when books of account duly audited and no defects pointed out regarding sales, purchase or profit, therefore no basis for adopting rate of profit at 3 per cent. Addition in excess of declared profits to be deleted. (AY. 2008-09)
Samwon Precision Mould Mfg. (India) P. Ltd. v. ITO (2016) 48 ITR 630 (Delhi)(Trib.)

1694 **S. 145 : Method of accounting – Rejection of accounts – Liquor business, since practice of not issuing bills was prevalent all over country in liquor trade, action of AO was not justified.**

Allowing the appeal of the assessee, the Tribunal held that liquor business, since practice of not issuing bills was prevalent all over country in liquor trade, action of AO was not justified. (AY. 2008-09, 2009-10)

Hem Raj v. ACIT (2016) 159 ITD 589 (Chd.)(Trib.)

1695 **S. 145 : Method of accounting – Qualified engineer is engaged by a Coaching Institute as a consultant – Income assessable as professional income and not as salary, without rejecting the books of account expenses claimed cannot be disallowed. [S.15, 28(i)]**

Allowing the appeal of the assessee the Tribunal held that without rejecting the books of account expenses claimed cannot be disallowed. As consequence, assessee was entitled to benefit under Act. No reason whatsoever had been given by authorities below for rejecting books of account. Sole reason given by authorities below was that assessee was salaried employee and not professional. Since assessee was professional, therefore, this ground was also decided in favour of assessee. (AY. 2007-08)

Shiv Pratap Raghuvanshi v. ACIT (2016) 139 DTR 57 / 179 TTJ 761 (Jaipur)(Trib.)

1696 **S. 145 : Method of accounting – Project completion method – Remuneration for services in connection with project – Depending on project.**

The assessee was paid a sum of ₹ 32 lakhs by A. A. Estate Pvt. Ltd. on account of professional services rendered and since the assessee had not shown any income by way of professional fees, the Assessing Officer added this sum to the assessee's income. The Commissioner (Appeals) deleted the addition holding that the quantification of the actual amount payable to the assessee was possible only at the stage of completion of the project and the amount received by the assessee during the year was only an advance which was adjusted on the completion of the project. The Tribunal held that the amount received by the assessee was including the expenditure incurred by it which was paid by A. A. Estate Pvt. Ltd. The amount paid to the assessee had not been claimed by A. A. Estate Pvt. Ltd. as expenditure but had only been shown as work-in-progress. Hence, there was a consistency in the accounts of both the payer and the payee. The services rendered by the assessee related to the activities of the builders and developers and in terms of the Memorandum of Understanding, the quantification of the remuneration of the assessee was dependent on the completion of the project and, hence, the assessee was justified in following the project completion method of accounting. The Commissioner (Appeals) had rightly concluded that the amount received by the assessee during the year was an advance and the actual remuneration was to be quantified at the completion of the project. The assessee was justified in not offering the amount as income for the year. There was no infirmity in the order of the Commissioner (Appeals). (AY. 2006-07, 2007-08, 2008-09, 2009-10)

ITO v. Trendsetter Construction Pvt. Ltd. (2016) 46 ITR 132 (Mum.)(Trib.)

S. 145 : Method of accounting – Change in method allowed, provided the AO verifies the calculation and correctness of the valuation of stock. 1697

In AY 1989-90, the assessee changed its method of valuation of stock from net realizable value to cost or market value, whichever is lower. The change was approved by the board of directors. The AO did not allow the change in method. The matter travelled up to the HC, which remanded the matter to the AO and asked him to reconsider the matter after the assessee submits the true picture of the P&L A/c if the stock is valued as per the old method. The new method was followed in the impugned year and similar addition was made by the AO. The ITAT remanded the matter to the AO and held that though the assessee was justified in changing the method, it was necessary that the AO verified the calculation of the stock, which was not looked into earlier. (AY. 1990-91)

DCIT v. Sri Chamundeshwari Sugar Ltd. (2016) 47 ITR 291 (Bang.)(Trib.)

S. 145 : Method of accounting – Valuation of stock – Merely on the basis of survey addition was held to be not justified. [S.133A] 1698

The assessee was running a cotton factory. A survey was conducted at premises of the assessee. Consequently, the surveying authority alleged excess stock of Narma-cotton by weighing stock on basis of cartons. The assessee objected that weighment was not done in accordance with the provisions of the Standards and Weights and Measures Act, 1976. The AO. made addition on basis of excess stock. The CIT(A) upheld addition observing that there was no evidence that the assessee provided to the survey team the necessary facility of weighment by a standardized scale.

The hon'ble ITAT held that it was surveying authority who arbitrarily never required assessee to provide him with weightment facility and it was not assessee who refused to do and, therefore, addition in income of assessee was not justified.(AY. 2011-12)

Kailash Devi Prop (Smt.) v. ITO (2016) 158 ITD 709 (Asr.)(Trib.)

S. 145 : Method of accounting – No addition based on monthly sales and purchases can be made by the AO when no unrecorded sales and purchases had been found by the AO. 1699

The assessee was a trader of consumer goods and followed direct marketing business model. Since the assessee had failed to mention the gross profit rate in the audit report, the AO calculated the same from the P&L A/c, Balance sheet and month-wise purchase and sales as submitted by the assessee. Consequently, an addition was made by the AO to the income of the assessee. The CIT(A) applied an average of the net profit rate earned by the assessee in subsequent two years. On appeal by the Department, the ITAT held that the AO failed to consider the genuineness of the purchases and sales and the nature of business of the assessee. The ITAT held that the addition by the AO based on month-wise details could not be sustained, when no unrecorded sales and purchases had been found by him. The addition was deleted considering the fact that the net profit rate was accepted by the Department in subsequent two years. (AY. 2009-10)

DCIT v. Smart Value Product and Services Ltd. (2016) 45 ITR 33 (Chd.)(Trib.)

1700 **S. 145 : Method of accounting – Valuation of closing stock – Value of unsold parking space – *Ad hoc* addition as cost of construction was held to be not justified.**
Tribunal held that the AO has made *ad hoc* addition as cost of construction of parking spaces on an estimate basis without substantiating or bringing on record what separate expenses were incurred on the same by the assessee and held that the parking spaces were sold along with flats only to the flat purchasers and not to anybody else. The AO has made the addition by nationally increasing the cost of construction of parking spaces. Therefore, CIT(A) was justified in deleting the impugned addition made by the AO. (AY. 2009-10)
ACIT v. Vardhaman Estate Corporation (2016) 175 TTJ 15 (UO)(Mum.)(Trib.)

1701 **S. 145 : Method of accounting – Cash system and mercantile system – Profession and business – Two methods of accounting allowable for two sources of income was held to be valid.**
There would be no distortion in computing the correct income by following either of the two methods of accounting regularly and there would be only a timing difference and no prejudice would cause to the Revenue. Thus, the assessee was not following a hybrid method of accounting. The method of accounting was allowable.(AY. 2007-08)
Vishwanath Acharya v. ACIT (2016) 157 ITD 1032 / 45 ITR 554 (Mum.)(Trib.)

1702 **S. 145 : Method of accounting – Rejection of books of account – Books of account cannot be rejected on an arbitrary basis. [S. 144]**
Allowing the appeal of assessee Tribunal held that the assessee is a company having declared a turnover of ₹ 44.45 crores and profit thereon of ₹ 1.65 crores. The books of account are duly audited and no defect has been pointed out vis-a-vis the sales, purchase or profit "It is a subsidiary of a Korean Company and therefore, the authorities below had to be circumspect before arriving at such a conclusion, particularly when there is no iota of material to doubt the quantitive details, audited results *vis-a-vis* the turnover and profit declared so as to warrant rejection. Instances of irregularities in cash payment cannot warrant *ipso facts* rejecting of books of accounts, at best disallowance could have been made u/s. 40A(3) of the Act. We, therefore, hold that the books of account were incorrectly rejected as it is not a case where it can be held that the books of account was incorrect or incomplete or correct profits could not be deduced. On the contrary, we find that completed audited books of account were produced before the AO, which were duly examined and such book of account have not been shown to have been maintained from where correct profits could not be deduced, thus vitiating the entire action of the AO and CIT(A) for rejecting the books of account."(ITA No. 2043/Del/2013, dt. 02.02.2016)(AY. 2008-09)
Samwon Precision Mould Mfg. (India) P. Ltd. v. ITO (Delhi)(Trib.); www.itatonline.org

S. 145A. Method of accounting in certain cases.

1703 **S. 145A : Method of accounting – Valuation – Service tax billed has no relation to any goods nor dies it have anything to do with brining to a particular location.**
Dismissing the appeal of the revenue the Court held that it is very clear from the reading of sec. 145A(a)(ii) of the Act that it only covers cases where the amount of tax, duty, cess or fee is actually paid or incurred by the assessee to bring the goods to

the place of its location and condition as on the date of valuation. The assessee has admittedly not paid or incurred any liability for the purposes of bringing any goods to the place of its location. Further, the respondent assessee is rendering services. Thus, on the plain reading of sec. 145A(a)(ii) of the Act, it is self-evident that the same would not apply to the service tax billed on rendering of services. This is so as the service tax billed has no relation to any goods nor does it have anything to do with bringing the goods to a particular location. (AY 2007-08, 2008-09)
CIT v. Knight Frank (India) (P.) Ltd. (2016) 143 DTR 32 / 242 Taxman 313 / 290 CTR 25 (Bom.)(HC)

S. 145A : Method of accounting – Valuation – Any fall in the value of such stock, is permissible as deduction. 1704
Dismissing the appeal of revenue the Court held that there is no dispute that the assessee has made payment for purchases of iron ore and the same are lying in the custody of the assessee, at various ports. Such could validly be termed as stock-in-trade. However, if the value of such stock has gone down at the year end, the assessee is legitimate in claiming deduction on such fall. Such goods would be treated as stock-in-trade, any fall in the value of such stock, is permissible as deduction. (AY. 2009-10)
PCIT v. STCL Ltd. (2016) 239 Taxman 2 (Karn.)(HC)

S. 145A : Method of accounting – Valuation – Service-tax billed on rendering of services is not includible as trading receipts. No disallowance can be made for the unpaid service-tax liability which is not claimed as a deduction. [S. 43B] 1705
Dismissing the appeal of revenue, the Court held that; Service-tax billed on rendering of services is not includible as trading receipts. No disallowance can be made for the unpaid service-tax liability which is not claimed as a deduction. (ITA No. 247 and 255 of 2014, dt. 16.08.2016)(AY. 2007-08, 2008-09)
CIT v. Knight Frank (India) Pvt. Ltd. (Bom.)(HC),www.itatonline.org

S. 145A : Method of accounting – Valuation – Change in closing stock – Corresponding adjustment to be done in the opening stock 1706
Held that when adjustment of excise duty is made in closing stock then corresponding adjustment is to be made in opening stock as held by decision of Delhi High Court in case of *CIT v. Mahavir Aluminum (2008) 297 ITR 77 (Del HC).* (AY 1999-00, 2005-06)
K. G. Petrochem Ltd. v. ACIT (2016) 176 TTJ 1 (UO) (Jaipur)(Trib.)

S. 145A : Method of accounting – Valuation – Deposit made to port trust not included. 1707
The deposit made with the port trust is not includible in the computation made under section 145A of the Act, if it does not fall in the category of tax, duty, cess or fee levied under any law. Hence, the same shall be liable to be included in the adjustments made under section 145A of the Act only if it is shown that the payment was made under authority of any law. Further, if the deposit so made is refundable to the assessee, then also the question of including the same under section 145A does not arise. The Assessing Officer is directed to reexamine this issue in the light of the discussions made supra. (AY. 2007-08 to 2010-11)
Mazgaon Dock Ltd. v. ITO (2016) 46 ITR 162 (Mum.)(Trib.)

1708 **S. 145A : Method of accounting – Valuation – No disallowance on valuation of closing stock if the assessee had consistently followed FIFO.**
The assessee valued its stock based on FIFO method. The AO alleged that the closing stock was undervalued, based on the average cost method. The ITAT deleted the disallowance on the basis that the FIFO method was consistently followed by the Assessee, which was also approved by the ICAI. (AY. 2009-10)
Kaiser Industries Ltd. v. JCIT (2016) 47 ITR 656 (Amritsar)(Trib.)

1709 **S. 145A : Method of accounting – Valuation of stock – Inclusive method cannot be applied selectively to closing stock without applying it to opening stock, purchases and sales.**
Tribunal held that inclusive method cannot be applied selectively to closing stock without applying it to opening stock, purchases and sales. Matter remanded. (AY. 2007-08)
Sunshield Chemicals (P.) Ltd. v. ITO (2016) 156 ITD 452 / 175 TTJ 129 (Mum.)(Trib.)

1710 **S. 145A : Method of accounting – Valuation – Provision mandating inclusive method of accounting to follow tax, duties or cess – Assessee ought to follow inclusive method in respect of MODVAT.**
The deposit made with the port trust was not includible in the computation made u/s. 145A, if it did not fall in the category of tax, duty, cess or fee levied under the law. It was liable to be included in the adjustments u/s. 145 only if it was shown that the payment was made under authority of any law. Further, if the deposit so made was refundable to the assessee, then also the amount of deposit could not be included u/s. 145A. The AO was directed to re-examine this issue.(AY. 2004-05, 2007-08 to 2010-11)
Mazgaon Dock Ltd. v. ITO (2016)46 ITR 162 (Mum.)(Trib.)

S. 147. Income escaping assessment.

1711 **S. 147 : Reassessment – No failure to disclose material facts – Reassessment was held to be not valid. [S. 4, 5, 148]**
On Revenue's filing of Special Leave Petition, the Apex Court didn't entertain the petition and thus dismissed it. Excess amount paid to members of co-operative society for buying sugarcane. No failure on part of assessee to disclose fully and truly all material facts. Reassessment was held to be without jurisdiction. (AY. 2007-08)
ACIT v. Maroli Vibhag Khand Udyog Sahakari Mandi Ltd. (2016) 239 Taxman 393 (SC)
Editorial : Refer Shree Chalthan Vibhag Khand v. Dy. CIT (2015) 376 ITR 419 (Guj.)(HC)

1712 **S. 147 : Reassessment – Accrual of income – Even if income by way of rent is enhanced with retrospective effect, it accrues only when a right to receive the income is vested in the assessee – Notice to assessee the income prior to accrual is without jurisdiction. [S. 5, 22, 23, 148]**
Following the ratio in E.D. Sassoon & Co Ltd. (1954) 26 ITR 27(SC), the court held that even if income by way of rent is enhanced with retrospective effect, it accrues only

when a right to receive the income is vested in the assessee hence notice to assessee the income prior to accrual is without jurisdiction. (AY. 1989-90)
P.G.& W. Sawoo Pvt. Ltd. v. ACIT (2016) 385 ITR 60 / 136 DTR 113 / 286 CTR 460 / 239 Taxman 257 (SC)
Editorial : Decision of the Full Bench of the Calcutta High Court in P. G. and Sawoo P. Ltd. v. A CIT (2008) 307 ITR 243 [FB] (Cal)(HC) reversed.

S. 147 : Reassessment – A Writ Petition to challenge the issue of a reopening notice is maintainable – Order of High Court was set aside. [S. 148, Art. 226] 1713
Allowing the petition the Court held that the High Courts dismissed the writ petitions preferred by the assessee challenging the issuance of notice under Section 148 of the Income-tax Act, 1961 and the reasons which were recorded by the Assessing Officer for reopening the assessment. The writ petitions were dismissed by the High Court as not maintainable. The aforesaid view taken is contrary to the law laid down by this Court in *Calcutta Discount Limited Company v. Income Tax Officer, Companies District I, Calcutta & Anr. [(1961) 41 ITR 191 (SC)]*. We, thus, set aside the impugned judgments and remit the cases to the respective High Courts to decide the writ petitions on merits. We may make it clear that this Court has not made any observations on the merits of the cases, i.e. the contentions which are raised by the appellant challenging the move of the Income Tax Authorities to re-open the assessment. Each case shall be examined on its own merits keeping in view the scope of judicial review while entertaining such matters, as laid down by this Court in various judgments. We are conscious of the fact that the High Court has referred to the Judgment of this Court in *CIT v. Chhabil Dass Agarwal (2013) 357 ITR 357 (SC)*]. We find that the principle laid down in the said case does not apply to these cases.
Jeans Knit Private Limited v. DCIT (2017) 390 ITR 10 / 244 Taxman 154 / 145 DTR 16 / 291 CTR 13 (SC)
Editorial : Decision in Jeans Knit Private Limited v. DCIT (2014) 367 ITR 773 (Karn)(HC), JCIT v. Kalanthi Maran (2014) 366 ITR 453 (Mad.)(HC) is set aside.

S. 147 : Reassessment – Bad debt – Assessment reopened on ground no material to show debt written off as required under provision as amended with effect from 1-4-1989, notice was held to be valid. [S. 36(1)(vii), 148] 1714
Allowing the appeal the Court held that having regard to the fact that though the assessee has disclosed that the bad debts were transferred to K bank for realisation, the authority recording the reasons prior to issuance of notice under section 148 of the Act had specifically recorded that there was no material available on record to indicate that the bad debts had been written off as mandatorily required under section 36(1)(vii) of the Act as amended with effect from April 1, 1989. If that be so, no fault could be found with the notice issued. The Court has not expressed no opinion on merits. (AY. 2004-05)
Dy. DIT v. Sumitomo Mitsui Banking Corporation (2016) 387 ITR 164 / 243 Taxman 514 /290 CTR 484 / 144 DTR 167 (SC)
Editorial : Bombay High Court in Sumitomo Mitsui Banking Corporation v. Dy. DIT W.P. No. (Lodg) No. 140 of 2011 dt 22-2-2011 is reversed.

1715 **S. 147 : Reassessment – Housing project – Failure fully and truly to disclose facts material to assessment – Information regarding actual size of plot used for construction available only in valuation report – Not full and true disclosure – Reassessment was held to be valid. [S. 80IB(10), 148]**

Dismissing the appeal the Court held that; in the communication dated February 10, 2003 addressed by the assessee to the Assessing Officer, only the value of the land was stated and in support, a certificate from the registered architect and engineer was filed. This information was supplied as there was some query about the value of the land. Obviously, while going to this document the Assessing Officer would examine the value of the land. However, the reason for issuing notice was that the assessee had not correctly disclosed the actual assets of the plot and hence, it was not entitled to deduction under section 80-IB(10) of the Act. The Income-tax Officer had himself mentioned in the notice that such information was available only in the valuation report. The Assessing Officer was not expected to go through the information available in the valuation report for the purpose of ascertaining the actual construction of the plot. Therefore, the Department was right in reopening the assessment and the High Court had rightly dismissed the writ petition of the assessee challenging the validity of the notice. (AY. 2001-02)

Girilal and Company v. ITO (2016) 387 ITR 122 / 243 Taxman 233 / 290 CTR 487 / 144 DTR 105 (SC)

Editorial: Decision in Girilal and Company v. S. L. Meena, ITO (2008) 300 ITR 432 (Bom.) (HC) is affirmed.

1716 **S. 147 : Reassessment – Change of opinion – Within four years – Issue of notice of reassessment in absence of any allegation that there was any failure on part of assessee to disclose truly and fully all material facts necessary for assessment, considering first proviso to S. 147 was absolutely improper. Further, issue of notice within period of 4 years was mere change in opinion and hence, reopening was not sustainable. [S.148]**

Dismissing the SLP of the revenue, the Court held that so far as initiation of impugned reassessment proceedings and impugned notices u/s. 148 within 4 years was concerned, it appeared that reopening taken place only on ground that assessee paid price of sugarcane more than SMP. In all cases assessments were completed u/s. 143(3) by AO after holding necessary inquiry. The High Court observed, that once at time of original assessment AO accepted return, thereafter reopening of assessment could be said to be on mere change of opinion of AO and merely on change of opinion of AO, reassessment proceedings were not permissible. Thus, the High Court held that impugned notices u/s. 148 to reopen proceedings beyond 4 years and within 4 years on ground that payment of purchase price in excess to SMP had escaped assessment could not be sustained and same deserved to be quashed and set aside.

DCIT v. Vadodara District Co-op. Sugarcane Growners Union Ltd. (2016) 242 Taxman 110 (SC)

Editorial : Refer Shree Chalthan Vibhag Khand v. Dy CIT (2015) 376 ITR 419 / 233 Taxman 469 (Guj.)(HC) SLP rejected (2016) 240 Taxman 2 (SC)

S. 147 : Reassessment – Mechanical way of recording satisfaction by Joint Commissioner for granting approval for reopening is unsustainable. [S. 148] 1717

A search was conducted at the residential and business premises of assessee. Thereafter notice for block assessment under section 158BC of the Act was issued and returns were filed which were processed under section 143(1) of the Act. However, notice under section 148 was issued by the Assessing Officer on basis of certain reasons recorded. Order was passed under section 143(3) read with section 147, of the Act, pursuant to that appeals were filed before the Commissioner on Income Tax (Appeals), Income Tax Appellate Tribunal and the High Court.

The High Court found that the reasons recorded by the Joint Commissioner, for according section, it only stated that "I am Satisfied". As this action for sanction was without application of mind and this was done in mechanical manner, following the law laid down in case of *Arjun Singh v. ADIT (246 ITR 363)(SC)*, the Commissioner (Appeals) quashed the notice under section 148 of the Act, and the same having been upheld by Tribunal and the Hon'ble High Court. Aggrieved by the High Court, Revenue filed an appeal before the Supreme Court which was dismissed by the Hon'ble Supreme Court.

CIT v. S. Goyanka Lines & Chemical Ltd. (2016) 237 Taxman 378 (SC)

S. 147 : Reassessment – After the expiry of four years – Additional depreciation – Reopening of assessment was based on re-appreciation of material already available on record at time of scrutiny assessment which amounted to mere change of opinion hence bad in law. [S.32, 80IA, 148] 1718

Dismissing the appeal of the Revenue, the Court held that the assessee had made true and full disclosure of all relevant facts relating to the claim of additional depreciation. The assessee had also submitted reply pursuant to all queries made by Assessing Officer during the assessment proceedings under section 143(3). Thus, it was held that there was no new tangible material to reopen the assessment and that the formation of the belief by the AO regarding escapement of the assessment was based on re-appreciation of the material already available on record at the time of scrutiny assessment which amounted to mere change of opinion. Accordingly, the reassessment was held to be invalid. (AY. 2005-06)

CIT v. Hindustan Zinc Ltd. (2016) 143 DTR 79 / 241 Taxman 392 / 290 CTR 322 (2017) 393 ITR 264 (Raj.)(HC)

S. 147 : Reassessment – After the expiry of four years – Disclosed fully and truly all relevant materials – Reassessment proceedings was held to be invalid. [S. 80I, 80HH, 148] 1719

Dismissing the appeal of the revenue, the Court held that it was discernible from the order of the Appellate Tribunal that the assessee had responded to the queries raised by the AO in the original assessment proceedings and during the course of such proceedings had produced all the relevant material facts as were called for and necessary to complete the assessment for the year. The Appellate Tribunal was justified in concluding that the reassessment proceedings were impermissible in view of the embargo under the first proviso to section 147. The order of the Appellate Tribunal was affirmed.

CIT v. Hindustan Latex Ltd. (2016) 389 ITR 407 / 76 Taxamnn.com 332 (Ker.)(HC)

1720 **S. 147 : Reassessment – After the expiry of four years – Absence of new material showing misdeclaration by assessee, notice was held to be invalid. [S. 28(i), 148]**

Allowing the petition, the Court held that reassessment was not permissible once the issue of allowability of loss had been thoroughly examined by the AO in the original order of assessment without there being any suggestion that the AO was in possession of some external material which would have shown that the assessee had not disclosed material facts truly and fully. He had examined the issue at length before concluding that the transactions were not off market transactions and that the loss suffered by the assessee could not be disallowed. Whatever be the validity of such findings, the AO himself could not question them by issuing the notice for reassessment, that too without there being anything additional on record, suggesting that the assessee had not disclosed true and full facts. In the reasons recorded, the AO merely hinted at the lack of disclosure regarding the loss and did not refer to the assessee's lack of disclosure of the sister concern. In the assessment order itself the AO had referred to the sister concern as one of the group concerns. His consideration of the issue of allowability of the loss was therefore not tainted by any mis-declaration by the assessee. The reassessment notice was invalid. (AY. 2004-05)

Prudent Finance P. Ltd. v. ACIT (2016) 389 ITR 488/ 75 taxmann.com 110 (Guj.)(HC)

1721 **S. 147 : Reassessment – After the expiry of four years – AO not having new material not forming part of original assessment proceedings, reassessment was held to be not valid. [S. 80IA, 115JB, 148]**

The reasons recorded by the AO nowhere demonstrated that the assessee had failed to disclose true and full facts. The reasons recorded established that the AO was referring to the material already on record to assert that the claim of expenditure was not in tune with the minimum alternate tax provisions contained under section 115JB and in particular, Explanation 1(c) thereto. The AO did not have additional or new material which did not form part of the original assessment proceedings to question the assessee's claim to deduction in this respect. Notice of reopening based on such ground which was issued beyond a period of four years, would therefore not be valid. The claim to deduction under section 80IA(4)(iv) was examined not only in the context of the petitioner's larger deduction but, specifically to that portion of the claim which related to the sale of steam. Such ground could not be re-agitated in exercise of power for reassessment, that too beyond the period of four years. (AY. 2010-11)

Meghmani Energy Ltd. v. Dy. CIT (2016) 389 ITR 281 / 243 Taxman 551 (Guj.)(HC)

1722 **S. 147 : Reassessment – After the expiry of four years – Sale of agricultural land – Reassessment on basis that land sold for commercial purposes amounts to change of opinion was held to be, not permissible – Writ petition cannot be dismissed on ground of availability of alternate remedy, writ petition is maintainable. [S. 2(14), 148, Constitution of India, Art. 226]**

Allowing the petition the Court held that the Department could not deny the fact that there was a full and true disclosure by the assessee of all material facts necessary for assessment. The case of the assessee fell under the category of true and full disclosure upon which the assessment order was passed on the opinion that the lands sold by the

assessee were agricultural lands and did not fall under the category of mere production of books of account and other records. The replies submitted by the assessee to the questionnaire indicated that the claim of the assessee was examined by the AO before he passed the original assessment order under section 143(3). Therefore to say after four years that the lands were sold to a real estate company for the purpose of forming a special economic zone amounted to a change of opinion which was not permitted by law. Writ petition cannot be dismissed on ground of availability of alternate remedy, writ petition is maintainable. (AY. 2008-09)
Kohinoor Hatcheries P. Ltd. v. Dy. CIT (2016) 389 ITR 493 / 76 taxmann.com 150 (T&AP) (HC)

S. 147 : Reassessment – After the expiry of four years – Bogus labour expenses – Notice after application of mind by AO and formation of own belief that income chargeable to tax had escaped assessment, notice was held to be valid. [S.371(1), 148] 1723
Dismissing the petition the Court held that the reason for reassessment after four years was that a substantial amount of labour charges were claimed though not incurred. The Department relied on the material collected by the investigation wing pursuant to a search operation. This material *prima facie* suggested that labour contractors were paid sizable amounts of labour charges without such labour work having been taken by the assessee. These aspects were not at large before the AO during the original assessment proceedings. Any examination by the AO of the assessee's claim of labour expenses would be confined to the declarations made by the assessee and the material produced by the assessee in response to the queries raised by the AO. The concluding portion of the reasons recorded by the AO, were in the nature of his observations on the basis of materials supplied by the investigation wing collected during the search operations. These observations indicated the application of mind by the AO and formation of his own belief that income chargeable to tax had escaped assessment. This was therefore, not a case of the AO proceeding on a borrowed satisfaction of the investigation wing. The notice was valid. (AY. 2008-09)
HVK International P. Ltd. v. Dy. CIT (2016) 389 ITR 630 / 72 Taxmann.com 208 (Guj.)(HC)

S. 147 : Reassessment – After expiry of four years – Depreciation – Change of opinion – Reassessment was quashed. [S. 32, 148] 1724
For relevant year, assessment in case of assessee was completed under section 143(3). After expiry of four years from end of relevant year, Assessing Officer reopened assessment on ground that even though assessee-company had come into existence from 30-8-2003, yet it claimed depreciation for whole year which resulted in excess claim of depreciation. On writ allowing the petition the Court held that it was undisputed that prior to formation of company, assessee was operating as a partnership firm. It was also undisputed that assessee company had claimed full deduction for entire year and correspondingly, partnership in turn for same period did not claim any depreciation. Even otherwise, Assessing Officer had allowed depreciation in original order of assessment after scrutinising return in detail. In aforesaid circumstances, initiation of reassessment proceedings merely on basis of change of opinion was not justified. (AY. 2004-05)
Anupam Rasayan India Ltd. v. ITO (2016) 243 Taxman 472 (Guj.)(HC)

1725 **S. 147 : Reassessment – After the expiry of four years – No failure to disclose material facts necessary for assessment, notice was not valid. [S.10A, 92C, 148]**
Allowing the petition the Court held that with respect to the first reason, the Assessing Officer was of the opinion that the additions made during the course of the original assessment by applying the arm's length price under section 92C of the Act would not qualify for deduction under section 10A of the Act. Even if that be so, nowhere had the Assessing Officer recorded that excess deduction was granted to the assessee due to failure on the part of the assessee to disclose truly and fully all material facts. In respect of the second reason it was clear from the record that under communication to the Assessing Officer, the assessee had given detailed clarification regarding the telecommunication expenses and freight and insurance charges. Thus, not only had the assessee made full disclosures in the original return filed, this issue was examined by the Assessing Officer during the original assessment for which the assessee had given written explanation. There was no failure to disclose material facts necessary for assessment. The notice was not valid.(AY. 2008-09)
Mastek Ltd. v. A CIT (2016) 387 ITR 72 (Guj.)(HC)

1726 **S. 147 : Reassessment – After the expiry of four years – Original assessment after scrutiny partially disallowing claim for exemption – Notice after four years to disallow entire exemption was held to be not valid. [S. 37(1), 148]**
Allowing the petition the Court held that in the notice for reassessment the reasons started with narration "on verification of the case record...". Thus, the conclusions of the Assessing Officer were based on verification of the case record. In other words, there was no material outside the assessment proceedings which enabled the Assessing Officer to conclude that income chargeable to tax had escaped assessment. This element would be crucial since notice for reopening had been issued beyond a period of four years from the end of the assessment year. Quite apart from the assessee`s placing full material at the disposal of the Assessing Officer, the claim was also examined by the Assessing Officer during the assessment proceedings. Having accepted the claim in law, but having made partial disallowance considering the facts, it was thereafter not open to the Assessing Officer to issue notice for reopening, that too, without any additional material which would suggest that the assessee had made a false declaration or provided inaccurate particular. (AY. 2009-10)
Nishith Surendrabhai Soni v. ACIT (2016) 387 ITR 99 (Guj.)(HC)

1727 **S. 147 : Reassessment – After the expiry of four years – Capital gains – Failure by assessee to furnish cost of acquisition of shares and failure by Assessing Officer to examine transfer of shares – Scrutiny permissible even if notice for reopening issued beyond period of four years. [S. 148]**
Dismissing the petition the Court held that *prima facie* it appeared that the assessee effectively sold the shares in K for acquiring the shares in A which were allotted to the assessee in accordance with the transfer arrangement between K and the assessee. The assessee failed to place on record the cost of acquisition of shares in K. The nature of transaction of transfer of investment was not visible from the declaration made by the assessee. There was failure by the Assessing Officer to examine the transfer of shares

in K by acquisition of preferential shares in A. Therefore, this was a case where further scrutiny would be permissible even if the notice for reopening was issued beyond a period of four years from the period of assessment year. The contention of the assessee that the assessee held no shares in K and the amount of ₹ 21.99 crores against K's preferential shares was mere mistake, could not be examined in the writ petition and could be examined only at the time of reassessment. (AY. 2009-10)
Ravjibhai Nagarbhai Patel v. ITO (2016) 387 ITR 639 (Guj.)(HC)

S. 147 : Reassessment – After the expiry of four years – Unexplained expenditure – Accommodation entries – Fake transactions – Information from investigation wing – Reassessment was held to be valid. [S. 69C, 143(3), 148] 1728
Assessee firm was engaged in manufacturing and selling gold and other ornaments. It filed return declaring certain taxable income - Assessing Officer completed assessment under section 143(3) making certain additions. After expiry of four years from end of relevant year, Assessing Officer sought to initiate reassessment proceedings on basis of report of Investigation wing of department that assessee had shown certain purchases of raw diamonds from firm 'S' Ltd. consisting of two directors who were engaged in providing accommodation entries and, it being a fake transaction without real trading of diamonds, assessee had thereby reduced its income by claiming fake purchases. The assessee filed the writ petition against the reassessment proceedings. Dismissing the petition, the Court held that it was undisputed that directors of 'S' Ltd. in course of search proceedings had themselves admitted that they were engaged in providing accommodation entries without actual sale of diamonds. On facts, merely because information was supplied to Assessing Officer by investigation wing of department would not mean that Assessing Officer could not rely upon it, therefore, validity of reassessment proceedings was to be upheld. (AY. 2008-09)
Choksi Vachharaj Makanji & Co. v. ACIT (2016) 243 Taxman 465 (Guj.)(HC)

S. 147 : Reassessment – After the expiry of four years – Book profit – diminution of value of derivatives – Reassessment was held to be not valid. [S.80IA(4)] 1729
Assessee-company was engaged in business of generation and distribution of power. For relevant assessment year, assessee filed return of income, declaring 'Nil' income under normal provisions of Act, and book profit of ₹ 4.23 crores under MAT provisions - Assessing Officer completed assessment under section 143(3) accepting various declarations made by assessee. After expiry of four years from end of relevant year, Assessing Officer initiated reassessment proceedings on two grounds, firstly, loss incurred by assessee on account of diminution of value of derivatives was required to be added back for purpose of computation of book profit and, secondly, assessee's claim for deduction under section 80-IA(4)(iv) in respect of sale of steam to its sister concern was wrongly allowed - Whether since there was no failure on part of assessee to disclose truly and fully all material facts, in view of proviso to section 147, initiation of reassessment proceedings after expiry of four years from end of relevant assessment year was not justified. (AY. 2010-11)
Meghmani Energy Ltd. v. DCIT (2016) 243 Taxman 551 / 389 ITR 281 (Guj.)(HC)

1730 **S. 147 : Reassessment – After the expiry of four years transfer pricing – Matter was set aside to the AO to consider the objection raised by the assessee. [S.92CA(2C), 92E]**
The AO reopened the assessment on the ground that the transfer pricing adjustment has escaped assessment. On writ petition, the HC observed that, the original assessment proceedings were completed prior to 1-7-2012 and thus, reopening is hit by S. 92CA(2C) which provides that the AO is not empowered to invoke reassessment proceedings u/s. 147 in respect of the transaction not reported in the report furnished u/s. 92E. Accordingly, it was held that though this objection was not raised before the AO, but it went to root of the matter & therefore, it was appropriate that this objection was considered by the AO and disposed of expeditiously. (AY. 2008-09)
Amore Jewels (P.) Ltd. v. P CIT (2016) 290 CTR 681 / 241 Taxman 321 / 144 DTR 101 (Bom.)(HC)

1731 **S. 147 : Reassessment – After the expiry of four years – Limitation – Notice issued after six years – Beyond time limit provided under section 149(1)(b) – Reassessment notice and proceedings pursuant thereto illegal. [S.148, 149(1)(b)]**
Held, allowing the petition, the Court held that as far as the assessment year 1993-94 was concerned the notice under section 148 of the Income-tax Act, 1961 and the proceedings pursuant thereto were unlawful as the notice was issued after six years, beyond the time limit prescribed under section 149(1)(b). (AY. 1993-94, 1994-95)
Nestle India Ltd. v. Dy. CIT (2015) 384 ITR 334 (Delhi)(HC)

1732 **S. 147 : Reassessment – After the expiry of four years – Assessee maintaining separate accounts and presenting accounts in course of assessment – Reasons recorded not showing suppression of material facts – Notice issued beyond period of limitation – Invalid. [S.80IA, 148]**
Allowing the appeal the Court held that the reasons recorded by the AO were borne out from the data available in the assessment records. Full separate accounts of both the businesses that had been maintained by the assessee had also been presented by it before the AO during the course of the assessment. Therefore, there was no failure on the part of the assessee to disclose truly and fully all the material facts necessary for assessment. The notice, which was issued beyond the period of limitation of four years, for reopening of the assessment was to be quashed. (AY. 2008-09)
Jivraj Tea Ltd v. ACIT (2016) 386 ITR 298 (Guj.)(HC)

1733 **S. 147 : Reassessment – After the expiry of four years – Conversion of investment in to stock-in-trade – Reassessment was held to be not justified. [S. 45(2), 148]**
Assessee converted its investment into stock-in-trade. Entered into JDA and executed a Power of Attorney. In the original assessment AO did not invoke section 45(2). Reopened on the ground that 45(2) applicable since after conversion stock transferred. ITAT held, all the facts within the knowledge of the AO during the original assessment proceedings. ITAT also held that AO either overlooked the applicability of provision or thought that the transaction was not taxable in the year. ITAT held, no failure to disclose and it was mere change of opinion, held, no substantial question of law. (AY 2005-06)
CIT v. Chaitanya Properties (P.) Ltd. (2016) 240 Taxman 659 / 140 DTR 224 (Karn.)(HC)

S. 147 : Reassessment – After the expiry of four years – Share application money – No failure to disclose material facts necessary for assessment – Notice was held to be not valid. [S. 68, 148] 1734

Held, allowing the petition, that the matter was one of change of opinion. The questionnaire specifically raised the issue with regard to share capital. It required the assessee to give a list, source, genuineness, identity of the shareholders along with confirmation copies of the ledger account of the party including confirmation of the mode, date, address and acknowledgment of return, etc. from the party along with source and relevant bank entries. The information was provided by the assessee. After receipt of the information, the Assessing Officer did not think it fit to make an addition and, under these circumstances, no addition itself amounted to forming an opinion. Another reason why the notice under section 148 of the Income-tax Act, 1961 and the proceedings consequent thereto had to be set aside was that the pre-condition of there being a failure on part of the assessee to fully and truly disclose all the material particulars necessary for assessment had not been made out. (AY. 2007-08)

Allied Strips Ltd. v. ACIT (2016) 384 ITR 424 / 69 taxmann.com 444 (Delhi)(HC)

S. 147 : Reassessment – After the expiry of four years – No new tangible material provided by Department – Nothing on record to show failure on part of assessee to truly and fully disclose all material facts – Reassessment invalid. [S. 148] 1735

Held, allowing the petition, the Court held that; as far as the Assessment Year 1994-95 was concerned the notice was issued after four years which was beyond the statutory time limit. There was nothing on record to show that there was any tangible material providing a live link to the reasons to believe that income escaped assessment. There was no failure by the assessee to fully and truly disclose material facts. Thus, the order dated March, 18, 2002, recording the reasons for reassessment was not in conformity with the mandatory requirement under section 147 and was therefore unsustainable in law. (AY. 1993-94, 1994-95)

Nestle India Ltd. v. Dy. CIT (2015) 384 ITR 334 (Delhi)(HC)

S. 147 : Reassessment – After the expiry of four years – Examined the details in the original assessment proceedings – Reassessment was quashed – DTAA-India-United Kingdom. [S.9(1), 148, Art. 5, 7] 1736

Allowing the petition, the Court held that; Assessment order indicating Assessing Officer had conducted detailed examination. No reason to believe income escaped assessment. Assessing Officer examining statement of computation of loss and recording satisfactory finding. No material indicating accounts, vouchers or details provided by assessee inaccurate or false. Notice for reopening assessment on account of change of opinion liable to be quashed. (AY. 2002-03)

BBC Worldwide Ltd. v. ADIT (IT) (2016) 383 ITR 197 / 239 Taxman 121 / 135 DTR 86 (Delhi)(HC)

1737 **S. 147 : Reassessment – After the expiry of four years – In original assessment proceedings AO accepted that the income received by the assessee is to be taxed as royalty under Article 12 of the India-USA DTAA – Notice u/s. 148 issued for taxing income under Article 7 as the AO was of the view that royalty payable was linked to its PE in India and by applying the principle of 'force of attraction' said royalty would be taxable as business profits under the said Article 7 – Held, reassessment not sustainable as there was no failure on part of assessee to disclose all material facts and that the assessment was reopened merely on the basis of change of opinion – DTAA-India-USA. [S. 9(1)(vi), 148, Art. 7, 12]**

The assessee, a US based company, was engaged in the manufacture and production of business support software. It had a wholly owned subsidiary in India, namely, OIPL. The assessee entered into a 'Software Duplication and Distribution License Agreement' with OIPL pursuant to which OIPL sub-licensed software products to various customers in India. The assessee offered the royalty received under the aforesaid agreement to tax in its return of income. During the original assessment proceedings, AO accepted the said contention of the assessee. Subsequently, AO took a view that royalty payable to the assessee by OIPL was linked to its PE in India and by applying the principle of 'force of attraction', the said royalty would be taxable as business profits and not as royalty under Article 12 of DTAA and accordingly, issued a notice u/s. 148. High Court held that, there was no failure on the part of the assessee to disclose all material fact. The AO was well aware about the existence of PE of the assessee in India and had himself taxed the income from the aforesaid agreement as royalty income. Further, reasons for reopening of assessment also did not indicate that the AO had discovered that the royalty in question was earned by the assessee through a PE, it only alleged that it was observed that such royalty was 'linked' to the assessee's PE. Thus, it was held that there was no tangible material available with the AO to reopen the assessment and that the reassessment would amount to change of opinion which is not permissible in law. (AY. 2005-06)

Oracle Systems Corporation v. DIT(IT) (2016) 383 ITR 434 / 238 Taxman 165 / 137 DTR 33 / 287 CTR 636 (Delhi)(HC)

1738 **S. 147 : Reassessment – After the expiry of four years – Reopening of assessment after the expiry of four years without showing any failure on part of assessee to disclose fully and truly all material facts, is liable to be quashed – Reopening of a claim which has been examined and allowed in the original assessment proceedings, is a "mere change of opinion". [S. 10(33), 148]**

In the return of income, the assessee claimed dividend income from units of mutual fund as exempt u/s. 10(33) of the Act. The said claim was examined and allowed in regular assessment proceedings.

Thereafter, the AO reopened the assessment u/s. 147 of the Act on the ground that dividend income is not exempt u/s. 10(33) of the Act as it has arisen from transfer of units of mutual funds and also, the assessee is a trader in shares and dividend income received was integral part of traded goods and could not be segregated from cost of shares.

The assessee challenged the initiation of reassessment proceedings by filing a writ petition before the Hon'ble Bombay HC. The HC quashed the initiation of reassessment proceedings on the ground that assessment was reopened after the expiry of four years without showing any failure on the part of the assessee to disclose fully and truly all material facts. Further,

in the original assessment proceedings, claim of exemption u/s. 10(33) was specifically examined and allowed, hence, reopening was a "mere change of opinion".
On merits, the HC held that dividend income has been earned from holdings of units of mutual funds and not from transfer of units. Therefore, impugned dividend income is eligible for exemption u/s. 10(33). (AY. 2000-01)
Nirmal Bang Securities (P) Ltd. v. ACIT. (2016) 382 ITR 93 / 131 DTR 35 / 284 CTR 244 (Bom.)(HC)

S. 147 : Reassessment – After the expiry of four years – Deductions granted in original assessment after enquiry – Reassessment was held to be invalid. [S.148] 1739
During original assessment proceedings, the assessee submitted complete details of the software licence fees and justified its claim. Only thereafter did the Assessing Officer while framing the assessment, treat the payment of software licence fees made to the foreign companies as revenue expenditure and allow the deductions Subsequent reopening on the ground that payment of software licence fees was in the nature of royalty and, thus, in the nature of capital expenditure, and wrongly claimed the deduction, was not valid. (AY. 2008-09)
E-Infochips Ltd. v. Dy. CIT (2015) 231 Taxman 838 / 123 DTR 199 / (2016) 380 ITR 449 (Guj.)(HC)

S. 147 : Reassessment – After the expiry of four years – Recompute valuation of stock – No failure to disclose material facts necessary for assessment – Notice was held to be not valid. [S.148] 1740
Where the issue of accounting treatment in respect of unutilised CENVAT credit for the purpose of valuing the closing stock was already examined by the Assessing Officer during the scrutiny assessment, reassessment proceedings on the same issue without any tangible material is mere a change of opinion and, hence, not sustainable. (AY. 2009-10)
Tirupati Foam Ltd. v. Dy. CIT (2016) 380 ITR 493 (Guj.)(HC)

S. 147 : Reassessment – After the expiry of four years – Assessee disclosed all material facts necessary for making assessment and no failure on his part – Reassessment was held to be invalid. [S.148] 1741
Dismissing the appeal of revenue, the Court held that in the reasons recorded by the Assessing Officer, he observed that the entries made related to purchases, which explanation was given by the assessee in the original assessment proceedings. Consequently, all the necessary explanation and information was furnished by the assessee and, therefore, there was no failure on the part of the assessee to disclose fully and truly all material facts for making assessment. The Tribunal had given a categorical finding that the assessee had disclosed all the material facts necessary for making the assessment and there was no failure on his part. This finding of the Tribunal was perfectly correct and the Assessing Officer in his original assessment proceedings had considered each and every document and the explanation given by the assessee on the seized documents. Therefore, it was not a case where the assessee failed to disclose fully or truly all material facts necessary for making the assessment. The notice issued u/s 148 was invalid. (AY. 1991-92)
CIT v. Hemkunt Timbers Ltd. (2016) 380 ITR 658 / 283 CTR 1 / 67 taxmann.com 231 (All.)(HC)

1742 **S. 147: Reassessment – After the expiry of four years – CBDT instructions cannot override the provisions – Assessing Officer has to form his own opinion – Reassessment on the basis of Audit objection was held to be bad in law. [S.148]**
Allowing the petition the Court held that Reopening of assessment to take remedial action pursuant to audit objections as per Instruction No. 9 of 2006 is not valid if AO disagrees with the objections. Instruction No. 9 cannot override the requirement in s. 147 that AO should form his own belief that income has escaped assessment. Court held that the CBDT instructions cannot override the provisions of section 147. (AY. 2004-05)
Sun Pharmaceuticals Industries Ltd. v. DCIT (2016) 381 ITR 387 / 237 Taxman 709 / 137 DTR 18 / 287 CTR 621 (Delhi)(HC)

1743 **S. 147 : Reassessment – Omission to issue notice under section 143(2) is not curable defects – Reassessment was not valid – Notice and reassessment on basis of documents discovered during income-tax survey and admission of assessee was held to be valid. [S. 143(2), 148, 292BB]**
Even within the time available for issuing notice under section 143(2) for making regular assessment if the Assessing Officer is of the view that materials available with him or discovered by him are such as to justify a belief of income escaping assessment under section 147, he is free to record the reasons for the belief and proceed to make the reassessment. In the absence of a notice under section 143(2), no further proceedings can be continued for assessment under section 143 and without such a notice the Assessing Officer cannot assume jurisdiction and this defect cannot be cured subsequently, since it is not a procedural defect, but a defect that goes to the root of the jurisdiction. Section 292BB creates an estoppel against the assessee in claiming that no notice has been served on him, if he has participated in the proceedings. However, the said section does not in any manner grant any privilege to the Assessing Officer in dispensing with the issuance of a notice under section 143(2) of the Act. Since the jurisdiction under section 143 is founded on the issuance of a notice under section 143(2), the Assessing Officer could have assumed jurisdiction only after issuing a notice under section 143(2). Even the participation of the assessee would not provide the benefit under section 292BB to the Revenue. The requirement that a notice be issued is mandatory and the Assessing Officer has no other option but to issue the notice before commencing the jurisdiction.
Travancore Diagnostics P. Ltd v. ACIT (2016) 290 CTR 241 / (2017) 390 ITR 167 / 244 Taxman 316 (Ker.)(HC)

1744 **S. 147 : Reassessment – Search by Excise Department – AO had sufficient material available with him which he perused, considered, applied his mind and recorded finding of belief that income chargeable to tax had escaped assessment – Reassessment was held to be valid. [S. 145, 148]**
Allowing the appeal of the Revenue, the Court held that; the entire material collected by the DGCEI during the search, which included incriminating documents and other such relevant materials, was along with report and show-cause notice placed at the disposal of the Assessing Officer which *prima facie* suggested suppression of sale consideration of the tiles manufactured by the assessee to evade excise duty. Based on such material, AO formed a belief that income chargeable to tax had also escaped

assessment. Accordingly, the Court held that AO had such material available with him which he perused, considered, applied his mind and recorded the finding of belief that income chargeable to tax had escaped assessment, and therefore, the re-opening could not be declared as invalid. (AY. 2004-05)
PCIT v. Gokul Ceramics & Ors. (2016) 141 DTR 45 / 289 CTR 126 / 241 Taxman 1 (Guj.) (HC)

S. 147 : Reassessment – Jurisdiction of Assessing Officer – survey carried on by officer of Ward 46, since no objection was taken within 30 days even from date of issuance of notice under section 148, assessee had lost right to raise objection by efflux of time. [S. 124, 133A, 148] 1745
The AO, Ward 46 conducted a survey u/s. 133A upon the assessee on 6-2-2015. Thereafter he issued on the assessee a notice u/s. 148 dated 27-3-2015 pertaining to the AY 2012-13 to 2014-15. Assessee filed a writ petition challenging the action of the AO on the ground that he had no jurisdiction over its case on and from 15-11-2014 in view of the CBDT Circular dated 22-10-2014. High Court directed to the AO to respond to the assessee's objection. AO held that the assessee had lost the right to raise objection to the territorial jurisdiction by efflux of time. Assessee, again filed a writ petition. High Court again dismissed the petition. Assessee filed an appeal against the said order. High Court held that, the assessee had lost the right to raise the objection to territorial jurisdiction of the Assessing Officer by efflux of time. (AY. 2012-13 to 2014-15)
Elite Pharmaceuticals v. ITO (2016) 242 Taxman 345 / (2017) 152 DTR 226 (Cal.)(HC)

S. 147 : Reassessment – Merger – Partly allowed by the Assessing Officer – Reassessment was held to be not justified. [S. 80HHC, 80IA] 1746
Dismissing the appeal of the revenue, the Court held that the Assessing Officer had considered issue relating to deductions under sections 80IA and 80HHC in detail in original assessment proceedings and also the Assessing Officer had allowed assessee's claim for deduction partly against which, assessee had approached Commissioner (Appeals), who had partly granted reliefs, therefore Tribunal was justified in setting aside reassessment proceedings. (AY. 2000-01, 2001-02)
PCIT v. Sun Pharmaceutical Industries Ltd. (2016) 241 Taxman 332 (Guj.)(HC)
Editorial : SLP of the revenue was admitted; PCIT v. Sun Pharmaceutical Industries Ltd. (2017) 244 Taxman 218 (SC). PCIT v. Sun Pharmaceutical Industries Ltd. (2017) 246 Taxman 60 (SC)

S. 147 : Reassessment – Notice u/s. 143(2) is mandatory and section 292BB does not in any manner grant any privilege to Assessing Officer in dispensing with issuance of such a notice – Reassessment was held to be invalid. [S. 143(2), 148, 292BB] 1747
Allowing the appeal of the assessee, the Court held that notice u/s. 143(2) is mandatory and section 292BB does not in any manner grant any privilege to Assessing Officer in dispensing with issuance of such a notice- Reassessment was held to be invalid In the result, appeal is allowed and the assessment order is set aside. (AY. 2009-10)
Travancore Diagnostics (P.) Ltd. v. ACIT (2016) 290 CTR 241 / (2017) 244 Taxman 316 / 390 ITR 167 (Ker.)(HC)

1748 **S. 147 : Reassessment – Conditions for reopening the assessment remains the same even when no return of income is filed by the assessee. [S. 139, 148]**
The High Court held that mere non filing of return of income does not give jurisdiction to the Assessing Officer to re-open the assessment unless the assessee has total income which is chargeable to tax. Therefore, non filing of return of income and/or not obtaining of PAN does not *ipso facto* give jurisdiction to reopen an assessment under Section 147/148 of the Act. *Prima facie,* the jurisdiction even in case of non filing of return of income to issue notice of re-opening notice is a reasonable belief of the Assessing Officer that income chargeable to tax has escaped assessment. The condition precedent for issuance of notice under Section 147/148 of the Act is no different in cases where no return of income has been filed. If clause (a) of Explanation 2 to Section 147 of the Act is to be applied then it must be established that the income of the person to whom the notice is issued is in excess of the maximum amount not chargeable to tax. (AY. 2008-09)
General Electoral Trust v. ITO (2016) 141 DTR 294 / 289 CTR 284 (Bom.)(HC)

1749 **S. 147 : Reassessment – Reassessment not valid when reasons for reopening the assessment was not served on the assessee. [S. 148]**
The High Court held that the as reasons for reopening the assessment was not served on the assessee despite request for the same by the assessee, the reassessment is invalid and therefore, the notice under section 148 and reassessment order are liable to be quashed. (AY. 2006-07)
Kothari Metals v. ITO (2016) 140 DTR 150 / 288 CTR 606 (Karn.)(HC)

1750 **S. 147 : Reassessment – Reassessment due to change of opinion is invalid when all details were filed before the Assessing Officer during the scrutiny assessment proceedings. [S. 148]**
The High Court held that the reassessment is not valid as all the details were filed before the Assessing Officer during the scrutiny assessment proceedings and therefore, the reassessment proceedings were initiated based on the change of opinion. In the absence of any material, as anticipated by the AO in the office note, it is difficult to appreciate on what basis the AO could form the "reasons to believe", that for the AY in question any income has escaped assessment.(AY. 1994-95)
Kulbhushan Khosla v. CIT (2016) 143 DTR 281 (Delhi)(HC)

1751 **S. 147 : Reassessment – Notice issued under section 148 is quashed as the subject matter of the notice had attained finality. [S. 148]**
The High Court quashed the notice issued under section 148 of the Income-tax Act for the reason the proposed disallowance on account of expenses incurred for land consolidation already attained finality when the same was deleted by the Commissioner of Income-tax (Appeals) against the order passed under section 143(3) and the same being confirmed by the Tribunal. Further, existence of alternative remedy is not a ground to dismiss the writ petition when the notice, on the face of it, is illegal. (AY. 2008-09)
Kiran Kanwar (Smt.) v. UOI (2016) 143 DTR 297 / 290 CTR 403 (Raj.)(HC)

S. 147 : Reassessment – Service of Notice – AO had sent the notice at the address mentioned on the PAN through postal department – Postal authorities returned back the notice with the remark "left" Reassessment was held to be valid. [S. 148] 1752

AO had sent the notice at the address mentioned on the PAN through postal department. Postal authorities returned back the notice with the remark "left". Assessee challenged the reassessment proceedings. Dismissing the petition the Court held that ;the petitioner did not enquire with the postal department as to why and under what circumstances was the remark 'left' made. Therefore, only on the ground of non-issuance of the service of notice, the reassessment proceedings could not be terminated. (AY. 2009-10)

Atulbhai Hiralal Shah v. Dy. CIT (2017) 244 Taxman 27 (Guj.)(HC)

Editorial : SLP of assessee was dismissed; Atulbhai Hiralal Shah v. Dy. CIT (2016) 242 Taxman 259 (SC)

S. 147 : Reassessment – Deduction was allowed after enquiry in scrutiny assessment, reassessment was held to be not valid. [S. 80IB(10), 148] 1753

Held, that deduction under section 80IB(10) was the main claim of the assessee which came up for scrutiny in the assessment. The AO raised several queries. It was not the case of the AO that in response to the queries raised during such assessment, the assessee did not make true or proper disclosures. The reasons recorded did not rely on any material outside the record. The notice under section 148 on the ground that the deduction had been granted erroneously was not valid. (AY. 2005-06)

Amaltas Associates v. ITO (2016) 389 ITR 340 (Guj.)(HC)

S. 147 : Reassessment – Opinion of audit party on point of law not information enabling Income – tax Officer to initiate reassessment proceedings – Reassessment notice void and to be set aside. [S.36(1)(iii), 80IB, 148] 1754

In the original assessment the claim of deduction under section 80-IB was examined by the AO. The matter was verified from the records and only thereafter the claim was accepted as it was. The AO might have committed an error in allowing deduction with respect to several amounts which might not be eligible for such deduction. An erroneous decision of the AO was different from non-consideration of an issue at the time of assessment. Therefore it could not be stated that the issue was not scrutinised by the AO during the original assessment. The audit party brought a certain issue to the notice of the AO and compelled her to issue notice of reopening despite her clear opinion that the issue was not valid and that there was no escapement of income on the grounds so urged by the audit party. Since the opinion of the audit party on a point of law could not be regarded as information enabling the Income-tax Officer to initiate reassessment proceedings, the notice was void and to be set aside. *Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 (SC)* applied. (AY. 2001-02)

N.K. Proteins Ltd. v. ITO (2016) 389 ITR 541 / 76 taxmann.com 241 (Guj.)(HC)

1755 **S. 147 : Reassessment – The Department's reference to otherwise binding judgments of the Supreme Court could have been the basis of a valid revision under section 263 but could not be the ground for reopening of assessment – No valid reason for reassessment proceedings to disallow claim of deduction under section 80IA. [S.148, 80IA]**
It was evident from the reasons recorded by the Department that there was no allusion to tangible material in the form of objective documents or information outside of the concluded assessment and the documents which pertained to it. Without such documents, evidence or tangible material, there could not be a valid reason leading to proper reassessment proceedings by invoking section 147. The Department's reference to otherwise binding judgments of the Supreme Court could have been the basis of a valid revision under section 263 but could not be the ground for reopening of assessment under section 147. All further proceedings were to be quashed. (AY. 1997-98)
Woodward Governor India Ltd. v. ACIT (2016) 389 ITR 50 (Delhi)(HC)

1756 **S. 147 : Reassessment – Book profit – Reasons recorded by Assessing Officer were not sufficient to reopen assessment, therefore, impugned reassessment proceedings were to be quashed. [S. 115JB]**
Assessee filed its return of income declaring Nil income. Return was taken under scrutiny by Assessing Officer, who passed order of assessment under section 143(3). Subsequently, Assessing Officer initiated reassessment proceedings mainly on ground that assessee was subjected to provisions of section 115JB and even though at present tax liability on assessee as per normal computation was higher than tax liability under MAT provisions, however, if assessee succeeded in appeal against order of assessment, question of applying MAT provisions could arise. On writ allowing the petition the Court held that ; reasons recorded by Assessing Officer were not sufficient to reopen assessment, therefore, impugned reassessment proceedings were to be quashed. (AY. 2009-10)
National Dairy Development Board v. ACIT (2016) 243 Taxman 560 (Guj.)(HC)

1757 **S. 147 : Reassessment – Search and seizure – Unsigned agreement – Reassessment was held to be justified. [S. 56(2), 132, 148]**
Assessee filed the petition contending that reopening of assessment on basis of unsigned agreement to sell was not justified. Dismissing the petition the Court held that, it was noted that in terms of agreement, assessee had received certain amount for vacating post of trustee and handing over properties to 'B'. On facts, even though agreement in question was unsigned, yet it could form a reason to believe that assessee's income had escaped assessment to tax, therefore validity of reassessment proceedings deserved to be upheld. (AY. 2010-11)
Jose Thomas v. DCIT (2016) 243 Taxman 483 (Ker.)(HC)

1758 **S. 147 : Reassessment – Unexplained investments – Data from Bombay Stock Exchange (BSE) – Record seized from an accommodation entry provider showed that assessee had received certain amount (pay-out) on sale of shares of company P which was floated and utilized for such purpose – Reassessment was held to be justified. [S. 69, 148]**
Record seized from an accommodation entry provider showed that assessee had received certain amount (pay-out) on sale of shares of company P which was floated and utilized

for such purpose. Further, documents seized from company P showed that said amount had, in fact, been received by assessee against payment of cash. Revenue authorities matched transactions found in such records with data from Bombay Stock Exchange (BSE) and entries were corroborated with trade data of company P maintained by BSE. It was on basis of such exercise that Assessing Officer recorded his reasons that income chargeable to tax had escaped assessment. The assessee challenged the reassessment proceedings. Dismissing the petition the Court held that since reasons recorded by Assessing Officer was valid, reopening of assessment was justified. (AY. 2010-11)
Vicky Rajesh Jhaveri v. DCIT (2016) 243 Taxman 573 / (2017) 148 DTR 150 / 293 CTR 291 (Guj.)(HC)
Editorial : SLP of assessee was dismissed, Sagar Rajesh Jhaveri v. DCIT (2016) 243 Taxman 515 (SC)

S. 147 : Reassessment – Unexplained investments – Reassessment on the basis of DVO's report was held to be not valid. [S. 55, 69,148] 1759
Assessment was completed under section 143(3). During process of assessment, all relevant bills for construction of factory building were produced and only thereafter assessment came to be finalized. Subsequently, on basis of report of DVO, Assessing Officer took a view that assessee had underestimated cost of construction of factory building. He thus issued a notice under section 148 seeking to reopen assessment. On writ allowing the petition the Court held that in view of fact that entire construction account was made available to Assessing Officer and only thereafter final assessment had taken place, DVO's report could not be construed as tangible material which would warrant Assessing Officer to exercise power of reopening of assessment,therefore, impugned reassessment proceedings deserved to be set aside. (AY. 2007-08)
Kisan Proteins (P.) Ltd. v. ACIT (2016) 243 Taxman 11 (2017) 292 CTR 345 (Guj.)(HC)

S. 147 : Reassessment – Charitable purpose – Issue which was examined by the Assessing Officer cannot be reopened – Relief is available to Trust promoting education even if it was engaged in publication of school books. [S. 2(15), 11, 12, 12AA] 1760
Allowing the petition the Court held that it appears that in the present proceedings, the exemption issue generated by the authority has already been thoroughly examined and therefore, it would not be proper on the part of the respondent-authority to reopen the said issue and further there is not remote indication that assessee has not truly and fully disclosed all material facts. In addition to this the circumstance prevailing on record which indicates that there was no distinguishable material or there was no substantial change of circumstance of any nature after carrying out scrutiny assessment which has taken place and thorough examination is undertaken with respect to the issue of exemption it is not proper on the part of the respondent authority to proceed further with the reopening of assessment. Hence, in view of aforesaid circumstances, the impugned notice issued under section 148 was quashed. Relief is available to Trust promoting education even if it was engaged in publication of school books. (AY. 2005-06)
Gujarat State Board of School Textbooks v. ACIT (2016) 243 Taxman 311 (Guj.)(HC)

1761 **S. 147 : Reassessment – At the stage of considering notice for reopening, one has to see only *prima facie* whether on basis of tangible material on record, Assessing Officer could form a valid belief that income chargeable to tax had escaped assessment. [S.4, 115JB, 148]**

Dismissing the petition the Court held that at the stage of considering notice for reopening, one has to see only *prima facie* whether on basis of tangible material on record, Assessing Officer could form a valid belief that income chargeable to tax had escaped assessment. Where elaborate reasons had been recorded by Assessing Officer which demonstrated how prima facie it could be shown that technology developed by assessee through use of its research and development facilities was routed through shell companies to avoid payment of tax, same could form basis for reopening of assessment. (AY. 2004-05)

Sun Pharmaceuticals Industries Ltd. v. ACIT (2016) 243 Taxman 299 (Guj.)(HC)

1762 **S. 147 : Reassessment – within four years – Reassessment was held to be valid. [S.50C, 148]**

Dismissing the petition the Court held that failure by Assessing Officer to examine issue for reassessment during original assessment proceedings and failure by assessee to place necessary and relevant information during original assessment proceedings, reopening of assessment within four years was held to be permissible. (AY. 2007-08)

Chunibhai Ranchhodbhai Dalwadi (Late) v. ACIT (2016) 388 ITR 130 (Guj.)(HC)

1763 **S. 147 : Reassessment – Contractor – Insurance claim on loss of equipment in transit only its capacity as contractor in terms of contract entered in to with principal, said claim would not be the income of assessee – Reassessment was held to be not valid. [S.28(i), 148]**

Dismissing the appeal of revenue the Court held that the two authorities concurrently reached a finding of fact that the assessee was not the supplier of the equipment and it had taken out an insurance claim only in its capacity as contractor and in terms of the contract entered into between the parties. Nothing was shown to indicate that the finding was perverse. The material used by the Assessing Officer for purportedly forming this opinion was the description of the assessee of itself as "a supplier" of the equipment in an EPC contract, which inter alia required it to take offshore delivery of the equipment from a foreign vendor and supply and install it onshore. Mere description as a "supplier" in a suit by the assessee against the insurance company claiming an insurance claim for loss of equipment, when the assessee insured the equipment jointly with the purchaser, could not possibly have any connection with the escapement of income arising out of sale of the equipment. Since that was the only material used by the Assessing Officer for issuance of the reopening notice, the notice was without legal basis or justification. The order of the Tribunal for the assessment years 1999-2000 and 2002-03 also supported that the assessee was not supplier of the equipment and no income assessable to tax had escaped assessment. The Commissioner (Appeals) and the Tribunal were right in setting aside the notice. (AY. 2000-01)

DIT(IT.) v. Doosan Heavy Industries and Construction Co. (2016) 388 ITR 557 / 243 Taxman 421 (Bom.)(HC)

S. 147 : Reassessment – Failure to deduct at source – Tangible material not available before Assessing Officer at time of assessment – Records destroyed in fire accident made available to assessee under Right to Information Act, 2005 – Principles of natural justice not violated and no prejudice caused to assessee – Notice valid. [S.148, Art. 226] 1764

Held, dismissing the petition, that there was no violation of principles of natural justice. The assessee was permitted to inspect the relevant record before it filed its objections to the initiation of reassessment proceedings. Even otherwise, the entire records, as asked for by the assessee, were made available under the Right to Information Act, 2005. The assessee who had made an incorrect statement in the main body of the audit report that the provisions regarding deduction of tax at source were not applicable could not turn around and say that it had stated the facts in an annexure from which the Assessing Officer could have discovered the incorrect statement. Moreover, the Assessing Officer could have legitimately thought that statement to be correct even with respect to the payment mentioned in the annexure for instance on the basis that the payee had deposited the same and that therefore, the question of the assessee paying the same did not arise. The reassessment notice was valid. (AY. 2010-11)

Franchise India Holdings Ltd. v. ACIT (2016) 388 ITR 563 / 293 CTR 474 (P&H)(HC)

S. 147 : Reassessment – Assessee communicated reasons for reopening – Assessee to submit objections before assessing authority Writ petition is not maintainable. [S. 148, Art. 226] 1765

Dismissing the petition, the Court held that the Court could not interfere with the reassessment notice on the ground that there was no loss of revenue. The assessee was communicated with reasons for reopening matter. The assessee has to file the return. That the assessee had not carried forward the loss relating to the assessment year 2005-06 nor set it off against the income of the subsequent years. The Court would not go into the aspect as to what was the effect of not carrying forward the loss to the next year or not setting it off against the income in the subsequent years and whether the assessee would be entitled to file revised returns. The factual issues were to be raised before the assessing authority and be decided by it and by court. (AY. 2005-06)

Sella Synergy India P. Ltd. v. ITO (2016) 388 ITR 539 / 290 CTR 154 / 76 taxmann.com 93 / 142 DTR 33 (Mad.)(HC)

S. 147 : Reassessment – Statement of partner before Excise authorities – Reassessment was held to be valid. [S. 148] 1766

Dismissing the petition the Court held that the reasons recorded by the Assessing Officer for his belief that income had escaped assessment were based on the information gathered by the Excise Department from the statements of the two partners of the assessee-firm during the search and the material found during further investigation, which constituted relevant material for the purpose of invoking the provisions of section 147 of the Income-tax Act, 1961. The contention of the assessee that the proceedings should be kept in abeyance till the Customs, Excise and Service Tax Appellate Tribunal decided its appeal could not be accepted. The assessee would have to furnish requisite material information to the Assessing Officer in the proceedings initiated under section 147. (AY. 2009-10, 2010-11, 2011-12)

Abc Classes PRS v. PCIT (2016) 387 ITR 119 (All.)(HC)

1767 **S. 147 : Reassessment – If no addition is made on basis of issues recorded in grounds for reassessment, Assessing Officer cannot make additions on any other issue during course of reassessment proceedings. [S. 148]**

Dismissing the appeal of revenue, the Court held that if no addition was made on the basis of the reasons recorded by the Assessing Officer for reopening an assessment under section 148 of the Income-tax Act, 1961, recourse cannot be had to Explanation 3 to section 147 to make an addition on any other issue not included in the reasons to believe for reopening the assessment. (AY. 2003-04)

CIT(E) v. Monarch Educational Society (2016) 387 ITR 416 (Delhi)(HC)

Editorial: Order in Monarch Educational Society v. ITO (E) (2015) 37 ITR (Trib.) 512 (Delhi) is affirmed.

1768 **S. 147 : Reassessment – Deduction allowed after detailed examination – Wrong assumptions by Assessing Officer – Reassessment was held to be not valid. [S. 80P(2)(d), 148]**

Allowing the petition the Court held that the deduction was allowed after detailed examination hence reassessment was held to be not valid. (AY. 2010-11)

Kaira District Co-op. Milk Producers Union Ltd. v. Dy. CIT (2016) 387 ITR 183 (Guj.)(HC)

1769 **S. 147 : Reassessment – Violation of principles of natural justice – Statement relied without giving an opportunity of cross examination – Reassessment was held to be not valid. [S.148]**

Allowing the petition the Court held that the Revenue was not justified in making addition at the time of reassessment without having first given the assessee an opportunity to cross-examine the deponent on the statements relied upon by the Assistant Commissioner. Quite apart from denial of an opportunity of cross examination, the Revenue did not even provide the material on the basis of which the Department sought to conclude that the loan was a bogus transaction. In the light of the fact that the monies were advanced apparently by account payee cheque and were repaid by account payee cheque the least that the revenue should have done was to grant an opportunity to the assessee to meet the case against him by providing the material sought to be used against the assessee before passing the order of reassessment. This not having been done, the denial of such opportunity went to the root of the matter. The order of reassessment was not valid. Followed *Andaman Timber Industries v. CCE (2015) 127 DTR 241 / 281 CTR 241 / 62 taxmann.com 3 (2016) 38 GSTR 117 (SC)* (AY. 1983-84)

H.R. Mehta v. ACIT (2016) 387 ITR 561 / 72 taxmann.com 110 (Bom.)(HC)

1770 **S. 147 : Reassessment – Company dissolved prior to issuance of notice – Assessee liable to clarify all issues raised by Department with necessary documents – Reassessment proceedings to be kept in abeyance till such time – Plea of limitation cannot be raised if assessment to proceed further – Notice calling for clarifications on factual issues cannot be challenged in writ petition. [S. 148, Constitution of India, Art. 226]**

Dismissing the petition, (i) that clarifications had been sought related to the assessment year prior to the dissolution of the firm and it was appropriate for the assessee to

produce the necessary documentary evidence called for by the Department and appear before it and clarify all the issues. If the Department had called for certain documents and sought for clarifications, it could not simultaneously proceed with the reassessment proceedings under section 144 of the Income-tax Act, 1961 and only if the assessee's explanations were not satisfactory, could it proceed further in the matter. The Department was directed to keep the reassessment proceedings in abeyance till it took note of the clarifications and perused the documents after hearing the assessee and then issuing a speaking order. No plea of limitation could be raised in the event the assessment had to proceed further.(ii) That a notice calling upon the assessee to clarify certain factual issues could not be challenged under article 226 of the Constitution. (AY. 2009-10)
PVP Ventures Ltd. v. ITO (2016) 387 ITR 716 / 72 taxmann.com 129 (Mad.)(HC)

S. 147 : Reassessment – Transfer of stock in trade to investment – Once a notice is issued and reassessment proceedings are pending, the AO is debarred from issuing another notice for reopening for the same assessment year. [S. 28(i), 148] 1771
Allowing the petition, the Court held that once a notice for reassessment is issued and reassessment proceedings are pending, the AO is debarred from issuing another notice for reopening for the same assessment year. Transfer of share from stock in trade to investment did not result in to any immediate income accruing to which could be taxed in the assessment year in question. (AY. 2005-06)
Aditya Medisales Ltd. v. Dy. CIT (2016) 242 Taxman 228 (Guj.)(HC)

S. 147 : Reassessment – Bogus purchases – Even if the expenditure of bogus purchases is disallowed, the only effect it could have is to increase the profit of the assessee which in any case is exempt under Section 10AA of the Act, addition cannot be made as unexplained expenditure as the payment was made by account payee cheques. [S. 10AA, 69B, 69C] 1772
On appeal quashing the reassessment proceedings; the Court held that it is undoubtedly true that the reasons to be recorded before issuance of notice of reopening have to be those of the Assessing Officer alone. This however, does not mean that the Assessing Officer cannot rely on the exercise undertaken by other wings of the Government Departments, if the material so collected through inquiry or investigation provides *prima facie* information, a tangible material; which enables the Assessing Officer to form a belief that income chargeable to tax has escaped assessment. On the contention of assessee that, in any case, the entire income of the assessee being tax exempt under Section 10AA of the Act, even if the stand of the Department as reflected in the reasons recorded is correct and ultimately established, there would be no additional tax burden on the petitioner, the High Court held that the result of the reassessment would be that even if the expenditure of the so called bogus purchases is disallowed, the only effect it could have is to increase the profit of the assessee which in any case is exempt under Section 10AA of the Act. Separately, the High Court also held that in the present case, Section 69C of the Act has no applicability as the explanation regarding source of expenditure was very much available since in reasons recorded itself. Petition was disposed in favour of the assessee. (AY. 2008-09)
Sajani Jewels v. Dy. CIT (2016) 143 DTR 263 / 241 Taxman 383 (Guj.)(HC)

1773 **S. 147 : Reassessment – With in four years – Change of opinion – AO noted reasons and accepted submission in original assessment proceedings, any later attempt to reopen case doubting original position would be a mere change of opinion. [S. 54EC, 148]**

Allowing the petition, the Court held that during the original scrutiny assessment, the entire issue came up for discussion. The Assessing Officer raised the queries which were answered by the assessee. In the order of assessment, the Assessing Officer passed a reasoned order why he had accepted assessee's classification of the sale proceeds of the land under the separate heads of business income and long-term capital gain. He also accepted the assessee's claim under section 54EC in respect of investment made in bonds of Rural Electrification Board out of LTCG. Thus the court held that any attempt on his part, later on, to reopen the issue by doubting whether the sale proceeds would qualify as capital gain or business income would be a mere change of opinion. (AY. 2010-11)

Manishkumar Tulsidas Kaneriya v. Dy. CIT (2016) 242 Taxman 164 / (2017) 145 DTR 26 (Guj.)(HC)

1774 **S. 147 : Reassessment – With in four years – During assessment, Assessing Officer had examined entire claim of interest expenditure incurred in respect of Deep Discount Bonds and concluded said claim as not valid, he could not reopen assessment taking ground that expenditure was disallowable for non-deduction of tax at source. [S. 40(a)(ia), 148, 194A]**

Allowing the petition, the Court held that the Assessing Officer had examined the entire claim from various angles and concluded that the claim of expenditure of the assessee was not valid. That being the position, in plain terms he could not have resorted to reopening of the assessment on the ground that the expenditure had to be disallowed for not deducting the tax at source. Thus, it was held that the impugned notice could not be upheld. In the result, the High Court quashed the impugned notice and ruled in favour of the assessee. (AY. 2005-06)

Nirma Ltd. v. Dy. CIT (2016) 242 Taxman 286 (Guj.)(HC)

1775 **S. 147 : Reassessment – After scrutiny assessment AO received information from Investigation wing that two well-known entry operators of country provided bogus entries to various beneficiaries, and assessee was one of such beneficiary, AO was justified in reopening assessment. [S. 148]**

Dismissing the petition the Court held that the AO has applied his mind and has rightly relied upon the information available before him while exercising the power to reopen the assessment. Accordingly, AO was justified in issuing notice under section 148 of the Act and the reasons were sufficient enough to permit him to exercise jurisdiction to reopen the assessment. Even the order rejecting the objections also appears to the Court cogent enough as supported by valid reasons. Accordingly, the notice was held to be valid. (AY. 2009-10)

Peass Industrial Engineers Pvt. Ltd. v. Dy. CIT (2016) 289 CTR 139 / 72 taxmann.com 302 (Guj.)(HC)

S. 147 : Reassessment – Accumulation of income – Reassessment was not justified as no amount have been accumulated. [S. 11(2), 148] 1776

Allowing the petition the Court held that; On facts no application for accumulation was made therefore, on the basis of reasons recorded by the Assessing Officer, he could not have formed the belief that income chargeable to tax has escaped assessment in the assessment years under consideration. The assumption of jurisdiction by the Assessing Officer by issuing the impugned notices is, therefore, without any authority of law. Consequently, it was held that the impugned notices cannot be sustained. (AY. 2008-09 to 2011-12)

Pal Gram Hindu Sarvajanik Trust v. ITO (2016) 241 Taxman 84 (Guj.)(HC)

S. 147 : Reassessment – Audit objection – If the AO reopens the assessment on information supplied by the audit party and also other issues independently applying the mind, the reassessment was held to be valid. [S. 115JB, 148] 1777

Dismissing the petition the Court held that if the AO reopens the assessment on information supplied by the audit party and also other issues independently applying the mind, the reassessment was held to be valid. (AY. 2009-10)

Elecon Engineering Co. Ltd. v. ACIT (2017) 148 DTR 81 (Guj.)(HC)

S. 147 : Reassessment – It is a regular practice for the broker to make modifications in the client code after the purchase and sale of securities. The mere fact that there is a client code modification *prima facie* does not mean that any income has escaped assessment. It appears to be case of 'reason to suspect' and not 'reason to believe' – Petition was admitted and interim relief was granted. [S. 148] 1778

(i) The reasons in support of the impugned notice relies upon the information received from the Principal Director of Income Tax that the petitioner has benefited from a client code modification by which a profit of ₹ 22.50 lakhs was shifted out by the petitioner's broker, resulting in reduction of the petitioner's taxable income. The only basis for forming the belief is the report from the Principal Director of Income Tax and the application of mind to the report of the Assessing Officer along with the record available with him. This information and application of mind has led the Assessing Officer to form a reasonable belief that there is not only an escapement of income but there has been failure to truly and fully disclose all material facts and information as the *modus operandi* of shifting profits was not known to the Revenue as not disclosed by the petitioner when the Assessing Officer passed the order in regular assessment proceedings.

(ii) We note that the reasons in support of the impugned notice accept the fact that as a matter of regular business practice, a broker in the stock exchange makes modifications in the client code on sale and / or purchase of any securities, after the trading is over so as to rectify any error which may have occurred while punching the orders. The reasons do not indicate the basis for the Assessing Officer to come to reasonable belief that there has been any escapement of income on the ground that the modifications done in the client code was not on account of a genuine error, originally occurred while punching the trade. The material available is that there is a client code modification done by the Assessee's broker but there is no link from

there to conclude that it was done to escape assessment of a part of its income. *Prima facie,* this appears to be a case of reason to suspect and not reason to believe that income chargeable to tax has escaped assessment. Petition was admitted and interim relief was granted. (WP No. 2627 of 2016, dt. 23.11.2016)(AY. 2009-10)
Coronation Agro Industries Ltd. v. DCIT (Bom)(HC); www.itatonline.org

1779 **S. 147 : Reassessment – Failure by AO to take note of audited books of account before issuance of notice – No other material suggesting money laundering or other financial irregularities in notice for reassessment – Notice was held to be not valid. [S. 148]**
Allowing the petition the Court held that; The assessee was granted about twelve hours of time to respond to the notice for production of material regarding investment made in the mutual funds and upon the assessee failing to do so, the AO presumed that such investment required further investigation. In fact, such investment was part of the audited books of account of the assessee. If the AO had perused the accounts, they would have clarified the investment in mutual funds. Having once issued the notice it was not impermissible for the AO to drop the proceedings if the assessee pointed out that the reasons for which the notice was issued were completely erroneous. The contention of the Department that there was sufficient other material suggesting money laundering or other financial irregularities, had not come in the reasons recorded and that ground could not be examined to support the notice for reopening. (AY. 2008-09)
Asharam Ashram v. ITO (E) (2016) 386 ITR 222 (Guj.)(HC)

1780 **S. 147 : Reassessment – Writ Petition challenging the notice issued is not maintainable as Petitioner has the alternate remedy of challenging the reassessment order under section 246A of the Act. [S. 148]**
The objection filed by the assessee against the reopening were rejected by the AO. The assessee filed a writ petition challenging the notice issued u/s. 148 of the Act on the ground that full and true disclosure was made during the assessment proceeding and reopening is based on change of opinion. The averment made by the assessee regarding the full disclosure and change of opinion was not disputed by the AO. However, High Court held that subsequent to the issue of notice, the assessment order has been passed for A.Y. 2007-08, therefore in view of the subsequent development, the assessee has the alternate remedy of filing an appeal u/s. 246A of the Act and thereafter to the Tribunal. For A.Y. 2008-09 the assessment order has not been passed however, the similar alternate remedy is available to the assessee. Therefore, the writ petition filed by the assessee deserves to be dismissed.
Kiran Kanwar v. UOI (2016) 135 DTR 209 / 286 CTR 262 (Raj.)(HC)

1781 **S. 147 : Reassessment – Where on basis of evidences collected and statement recorded during course of search of entry provider, Assessing Officer had reason to believe that unsecured loans received by assessee from certain persons escaped assessment, it could not be said that there was change of opinion. [S. 68, 143(3), 148]**
Dismissing the petition the Court held that the reasons in support of the impugned notice indicates that the Assessing Officer has received definite information that one Mr. P. and the companies controlled by him was in the business of providing accommodation entries. On receipt of the aforesaid information, the Assessing Officer

called for the necessary information in regard to the accommodation entries made in respect of the assessees in his jurisdiction. Consequent thereto, the Assessing Officer found that the information received indicated that the eight companies mentioned in the reasons belonged to P group and formed the basis of his reasonable belief. At this stage the Assessing Officer has merely to establish that there is justification for him to form a reasonable belief that income chargeable to tax had escaped assessment and not conclusively prove the same. The statement of P *prima facie* completely negatives the stand taken by the petitioner during the regular assessment proceedings. The exact nature of the transaction is only privy to the parties to the transaction and when one of the parties to the transaction states that what appears is not factually so, then the Assessing officer certainly has tangible material to form a reasonable belief that income chargeable to tax has escaped assessment. (AY. 2012-13)
Bright Star Syntax P. Ltd. v. ITO (2016) 387 ITR 231 / 240 Taxman 459 / 137 DTR 362 (Bom.)(HC)

S. 147 : Reassessment – Capital gains – Income cannot be said to have escaped assessment – Merely on presumption that sizable income must be disclosed – When both sale and purchase transactions of huge amount are made in respect of properties. [S. 45, 148] 1782
Allowing the petition court held that ;from the reason for reopening by AO that since the assessee had purchased two properties at sizeable cost and showed income of only ₹ 2.44 lakhs and hence ₹ 1.16 crores had escaped assessment was lacking logic. There is no direct co-relation between the purchase of properties by the assessee and his disclosure of the income during a particular period. The AO seems to be presuming that when the assessee had made purchase worth such huge amounts, he must disclose sizable income. Despite the sale of land was not shown in the return, it was shown in the previous year and duly taxed. If the AO was *prima facie* of the opinion that sale transaction invited capital gain which the assessee had avoided by non-disclosure, the same had not come on record in the reasons provided by the AO.
Further, when notice for reopening for scrutinized assessment was issued beyond the period of four years, twin conditions to be satisfied were that the AO has some tangible material to form a belief that income chargeable to tax has escaped assessment and further that such escapement was due to failure on part of the assessee to disclose truly and fully all material facts. When first condition of tangible material is not satisfied, because the assessee failed to disclose the sale transaction would not by itself give authority to AO to reopen the assessment on presumption that sizable income must be disclosed when both sale and purchase transactions of huge amount are made in respect of properties. Thus the petition filed by the assessee was allowed. (AY. 2008-09)
Jayesh Govindbhai Balar v. ITO (2016) 240 Taxman 703 (Guj.)(HC)

S. 147 : Reassessment – Cash credits – Cash deposited – Change of opinion – Reassessment initiated to treat the cash deposits in the bank account as unexplained is invalid – Reassessment was held to be not valid. [S. 68, 133A, 148] 1783
The assessee was in the business of issuing of cheques and demand drafts against cash deposits received from the parties/customers in lieu of commission. The assessee had submitted the details of bank accounts, cash book etc. establishing the train of money

in the reassessment proceedings initiated initially which was accepted by the Assessing Officer. Subsequently a survey was carried out and in pursuance of the survey, the Assessing Officer initiated fresh reassessment proceedings based on information received from Additional Director. The High Court quashed the reassessment proceedings after holding that there was no incriminating document found during the course of survey and that all relevant details were filed during the first re-assessment proceedings and therefore, it cannot be said that "income has escaped assessment" as it merely amounts to change of opinion. (AY. 2008-09)

Shree Sidhnath Enterprise v. ACIT (2016) 387 ITR 644 / 240 Taxman 631 / 293 CTR 535 (Guj.)(HC)

1784 **S. 147 : Reassessment – Reassessment initiated to treat the notional rent received by the assessee is upheld [S. 23, 148]**

The assessees were the owners of a industrial plot which was leased to a firm for which rent is received and the same were offered to tax. Under a scheme floated by Chhatisgarh Housing Board, the said industrial plot was converted into commercial plot by paying charges to the Board, which was borne by the lessee and the same was claimed as expenditure in the return of income filed by it. The Assessing Officer reopened the assessee in the hands of the assessee to treat the said amount paid by the lessee to the Board as a constructive receipt by the assessee and treating the same as notional rent. The High Court upheld the validity of the reassessment as according to the Court, based on the materials available, the Assessing Officer had reason to believe that income chargeable to tax has escaped assessment and that the expression "reason to believe" cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. It was also held that the assessee has an equally efficacious remedy once the reassessment is concluded and therefore, the petition is dismissed without deciding on the validity of the reassessment. (AY. 2005-06 to 2013-14)

Sumit Passi v. ACIT (2016) 386 ITR 46 / 240 Taxman 82 / 139 DTR 224 (P&H)(HC)

1785 **S. 147 : Reassessment – Reopening of assessment to treat license fees from lease as income from house property – Absence of materials on record to conclude "camouflage" and "sham rental income" – Reassessment was held to be bad in law – Rule of consistency. [S.28(i), 148]**

Allowing the petition the Court held that by simply using the word "camouflage" and "sham rental income" the AO was not relieved of the obligation of explaining why he came to the conclusion. There was no material other than the licence deeds and the licence receipts for him to come to the conclusion that there was any attempt at camouflaging. The basis for forming the reasons to believe had not even been set out. Therefore, reopening was not valid. For the AY 1982-83 an assessment order was passed under section 143(3) accepting the stand of the assessee that the licence fee was in the nature of business income. The assessee had consistently thereafter treated the licence fees collected as business income including for the AYs in question. The licence fees were assessable under the head "business income". (AY. 1990-91 to 1993-94)

Agya Ram v. CIT (2016) 386 ITR 545 / 241 ITR 407 / 141 DTR 133 / 290 CTR 539 (Delhi) (HC)

S. 147 : Reassessment – Change of opinion – Re-assessment initiated to treat the difference between the cost of the shares of a company in the hands of the holding company as and the value of the shares computed as per book value method under section 28(iv) of the Income – tax Act is invalid as the disclosure with regard to the purchase of the shares was already disclosed in the scrutiny assessment proceedings [S. 28(iv), 148] 1786

The Assessing Officer initiated the reassessment to treat the difference between the purchase price of the shares from the holding company and the value of the shares as per book value method under section 28(iv) of the Act. Quashing the reassessment proceedings, it was held that all the required disclosures were made during the scrutiny assessment proceedings with regard to the purchase transaction by disclosing the price at which it was purchased etc and therefore, as it was a subject matter of enquiry in the scrutiny assessment proceedings, the same cannot be reopened based on subsequent change of opinion by the Assessing Officer. (AY. 2010-11)

Unitech Holdings Ltd v. DCIT (2016) 240 Taxman 70 / 138 DTR 272 / 290 CTR 201 (Delhi) (HC)

S. 147 : Reassessment – Reassessment initiated to (a) treat the difference between FMV adopted by the assessee and the Assessing Officer as on 1/4/1981 for the purpose of ascertaining the cost of acquisition in respect of asset acquired prior to 1/4/1981 and (b) to disallow claim of deduction under section 54EC in excess of ₹ 50,00,000/ – quashed. [S. 48, 54EC, 148] 1787

The Assessing Officer initiated reassessment proceedings to disallow the cost of acquisition for the purpose of computation of capital gain in excess of the FMV ascertained by the AO and also to disallow the excess claim of section 54EC beyond ₹ 50,00,000/-. The High Court quashed the reassessment on the ground that the reassessment was initiated merely based on change of opinion and there was no reason to believe that the income has escaped assessment. Further, on the issue of disallowance of excess claim of exemption under section 54EC, it was held that the Assessing Officer decided the allowability of the claim based on the decision of the jurisdictional Tribunal and therefore, it merely amounted to change of opinion. (AY. 2011-12)

Swati Saurin Shah v. ITO (2016) 386 ITR 256 / 240 Taxman 758 (Guj.)(HC)

S. 147 : Reassessment – Non-supply by the AO of reasons recorded for reopening the assessment (even where the reopening is prior to GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC)) renders the reassessment order bad as being without jurisdiction [S.148] 1788

(i) The question as framed proceeds on the basis that the Respondent Assessee was aware of the reasons for reassessment. The only basis for the aforesaid submission is the submission made by the revenue before the Tribunal that the Respondent Assessee is a public sector institution who was aware that search action has been initiated on certain lessees in respect of transactions with IDBI i.e. Assessee. On the basis of the above, it is to be inferred that the reason for reassessment was known to the respondent assessee. The supply of reason in support of the notice for reopening of an assessment is a jurisdictional requirement. The reasons

recorded form the basis to examine whether the Assessing Officer had at all applied his mind to the facts and had reasons to believe that taxable income has escaped reassessment. It is these reasons, which have to be made available to the Assessee and it could give rise to a challenge to the reopening notice. It is undisputed that the reasons recorded for issuing reopening notice were never communicated to the Respondent Assessee in spite of its repeated requests. Thus, the grievance of the Revenue on the above count is unsustainable.

(ii) An alternative submission is made on behalf of the Revenue that the obligation to supply reasons on the Assessing Officer was consequent to the decision of the Apex Court that *GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC)* rendered in 2003 while, in the present case, the reopening notice is dated 9 December 1996. Thus it submitted at the time when the notice under section 148 of the Act was issued and the time when assessment was completed, there was no such requirement to furnish to the assessee a copy of the reasons recorded. This submission is not correct. We find that the impugned order relies upon the decision of this Court in Seista Steel Construction (P.) Ltd. [1984] 17 Taxman 122 (Bom.) when it is held that in the absence of supply of reasons recorded for issue of reopening notice the assessment order would be without jurisdiction and needs to be quashed. The above view as taken by the Tribunal has also been taken by this Court in *CIT v. Videsh Sanchar Nigam Ltd. [2012] 21 Taxman 53 (Bombay)* viz. non-supply of reasons recorded to issue a reopening notice would make the order of Assessment passed thereon bad as being without jurisdiction. (ITA No. 494 of 2014, dt. 19.09.2016)(AY. 1993-94)

CIT v. IDBI Ltd. (Bom.)(HC); www.itatonline.org

1789 **S. 147 : Reassessment – Reassessment proceedings taken over from Income-tax Officer by Deputy Commissioner vested with pecuniary jurisdiction was held to be proper – Furnishing copy of reasons recorded and order of Commissioner granting permission along with notice to assessee is not mandatory – Copy of reasons and order of sanction was furnished to assessee – No prejudice to assessee – Reassessment proceedings was held to be valid. [S. 2(7A), 124 148, 151]**

As provided under section 124(3) no person is entitled to call in question the jurisdiction of an Assessing Officer after the expiry of the time allowed by the notice issued under section 148. Held, the basic territorial and pecuniary jurisdiction to assess income up to ₹ 10 lakhs to entertain the case of the petitioner vested with the Income-tax Officer as an Assessing Officer and he had dealt with the assessment of the period 2011-12 onwards. As soon as he noted from the return filed for the year 2010-11 that the income was more than ₹ one crore and the assessment was made by the Joint Commissioner, he transferred the file to the Deputy Commissioner. There was no illegality or irregularity on the part of the Income-tax Officer in issuing notice under section 148 as well as order dated September 16, 2015 passed by the Deputy Commissioner. Since the Joint Commissioner had dealt with the case of the assessee for the assessment year 2010-11 pursuant to the transfer order passed by the Commissioner, operative for the period February 9, 2012 to March 31, 2013, the assessee was not entitled to contend that only an officer not below the rank of Joint Commissioner

could make reassessment. The Deputy Commissioner dealing with the case was duly competent and possessed the pecuniary and territorial jurisdiction to deal with the case of the assessee for reassessment. The notice issued by the Department was not illegal, bad in law or without jurisdiction. There was no infirmity in the order passed by the Deputy Commissioner. No objection as to the jurisdiction was raised by the assessee within the period of thirty days of issuance of notice under section 148. In response to the notice dated March 25, 2015, the assessee did not raise any objection as to the jurisdiction of the Income-tax Officer to issue such notice. He had raised the objection as to reopening of assessment and issuance of notice under section 148 by the Income-tax Officer for the first time by representation dated September 7, 2015. No person is entitled to call in question the jurisdiction of an Assessing Officer after the expiry of the time allowed by the notice issued under section 148.

On the request of the assessee the Income-tax Officer had provided the assessee a copy of the reasons recorded and of the order passed under section 151 of the Act. No case of prejudice to the assessee had been made out. (AY. 2010-11)

Suresh v. Addl. CIT (2016) 385 ITR 1 / 139 DTR 213 / 288 CTR 203 (Bom.)(HC)

Editorial : The Supreme Court has dismissed special leave petition filed by the assessee against this judgment: Suresh v. Addl. CIT (2016) 383 ITR 18 (St.)

S. 147 : Reassessment – Change of opinion – No reference to new material other than that examined in original assessment proceedings – Issuance of notice on change of opinion – Notice to be quashed. [S. 28(va), 148] 1790

Allowing the petition the Court held that the Assessing Officer did not refer to any material, other than what was examined in the initial round of assessment proceedings, for forming his belief that the assessee's income had escaped assessment. The Assessing Officer's belief was based solely on the basis of material already examined by him during the first round of assessment proceedings. A perusal of the reasons recorded by the Assessing Officer also indicated that he had initiated the proceedings for reassessment pursuant to a letter sent by the Commissioner (Appeals) who had opined that the revised agreement was void and the consideration of ₹ 38 per share should be attributed to the non-compete clauses. This was a matter of opinion regarding agreement and the revised agreement, which were duly considered by the Assessing Officer at the time of initial assessment. In the case of another promoter shareholder of PLL, who was also a party to the agreement and the revised agreement, the Assessing Officer had accepted the sale of shares of PLL at ₹ 190 per share and assessed the gains from sale of shares of PLL as capital gains. Accordingly, the action of the Assessing Officer was not consistent with what he had done in the case of the assessee. Thus, it was apparent that the issuance of the notices was occasioned by a change of opinion, which was impermissible under section 147 read with section 148 of the Act and therefore, the notices were to be quashed. (AY. 2007-08)

Priya Desh Gupta v. DCIT (2016) 385 ITR 452 / 240 Taxman 285 / (2017) 146 DTR 149 (Delhi)(HC)

Abha Gupta v. DCIT (2016) 385 ITR 452 / 240 Taxman 285 / (2017) 146 DTR 149 (Delhi) (HC)

1791 **S. 147 : Reassessment – Assessment proceedings pending – Material indicating that assessee had received illegal gratification – Notice for reassessment was held to be valid. [S. 148]**

Dismissing the petition the Court held that the enquiry into the matter by the Income-tax Department was still in progress and considering the fact that the Department had indicated that the assessee was a key person having control over the decision making process, it was not appropriate to hold that the material produced was not sufficient or reliable enough to proceed in the matter. The assessment process was still in progress and therefore, the question of change of opinion or reopening of assessment already concluded would not arise. The notice of reassessment was valid. (AY. 2009-10)

Malay Shrivastava v. DCIT (2016) 385 ITR 14 / 135 DTR 249 / 287 CTR 387 (MP)(HC)

1792 **S. 147 : Reassessment – Reopening on basis of audit objection based on fact – Reassessment was held to be valid. [S. 37(1), 148]**

The Tribunal dismissed the assessee's appeal and held that the audit party's objection that certain expenses which pertained to earlier years had been claimed in the current assessment year was a factual error pointed out by the audit party which was information and not an interpretation of law by the audit party, and that the reopening on the basis of audit information was in accordance with law. It further affirmed the order of the Commissioner (Appeals) holding that the prior period expenses as quantified by its auditors were disallowable under section 37(1) but that the expenses to the extent incurred during the assessment year in question could be allowed. On appeal: Held, dismissing the appeal, that there was no error in the findings recorded by the Tribunal on appreciation of evidence and relevant case law on the point, warranting interference. (AY. 2008-09)

Haryana Agro Industries Corporation Ltd. v. CIT (2016) 385 ITR 488 (P&H)(HC)

1793 **S. 147 : Reassessment – Failure by Assessing Officer to apply mind before issuing notice – Reassessment was not sustainable. [S.148]**

Dismissing the appeal of revenue the Court held that; the Tribunal's order was based on uncontroverted facts. The variance between the amounts shown in the notice as income escaping assessment and the additions made meant that the Assessing Officer himself was not sure that the entire amount mentioned in the investigation report was on account of escaped income of the assessee and that the Assessing Officer did not apply his mind before issuing notice under section 148 of the Income-tax Act, 1961. No question of law arose.

CIT v. Ashian Needles P. Ltd. (2016) 384 ITR 144 (Delhi)(HC)

1794 **S. 147 : Reassessment – With in four years – Non-resident – Reassessment notice issued during pendency of appeal based on change of opinion – Not permissible – DTAA – India – France [S.148, Art.13]**

Allowing the petition the Court held that in view of third proviso to section 147, reassessment notice issued during pendency of appeal based on change of opinion is held to be not permissible, when earlier assessment order was the subject matter of appeal. Department is not entitled to supply fresh reasons or material not found in reasons recorded for reopening. (AY. 2004-05 to 2008-09)

Alcatel–Lucent France v. ADIT (2016) 384 ITR 113 / 240 Taxman 414 / 136 DTR 209 / 287 CTR 488 (Delhi)(HC)

S. 147 : Reassessment – Notice – No proof of failure by assessee to truly or fully disclose primary facts pertaining to transaction relating to one of properties – Reasons recorded not disclosing reason to believe that income had escaped assessment – Notice was set aside [S. 45, 54EC, 148] 1795

Allowing the petitions, the Court held that there was no proof of failure by assessee to truly or fully disclose primary facts pertaining to transaction relating to one of properties. Reasons recorded not disclosing reason to believe that income had escaped assessment. Notice was set aside. (AY. 2007-08)

Ranglal Bagaria (HUF) v. ACIT (2016) 384 ITR 477 / 241 Taxman 72 / (2017) 292 CTR 100 (Cal.)(HC)

Sudershan Prasad Bagaria v. ACIT (2016) 384 ITR 477 / 241 Taxman 72 / (2017) 292 CTR 100 (Cal.)(HC)

S. 147 : Reassessment – Reopening notice issued to a private trust which received contributions of ₹ 6.58 crore on the ground that it has not obtained a PAN or filed a return of income is not valid. The AO cannot assume all receipts are income and issue the reopening notice [S. 2(24)(iia), 4, 148] 1796

Admitting the petition and granting the interim stay the Court observed that reopening notice issued to a private trust, which received contributions of ₹ 6.58 crore, on the ground that it has not obtained a PAN or filed a return of income is not valid. The AO cannot assume all receipts are income and issue the reopening notice. (AY. 2008-09)

General Electoral Trust v. ITO (2016) 141 DTR 294 (Bom.)(HC)

S. 147 : Reassessment – Order of reassessment cannot be passed without notice under section 143(2) – Jurisdictional error cannot be cured by section 292BB. [S. 143(2), 148, 292BB] 1797

Dismissing the appeal of revenue the Court held that , the order of reassessment cannot be passed without notice under section 143(2). Jurisdictional error cannot be cured by section 292BB. (AY. 2005-06 to 2008-09)

PCIT v. Silver Line (2016) 383 ITR 455 / 283 CTR 148/ 65 taxmann.com 137 (Delhi)(HC)

S. 147 : Reassessment – Notice issued to, and reassessment order passed on, a non-existing entity is without jurisdiction. A writ petition can be entertained despite the presence of alternate remedy. [S. 143(3), 148] 1798

Normally we would not have entertained a petition as an alternative remedy to file an appeal is available to the petitioners. However, *prima facie*, the impugned notice has been issued in respect of a non-existing entity as M/s. Addler Security Systems Pvt. Ltd., which stands dissolved, having been struck off the Rolls of the Registrar of Companies much before its issue. Consequently, the assessment has been framed also in respect of the non-existing entity. This defect in issuing a reopening notice to a non-existing company and framing an assessment consequent thereto is a issue which goes to the root of the jurisdiction of the Assessing Officer to assess the non-existing company. Thus, prima facie, both the impugned notice dated 24th March, 2015 and the Assessment Order dated 28th March, 2016, are without jurisdiction. (AY. 2008-09)

Jitendra Chandralal Navlani v. UOI (2016) 386 ITR 288 (Bom.)(HC)

1799 **S. 147 : Reassessment – Residential Status – Resident or non-resident – Reassessment notice was held to be valid. [S. 5, 6(ii), 142(1), 143(2), 148 & 282]**

Question of law involved in HC was challenging the notices issued u/s. 148 and notice not served in accordance to law and whether assessee was resident of India within the meaning of S. 6(3)(ii) of the IT Act, 1961. On appeal in HC, by revenue, Hon'ble HC allowed Department's appeal and held that RG was not only doing the audit work of the five assessee companies but determining who should be the directors of the said companies, this coupled with the fact that the blank signed cheque books of all the five companies together with rubber seals, the letterhead, the blank signed cheques and other records were also found in Delhi office of RG & Co, the factual determination by the AO that the management and control of five companies was actually wholly situated in Delhi gets fortified, there were sufficient grounds for exercising the power u/s. 148, there was an implied authority of RG r/w. order V r.20 CPC. The Court also held that there were sufficient grounds for exercising the power u/s. 148, plea of the assessee that the notices u/s. 142(1) & 143(2) were issued for the first time in 1998 and were time barred was rejected. (AY. 1987-88 to 1989-90)

CIT v. Mansarovar Commercial (P) Ltd. (2016) 134 DTR 105 / 287 CTR 28 (Delhi)(HC)
CIT v. Pasupati Nath Commercial (P) Ltd. (2016) 134 DTR 105 / 287 CTR 28 (Delhi)(HC)
CIT v. Sovereign Commercial (P) Ltd. (2016) 134 DTR 105 / 287 CTR 28 (Delhi)(HC)
CIT v. Swastik Commercial (P) Ltd. (2016) 134 DTR 105 / 287 CTR 28 (Delhi)(HC)
CIT v. Trishul Commercial (P) Ltd. (2016) 134 DTR 105 / 287 CTR 28 (Delhi)(HC)

1800 **S. 147 : Reassessment – Within four years – The basis of formation of belief by the AO that income liable to tax has escaped assessment must form part of reasons recorded by him – AO could not initiate reassessment proceedings merely on the basis of information supplied by DGIT (Inv.) which is an external source of material not forming part of reasons recorded – Thus basic requirement of section 147 was not satisfied and the reassessment notices were quashed. [S. 143(1)]**

For the relevant assessment years, the returns filed by the assessee were processed under section 143(1). Subsequently, the AO issued notice under section 148 seeking to reopen the assessment on ground that on verification of details available on record, it was found that assessee had made bogus purchases and to that extent profit had escaped assessment from tax. The assessee filed its objections to the reopening of assessment. The AO passed an order rejecting the objections raised by the petitioner which showed that the reopening was based on material received from the DGIT (Inv.), Mumbai, pursuant to inquiries made by him (the DGIT). On writ filed by the petitioner against reassessment, the HC observed that the material on the basis of which the AO sought to assume jurisdiction under section 147 of the Act, was the information received from an external source viz., from the DGIT and not the material on record as reflected in the reasons recorded. Since the belief of the AO was not based upon the material on record, but on some other material from an external source which did not find reference in the reasons recorded by him, it was held that the basic requirement of section 147 was not satisfied. Hence, the HC quashed and set aside the impugned notices under section 148 of the Act. (AY. 2009-10 to 2011-12)

Varshaben Sanatbhai Patel v. ITO (2016) 282 CTR 75 (Guj.)(HC)

S. 147 : Reassessment – Tangible material to form belief that income chargeable to tax has escaped assessment – absence of reason – Issuance of notice u/s. 148 is without authority of law [S. 148] 1801

The assessee, a SSI unit, filed a return of income claiming deduction u/s. 80IB(10) for the relevant assessment year. The said claim of assessee was allowed in the original assessment proceedings. Subsequently, the AO reopened assessment u/s. 147 on the basis that, on perusal of the Balance Sheet of the assessee, the assessee did not fulfil conditions of being an SSI unit. Accordingly, the deduction u/s. 80IB(10) which was allowed to assessee in the original assessment came to be withdrawn.

On appeal to the CIT(A), the CIT(A) partly allowed the appeal of the assessee. On further appeal, the Tribunal held that reopening of assessment by the AO was without authority of law.

On appeal before the HC, HC relying on decision of *Gujarat Power Corporation Ltd. v. ACIT (2013) 350 ITR 266 (Guj)* held that as long as there was some tangible material on basis of which AO would form a belief that income chargeable to tax has escaped assessment, it could be permissible to reopen assessment u/s. 147 and such tangible material need not be alien to the record. However, in the present case, AO proceeded on erroneous assumption that assessee did not meet the requirement of being an SSI unit where the record pointed out to be contrary and accordingly the order of Tribunal was upheld quashing the initiation of reassessment proceedings. (AY. 2004-05 & 2005-06)

CIT v. Lincoln Pharmaceuticals Ltd. (2016) 129 DTR 355 / 282 CTR 588 (Guj.)(HC)

S. 147 : Reassessment – Search – Incriminating documents found against assessee in search at its own premises could be utilized for the purpose of reassessment. [S. 132, 148, 153C, 153A] 1802

Search and seizure was conducted u/s. 132 at assessee's factory premises. On the same day, search was also conducted at the business and residential premises of 'P' group. Proceedings u/s. 153A were initiated against assessee on the basis of search but was subsequently dropped by AO as the name of the entity mentioned in the search warrant u/s. 132 of the Act was incorrect. While conducting search at 'P' group, incriminating documents were found against the assessee and accordingly notice u/s. 153C r.w.s. 153A was issued to assessee but such proceeding was also subsequently dropped.

Based on the incriminating documents seized at assessee's factory premises, AO had reasons to believe that some income escaped assessment and thus initiated proceeding u/s. 147 of the Act. On appeal before CIT(A), the reassessment order was set aside by the CIT(A) on the ground that re-assessment proceedings were not valid. On Revenue's appeal, Tribunal allowed the appeal in part and restored back the matter to CIT(A) to decide the matter on merits. HC relying on the principle laid down in the case of *Dr. Sarad B. Sahai & another v. CIT (235 CTR 596) (Allahabad HC)*, held that even if search is declared illegal, the material found at the time of search can be utilized for the purpose of assessment. HC further observed that the proceeding u/s. 153C and u/s. 147 were on totally different set of reasons and documents. The materials gathered from premises of 'P' group against assessee was never used to initiate proceedings u/s. 147 against the assessee. The proceeding u/s. 147 was initiated only on the basis of materials

which were found at the assessee's premises. No question of law arises and assessee's appeals dismissed. (AY. 2003-04 to AY 2006-07)
Shivam Gramodyog Sanstan v. CIT (2016) 282 CTR 96 / 129 DTR 18 (All.)(HC)

1803 **S. 147 : Reassessment – Assessing Officer must pass speaking orders for separate assessment years while disposing off the objections filed for separate assessment years. [S. 148]**
Assessing Officer reopened the assessment from AY. 2007-08 to 2010-11. Assessee filed objections against the notice issued u/s. 148 for each year separately. The AO passed a Non-speaking composite order disposing off the objections for all the assessment years. On Writ Petition, the High Court held that the AO must pass a speaking order and Non-composite order disposing off the objections of the assessee. Hence, the Composite order passed was set aside. (AY. 2007-08 to 2010-11)
JVS Export v. Dy. CIT (2016) 130 DTR 411 (Mad.)(HC)

1804 **S. 147 : Reassessment – Reassessment cannot be initiated merely because the assessee suffered loss on shares of the company which was floated by one of the directors of the assessee company. [S. 148]**
Assessee filed return of income declaring income of ₹ 6,23,880. In the return of income it had claimed loss of ₹ 1,28,80,000 on closing stock of shares namely, PP Ltd. whose cost was more than the market price. The assessment u/s. 143(3) was completed without any dispute on the point of valuation. Later on, during the assessment of A.Y. 1997-98, the AO found out that the director of the assessee had floated PP Ltd. and company does not carry on any business. Therefore, the transaction carried out by assessee were collusive in nature. Accordingly, the AO issued notice u/s. 148 for assessing the loss claimed on closing stock. The order of reassessment was quashed by CIT(A) which was affirmed by the Tribunal. On appeal, the High Court held that the reason to believe was not based on tangible material or information. In fact, it was purely on the basis of surmises that the assessment was reopened. Further, the existence of common director of the companies could not give the AO "reason to believe" to reopen the assessment. Also, the loss claimed by the assessee on closing stock is based on the accounting policy which assessee has been consistently following and has been accepted by the department in the past. Therefore, the reassessment is invalid in law. (AY. 1995-96)
CIT v. Vishishth Chay Vyapar Ltd. (2016) 384 ITR 505 / 130 DTR 87 (Delhi)(HC)

1805 **S. 147 : Reassessment – Assessment cannot be reopened, if all the facts and material seized during the search was explained and accepted by the AO during the original assessment proceeding.**
A search u/s. 132(1) was conducted in the business premises of the assessee. During the assessment proceedings, assessee was asked to explain the material that was seized during the search. Based on the explanation furnished by the assessee, assessment was finalized by the AO for AY. 1991-92. For AY. 1992-93, assessment made was challenged by the assessee before CIT(A). While passing the order, the CIT(A) also issued directions to AO to verify the material seized during the search again and compute the income for A.Y. 1991-92. The AO issued notice u/s. 148 based on the direction of CIT(A) and completed

the assessment. The order of the AO was upheld by CIT(A). The Tribunal, quashed the reassessment and reversed the order of CIT(A). On appeal, High Court held that during the original assessment proceeding, assessee had explained the entire material seized during the search. Therefore, there was no failure on the part of the assessee to make full and true disclosure hence reassessment is bad in law. (AY. 1991-92)
CIT v. Hemkunt Timbers Ltd. (2016) 380 ITR 658 / 130 DTR 101 / 283 CTR 1 (All.)(HC)

S. 147 : Reassessment – Cash credits – Assessing Officer cannot reopen the assessment on the basis of information that huge cash deposits were made in the bank account of the assessee without examining whether such deposits were reflected in the return of income. [S. 68, 143(1)] 1806

The assessee filed return of income declaring income of ₹ 36,02,307. The return was processed under section 143(1). Subsequently, the AO reopened the assessment based on the information received from Enforcement Directorate (ED) that there have been cash deposits of ₹ 3,23,00,550 and in the investigation carried out by ED, assessee failed to explain such deposits to them. The assessee explained that it acts as an agent of an airline and cash deposits were from the sale of tickets which were duly disclosed in the books of accounts. The AO rejected the explanation and assessed the cash deposits as undisclosed income. The CIT(A) confirmed the order of the AO however, the Tribunal reversed the order of CIT(A) and quashed the reassessment for want of Jurisdiction. On appeal to the High Court, it was held that AO failed to examine whether mere information received from ED provided him the vital link to form the 'reason to believe'. Further, mere information that huge cash deposits were made in the bank accounts could not give the AO *prima facie* belief that income has escaped assessment. The AO is required to form *prima facie* opinion based on tangible material which provides the nexus or the link having reason to believe that income has escaped assessment. The AO was also required to examine whether the cash deposits were disclosed in the return of income to form an opinion that income has escaped assessment. (AY. 2002-03)
CIT v. Indo Arab Air Services (2015) 64 taxmann.com 257 / (2016) 130 DTR 78 / 283 CTR 92 (Delhi)(HC)

S. 147 : Reassessment – Report of DVO – Could not be made sole basis to reopen assessment without verification of facts to support conclusion of DVO [S. 69, 80IB(10), 148] 1807

During the assessment proceedings for subsequent year (i.e. AY 2011-12), the AO noticed that the cost of construction claimed by the assessee for the project appeared to be less in comparison to similar projects run by other assessees. He, therefore, made a reference to the DVO for determining the cost of construction of the project of the Assessee. The DVO determined the cost of construction of the entire project of the Assessee at higher figure (report was for the period AY 2007-08 to AY 2012-13). On the basis of the aforesaid report of the DVO, the AO formed the belief that the assessee had under-reported the cost of investment made by it in the ongoing project and artificially inflated the profit from the project as it was getting benefit of deduction under section 80-IB(10). He, therefore, reopened the assessment for the year under consideration.
The High Court held that except for the report of the DVO, there was no tangible material for the Assessing Officer to form the belief that income chargeable to tax has

escaped assessment. Following the ruling of *ACIT v. Dhariya Construction Co. (2010) 328 ITR 515 (SC)* wherein it was held that the opinion of DVO *per se* is not an information for the purpose of reopening assessment under section 147 of the Act, the High Court held, very assumption of jurisdiction under section 147 of the Act on the part of the Assessing Officer by issuing the impugned notice under section 148 of the Act is without authority of law, and hence, the impugned notice cannot be sustained. Further it was held that there was no profit during the year and deduction under section 80IB(10) has not been claimed by Assessee and hence objection of department on this ground in incorrect. Thus writ petition filed by the Assessee is allowed. (AY. 2007-08)
Aavkar Infrastructure Company v. Dy. CIT (2016) 238 Taxman 644 / 136 DTR 405 / 290 CTR 413 (Guj.)(HC)

1808 **S. 147 : Reassessment – Gift of shares to sister company – Reasons for reopening only contained the transaction and nothing more – Held, no live nexus between the transaction and the fact that income has escaped assessment – Reassessment quashed. [S. 47, 148]**
Assessee had transferred shares, having huge market value, without consideration to its sister concern. Intimation u/s. 143(1) was issued accepting the transaction and there was no assessment u/s. 143(3). AO issued notice u/s. 148. Reasons supplied by the AO for reopening of assessment merely mentioned the transaction and his opinion that he has reason to believe that income has escaped assessment. High Court held that formation of belief by the AO must be *prima facie* and at the stage when the Court was testing validity of such a notice; it would not be necessary for the AO to conclusively establish that the income chargeable to tax had escaped assessment. High Court also held that there was no live nexus between the transaction and the fact that income has escaped assessment, since gift of shares to sister concern did not attract capital gain by virtue of section 47(iii). Accordingly, it was held that, reasons recorded by the AO to form belief that the income chargeable to tax had escaped assessment lacked validity. (AY. 2010-11)
Prakriya Pharmacem v. ITO (2016) 238 Taxman 185 (Guj.)(HC)

1809 **S. 147 : Reassessment – Amalgamation of companies – Notice of reassessment served on amalgamated company – Not proper service on amalgamating company – Consequent assessment order passed without jurisdiction and liable to be set aside. [S. 144, 148]**
Order treating amalgamated company as agent of amalgamating company struck down and order of court attaining finality. The Assessing Officer issued the notice of reassessment on amalgamated company and passed order u/s. 144. On writ, allowing the petition the Court held that, notice of reassessment served on amalgamated company is not proper service on amalgamating company, consequent assessment order passed without jurisdiction and liable to be set aside. (AY. 2005-06)
Techpac Holdings Ltd. v. Dy. CIT (2016) 382 ITR 474 / 238 Taxman 542 / 286 CTR 412 / 135 DTR 322 (Bom.)(HC)

S. 147 : Reassessment – Petition filed after almost a year of issuance of the show-cause notice when reopening proceedings were at final stage, held Writ is not maintainable. [S.148, Constitution of India, Art.226] 1810

Assessee filed a special appeal against the order disposing the writ petition by the High Court *vide* order dated 9th February, 2015. The assessee had filed a Writ Petition on 4th March, 2014 after almost a year from the show cause notice which was served on 14th March, 2013. Assessee delayed the reassessment proceedings and filed the its objections on 12th February, 2014 after which assessment order was passed by the AO on 13th March, 2014. High Court Single Judge dismissed the writ petition filed after almost a year, as Assessee wanted just to defer the proceedings and alternate statutory remedy of appeal was available to Assessee.

Shiv Mahima Township (P.) Ltd. v. ITO (2016) 385 ITR 609 / 133 DTR 87 / 286 DTR 222 (Raj.)(HC)

S. 147 : Reassessment – Notice issued after death of assessee returned unserved notice sent to legal heir after limitation period was held to be not valid. [S.148, 149,159] 1811

Held the limitation for issuance of the notice under section 147 read with section 148 of the Act was March 31, 2015. On March 27, 2015, when the notice was issued, the assessee was already dead. If the Department intended to proceed under section 147 of the Act, it could have done so, prior to March 31, 2015 by issuing a notice to the legal heirs of the deceased. Beyond that date, it could not proceed in the matter even by issuing notice to the legal heirs of the assessee. Thus the proceedings under section 147 read with 148 of the Act against the petitioner were wholly misconceived and were to be quashed. (AY. 2008-09)

Vipin Walia v. ITO (2016) 382 ITR 19 / 238 Taxman 1 / 141 DTR 36 (Delhi)(HC)

S. 147 : Reassessment – Notice issued after it had amalgamated with petitioner company and was no longer in existence was held to be invalid. [S. 148, Companies Act, 1956, S. 394] 1812

Merger of assessee with petitioner-company under sanctioned scheme of amalgamation. Assessee ceasing to exist on amalgamation. Notice for reassessment issued to assessee was held to be invalid. (AY. 1989-90 to 1993-94).

Rustagi Engineering Udyog P. Ltd. v. DCIT (2016) 382 ITR 443 (Delhi)(HC)

S. 147 : Reassessment – Processing the assessment under section 143(1)(a) does not result in to an assessment and thus provision of section 151(1) are not attracted – Reassessment was held to be valid [S. 143(1)(a), 148, 151(1)] 1813

Intimation issued pursuant to earlier notice for reassessment is not an assessment thus no proceedings was pending, thus fresh notice issued pursuant to information is valid. No sanction required for issue of notice hence reassessment was held to be valid. (AY. 1991-92)

Ranjeet Singh v. CIT (2016) 382 ITR 409 / 238 Taxman 552 (P&H)(HC)

1814 **S. 147 : Reassessment – Writ petition against notice of reassessment – Maintainable [S. 148 Constitution of India, Art. 226]**

Exercise of extraordinary jurisdiction of the High Court under article 226 of the Constitution is available where the petitioner assails action of the authorities on the following grounds: (i) as being without jurisdiction, (ii) as being in violation of principles of natural justice, (iii) as being without authority of law, and (iv) where the validity or vires of the statutory provision is under challenge. Held, that the writ petition against the notice of reassessment was maintainable. Decision of the single judge of the Karnataka High Court in *Dell India P. Ltd. v. Joint CIT (LTU) [2015] 5 ITR-OL-171 (Karn.)* affirmed. (AY. 2009-10)

JCIT v. Dell India P. Ltd. (2016) 382 ITR 310 / 287 CTR 695 (Karn.)(HC)

1815 **S. 147 : Reassessment – Assessing Officer raising query in original assessment and assessee clarifying it in writing – Reopening of assessment based on change of opinion, held to be not permissible. [S.143(3), 148]**

Held, dismissing the appeal, that the original assessment was framed under section 143(3) of the Act and while framing original assessment, a specific query was raised by the Assessing Officer and was clarified by the assessee in writing. It was not a case where relevant material was not disclosed by the assessee in the first round of assessment. Thus the reopening of the assessment by the Assessing Officer for the AY 2005-06 was based on a change of opinion, which was impermissible in law.(AY. 2004-05, 2005-06)

CIT v. Central Warehousing Corporation Ltd. (2016) 382 ITR 172 (Delhi.)(HC)

1816 **S. 147 : Reassessment – Issue on which reasons based considered in original assessment – Satisfaction cannot be outsourced or arrived at on the basis of directions of his superiors – Obligation of assessee only to disclose primary facts necessary for assessment – Assessee disclosing truly and fully all material facts – Reopening of assessment was held to be not warranted. [S.80IA, 143(3), 148]**

Held, the necessary enquiry was made into the profits claimed by the eligible unit for the purpose of the benefit under section 80-IA of the Act during the regular assessment proceedings. It was noticed from those records that the assessee had claimed excess profits in respect of its power generating units. The obligation of the assessee under the Act was only to disclose the primary facts necessary for assessment. The Commissioner (Appeals) and the Tribunal came to the conclusion that in view of the fact that the Assessing Officer himself had not accepted the audit objection, there could be no reason for him to believe that income chargeable to tax had escaped assessment. The condition precedent for reason to believe that income chargeable to tax had escaped assessment was not satisfied. The notice for reopening was without jurisdiction. The application of law and the determination of the market value of the electricity sold by the eligible units under section 80-IA to the other units of the assessee was a subject matter of enquiry by the Assessing Officer while passing an order under section 143(3) of the Act in regular assessment proceedings. Thus, there was no failure on part of the assessee to disclose truly and fully all material facts which would warrant reopening of the assessment. (AY. 2004-05)

CIT v. Reliance Industries Ltd. (2016) 382 ITR 574 (Bom.)(HC)

S. 147 : Reassessment – Notice based on review of assessment order by Commissioner was held to be not valid – Notice cannot be improved by affidavits and other reasons. [S. 14A, 143(3), 148] 1817

In the original assessment proceedings there was complete disclosure made by the assessee of the relevant particulars. The Revenue had been unable to counter the assertion made by the assessee that the investment was in mutual funds and made under the growth plan scheme that did not yield any exempt income. The assessee made disclosure in schedule 15 to the profit and loss account, under the head "Other income" of the dividend earned during the relevant previous year. The financial expenses incurred by the assessee were reported in schedule 20 to the profit and loss account. Even as regards the loss on account of foreign exchange fluctuation, there was complete disclosure of all the relevant facts by the assessee during the original assessment proceedings. The return was picked up for scrutiny under section 143(3) and in the balance-sheet accounts (together with notes) rendered by the assessee, there was sufficient disclosure on this aspect. Schedule 22 to the notes of accounts had a separate disclosure under the heading. The notice under section 148 was not valid. (AY. 2008-09)

Munjal Showa Ltd. v. Dy. CIT (2016) 382 ITR 555 / 239 Taxman 239 / 137 DTR 231 (Delhi)(HC)

S. 147 : Reassessment – No contention that Assessing Officer had no reason to believe income had escaped assessment – Challenge after order of reassessment was passed that sanction for notice had been accorded mechanically – Mere fact that reasons had not been mentioned in order of sanction would not render notice invalid – Reassessment was held to be valid. [S. 148, 151(2)] 1818

Dismissing the appeal of the assessee the Court held that no prior assessment had been done for three assessment years under consideration. Hence the Assessing Officer before issuing notice under section 148 of the Income-tax Act, 1961, had to obtain sanction under section 151(2) of the Act from the competent authority. The only contention raised by the assessee in the appeal was that the Additional Commissioner while according his approval under section 151(2) of the Act did not apply his mind and mechanically granted sanction. The assessee had not contended that the reasons cited by the Assessing Officer for initiating reassessment proceedings under section 147 were irrelevant or that the Assessing Officer had no reason to believe that income chargeable to tax had escaped assessment. The Tribunal moreover had found that the assessee without objecting to the validity of the notice filed his return in compliance therewith and participated in the reassessment proceedings. It was only after receiving the assessment order that the assessee objected to the validity of the notice first before the Commissioner (Appeals) and then before the Tribunal. The mere fact that the Additional Commissioner did not record his satisfaction in so many words should not render invalid the sanction granted under section 151(2) when the reasons on the basis of which sanction was sought for could not be assailed. Even an appellate authority is not required to give reasons when it agrees with the finding unless statute or rules so require. The notice and consequent reassessment were valid. (AY. 1990-91, 1991-92, 1992-93)

Prem Chand Shaw (Jaisal) v. ACIT (2016) 383 ITR 597 / 238 Taxman 423 / 286 CTR 252/ 135 DTR 172 (Cal.)(HC)

1819 **S. 147 : Reassessment – Though assessee claims that she is a non-resident & that onus is on the revenue to show that the money in the HSBC Geneva account is taxable in India, the non-cooperation with the revenue by signing the consent waiver form shows that she has something to hide and makes it an unfit case for exercise of writ jurisdiction.[S. 148, 149(1)(c)]**

Dismissing the petition the Court held that (i) During the course of the hearing of the Reply of the Revenue it was pointed out to us that despite the revenue's request, the Petitioner had failed to sign a Consent Waiver Form ("the Waiver") which would have enabled HSBC to provide information about the Account. According to the petitioner the Waiver was sought only on 30th October, 2015 i.e., much after the issue of the impugned notice on 31st March, 2015 and also after filing of this Petition in Court on 30th October, 2015. In any case, we asked the Petitioner whether she is now ready to sign the Waiver. At the time of the rejoinder we were informed that the Petitioner is willing to sign the Consent Waiver Form with a modification-namely as alleged beneficiary rather than holder or beneficiary of the account in HSBC, Geneva.

(ii) However, on enquiry by the Revenue from HSBC, Geneva, it was learnt that a modified Consent Waiver Form would not enable the bank to give copies of the bank statement of A/c. No. 5091404580 since the Waiver would have to be provided without modifications.

(iii) We notice that the principal contention of the Petitioner before us has been that she is non-resident and it is only her income which is received or accrued or arising in India which can be brought to tax under the Act. Thus, it is submitted that it is for the revenue to establish that the income had accrued or arisen in India which was lying on 26th March, 2006 in A/c. No. 5091404580 in HSBC, Geneva. We find that the Petitioner and/or her uncle – Dilip Mehta i.e. Executor of the Estate of late Ramniklal N. Mehta who could probably amongst others be able to produce copies of the bank statement either by giving a Consent Waiver Form to the Income Tax Department or in the alternative Mr. Dilip Mehta could instruct the Director of M/s. White Cedar to apply for and furnish to him copies of the bank statement in A/c. No. 5091404580 of HSBC,Geneva. The fact that it is within the authority/power of Mr. Dilip Mehta to instruct M/s. White Cedar is evident from the letter dated 14th. August 2014 addressed by HSBC Bank, Geneva to M/s. Red Oak Operation Ltd. which has been taken on record and marked X for identification. This bank statement if obtained from HSBC, Geneva, would reveal and/or possibly give clues as to the source of amounts deposited in the Account No. 5091404580 of HSBC. Neither the petitioner nor her uncle i.e. Executor of the Estate of late Ramniklal N. Mehta is ready to obtain the necessary statement either directly or through M/s. White Cedar from HSBC, Geneva in respect of A/c. No. 5091404580 by exercising or causing to be exercised the limited authority to instruct White Cedar to apply for and obtain the requisite information.

(iv) In the normal course of human conduct if a person has nothing to hide and serious allegations /questions are being raised about the funds a person would make available the documents which would put to rest all questions which seem to arise in the mind of the Authorities. The conduct on the part of the petitioner and her uncle, in not being forthcoming, to our mind leads us to the conclusion that this is not a fit case where we should exercise our extra ordinary writ jurisdiction and/or interfere with the orders

passed by the authorities under the Act. If a person has nothing to hide, we believe the person would have cooperated in obtaining the Bank Statements. (AY. 2006-07)
Soignee R. Kothari v. DCIT (2016) 386 ITR 466 / 285 CTR 230 / 134 DTR 193 (Bom.)(HC)

S. 147 : Reassessment – Non-residents – In the absence of taxable income, notice for reassessment was held to be not valid. [S. 44BBA, 148] 1820
High Court held that where there is no income, section 44BBA cannot be applied to bring to tax the presumptive income constituting 5% of the gross receipts in terms of section 44BBA(2) and as the assessee is not having the taxable income reassessment was held to be not valid.(AY. 1989-90 to 1993-94)
DIT v. Royal Jordanian Airlines (2016) 383 ITR 465 / 236 Taxman 10 / 129 DTR 364 / 287 CTR 407 (Delhi)(HC)

S. 147 : Reassessment – Permanent Establishment (PE) – If the alleged PE has been assessed on ALP basis in terms of Article 7, no income has escaped escapement so as to justify issue of reassessment notice – DTAA – India – USA [S. 148, Art. 5, 7, 11] 1821
Allowing the petition the Court held that even if the subsidiary of a foreign company is considered as its PE, only such income as is attributable in terms of paragraphs 1 and 2 of Article 7 can be brought to tax. In the present case, there is no dispute that Adobe India – which according to the AO is the assessee's PE – has been independently taxed on income from R&D services and such tax has been computed on the basis that its dealings with the assessee are at arm's length (that is, at ALP). Therefore, even if Adobe India is considered to be the assessee's PE, the entire income which could be brought in the net of tax in the hands of the assessee has already been so taxed in the hands of Adobe India. There is no material that would even remotely suggest that the Assessee has undertaken any activity in India other than services which have already been subjected to ALP scrutiny/adjustment in the hands of Adobe India. Thus, in our view, even if the AO is correct in its assumption that Adobe India constituted the Assessee's PE in terms of Article 5(1), 5(2)(l) or 5(5) of the Indo-US DTAA, the facts in this case do not provide the AO any reason to believe that any part of the Assessee's income had escaped assessment under the Act. (AY. 2004-05, 2005-06, 2006-07)
Adobe Systems Incorporated v. ADIT (2016) 137 DTR 255 / 240 Taxman 353 / 292 CTR 407 (HC)(Delhi)

S. 147 : Reassessment – AO can form reasons to believe that income has escaped assessment by examining the very return and/or the documents accompanying the return. It is not necessary in such a case for the AO to come across some fresh tangible material to form 'reasons to believe' that income has escaped assessment.[S. 143(1), 148] 1822
Dismissing the petition the Court held that where reopening is sought of an assessment in a situation where the initial return is processed under Section 143 (1) of the Act, the AO can form reasons to believe that income has escaped assessment by examining the very return and/or the documents accompanying the return. It is not necessary in such a case for the AO to come across some fresh tangible material to form 'reasons to believe' that income has escaped assessment. In the assessment proceedings pursuant to such

reopening, it will be open to the Assessee to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. (AY. 1999-2000)
Indu Lalta Rangwala v. DCIT (2016) 384 ITR 337 / 136 DTR 289 / 286 CTR 474 (Delhi) (HC)

1823 **S. 147 : Reassessment – Limitation – ITO who is not the Assessing Officer of the assessee, not empowered to reopen the assessment. [S. 148, 149(1)]**
The time limit for reopening of the assessment under section 147 of the Act in the assessee's case was 31st March 2012. The extended period of limitation in terms of section 149(1)(b) of the Act was 31st March 2014 (i.e. 6 years from end of the assessment year). The DCIT – Circle 39(1) was the Assessing Officer of the assessee and had the jurisdiction over this case. However on 14th March 2014 the ITO Ward 39(2) issued a notice to the assessee under section 148 of the Act. The notice of reopening was issued by ITO Ward 39(2) who was not the Assessing Officer of the assessee and this single fact in itself vitiates the reopening of the assessment. Realising the mistake the Assessing Officer (who had the jurisdiction over the Assessee) issued a notice dated 23rd June 2014 under section 148 of the Act but it was beyond the deadline of 31st March 2014 under section 149(1)(b) of the Act.
One of the main points urged in the present petition is that the reopening of the assessment sought to be made under Section 148 of the Act is bad in law since the notice had been issued and the reasons for reopening had been recorded by the ITO Ward 39(2), who was not the Assessing Officer as far as petitioner is concerned.
The High Court held that it was only the Assessing Officer who has issued the original assessment order dated 13th April 2009 for AY 2007-08 under Section 143(3) of the was empowered to exercise powers under Section 147/148 to re-open the assessment. This was because he alone would be in a position to form reasons to believe that some income of that particular AY had escaped assessment. Further provisions of section 151 of the Act required prior approval of CIT if he feels that the assessment order is prejudicial to the interest of Revenue. However in any event ITO who has not passed the original order cannot reopen the assessment.
Thus the writ petition filed by the Assessee is allowed. (AY. 2007-08)
Dushyant Kumar Jain v. CIT (2016) 381 ITR 428 / 237 Taxman 646 / 139 DTR 209 / 288 CTR 124 (Delhi)(HC)

1824 **S. 147 : Reassessment – Within four years – Issue of share capital at huge premium – Reopened on the ground that excess premium was cash credit and had escaped assessment – Held, not necessary to have some material outside or extraneous to the original records – Held, reasons not perverse to terminate the assessment proceedings at this stage. [S. 68, 143(1)]**
The assessee company had filed nil return which was accepted u/s. 143(1). Subsequently, the AO reopened the assessment on the ground that the assessee had issued shares at huge premium and therefore, he had reason to believe that said excess premium was unexplained cash credit which had escaped assessment. Held, where the return has been

accepted u/s. 143(1), then the contention that it was necessary to have some material outside or extraneous to the original records cannot be accepted. Further, it was held that prima facie the facts appeared to be glaring and it would not be proper to terminate the assessment proceedings at this stage. Whether the assessee would be able to discharge the minimal burden of establishing identity, source and creditworthiness or whether the assessee company had started its operations cannot be gone into at this stage. The assessee can present its case before the AO during the assessment proceedings. (AY. 2011-12)

Olwin Tiles (India) (P.) Ltd. v. Dy. CIT (2016) 382 ITR 291 / 237 Taxman 342 / 283 CTR 200 / 13O DTR 209 (Guj.)(HC)

S. 147 : Reassessment – No addition on the issues mentioned in "reason to believe" – AO is not permitted to bring to tax other issues which did not form part of reasons recorded, but came to his notice subsequently in the course of reassessment proceedings. [S. 11,148] 1825

In the reassessment order, the AO brought to tax escaped income relating to the cost of construction on the basis of report of the DVO; but there is no adverse finding on undisclosed investment of the funds or payment made to various parties or denial of benefit u/s. 11 of the Act which he had considered to have escaped assessment in the reasons recorded while initiating proceedings u/s. 147 of the Act.

The CIT(A) confirmed the action of the AO, however, the Tribunal reversed the findings of the AO.

On further appeal, the HC held that the assumption of jurisdiction u/s. 147 of the Act, is the reason to believe that certain income of the assessee has escaped assessment or reassessment. However, if in the course of proceedings u/s. 147 of the Act, the AO came to the conclusion that the income which formed his "reason to believe", did not escape assessment, then, the AO would not have any jurisdiction, to tax any other income as having escaped assessment and which may come to his notice subsequently in the course of proceedings u/s. 147.

Dy. CIT v. Takshila Educational Society (2016) 131 DTR 332 / 284 CTR 306 (Pat.)(HC)

S. 147 : Reassessment – Jurisdiction – Participated in the proceedings – Writ is not maintainable. [S.148, Constitution of India, Art. 226] 1826

If the assessee responds to the S. 142(1)/ 143(2) notices, it means that he has submitted to the AO's jurisdiction and is estopped for filing a writ Petition to challenge the same. The fact that the jurisdiction is challenged while participating in the proceedings is irrelevant. Petition of the assessee was dismissed. (AY. 2008-09)

Amaya Infrastructure Pvt. Ltd. v. ITO(2016) 383 ITR 498 / 140 DTR 19 / 288 CTR 340 (Bom.)(HC)

S. 147 : Reassessment – Even when return of income is processed under section 143(1), reassessment can be initiated only if there is tangible material. [S. 40(a)(i), 143(1)] 1827

The assessee filed return of income declaring loss of ₹ 96,19,890. The return of income was processed under section 143(1) and refund of ₹ 20,16,957 was granted. The assessing officer sought to reopen the assessment on the ground that management fees

paid to a foreign company is to be disallowed under section 40(a)(i) as reported in the Tax Audit report annexed to the return of income. The assessee filed objection against initiation of reassessment proceedings which were not disposed off by the Assessing Officer and order was passed making disallowance under section 40(a)(i). The CIT(A) upheld the initiation of reassessment proceedings but, deleted the addition made by the Assessing Officer. On appeal, the Tribunal quashed the reassessment proceeding under section 147 on the ground that there was no tangible material. The High Court held that reassessment proceeding was based on the Tax Audit report which was filed with the return of income therefore, there was no tangible material to show escapement of income. It was also held that even in a case where return was processed under section 143(1), reassessment proceeding can be initiated only if "reason to believe" exists as laid down by Supreme Court in *CIT v. Kelvinator of India Ltd. (320 ITR 561)(SC).* (AY. 2003-04)
PCIT v. Tupperware India (P.) Ltd. (2016) 236 Taxman 494 / 284 CTR 68 (Delhi)(HC)

1828 **S. 147 : Reassessment – An assessment cannot be reopened for the purpose of making a fishing and roving enquiry. [S.148]**
Allowing the appeal the Court held that Sections 147/148 of the Act is not meant for reopening an already concluded assessment by first issuing notice and then proceeding to investigate and find out if there was any lacuna in the accounts. If such further investigation, by reopening a concluded assessment, is permitted, it, would give rise to fishing and rowing enquiries, because, in every case, the Assessing Officer can then issue notice for the purpose of investigation, and thus reopen any concluded assessment. Reassessment was quashed. (ITA No. 795/2009, dt. 24.08.2015) (AY. 2004-05)
C. M. Mahadeva v. CIT (Karn.)(HC); www.itatonline.org

1829 **S. 147 : Reassessment – Change of opinion Method of accounting – Reopening on factually erroneous premise is not permissible. [S.148]**
Allowing the petition the Court held that none of the objections raised by the assessee was adequately dealt with by the AO. Court also held that since the action of the Revenue was based on a factually erroneous premise, the Court is of the view that the reopening of the assessments for the said AYs is not sustainable in law. The Court is also satisfied that the requirement of the law, as explained by the Court in *Commissioner of Income Tax. v. Kelvinator of India Limited (2010) 320 ITR 561 (SC),* and reiterated in the later decisions, has not been fulfilled in the present case. (AY. 2006-07, 2007-08, 2008-09, 2009-10)
Dr. Ajit Gupta v. ACIT (2016) 383 ITR 361 (Delhi)(HC)

1830 **S. 147 : Reassessment – Change of opinion – Claim for exemption granted after considering material – Subsequent reassessment proceedings on ground excess exemption was granted – Reassessment was held to be not valid. [S.10A, 148]**
Dismissing the appeal of revenue the Court held that it could be seen from the original assessment records that the claim of the assessee u/s. 10A was thoroughly scrutinised, the Assessing Officer had examined the claim of expenditure incurred in foreign currency for providing technical services allocating the sum of ₹ 38,51,45,781 between

the five software technology park units in the ratio of the export sales. In fact, the Assessing Officer had raised certain queries during the assessment proceedings and a detailed reply had been given by the assessee. The Tribunal was fully justified in arriving at the conclusion that the reopening of assessment was by change of opinion. The reassessment was not valid. (AY. 2003-04)
CIT v. Hewlett-Packard Globalsoft P. Ltd. (2015) 127 DTR 281 / (2016) 380 ITR 386 (Karn.) (HC)

S. 147 : Reassessment – Non disposal of objections – Providing the assessee with the recorded reasons towards the end of the limitation period and passing a reassessment order without dealing with the objections results in gross harassment to the assessee which the Pr. CIT should note & remedy. [S. 144C, 148] 1831

(i) This passing of the draft assessment order on 30th March, 2015 was in the face of the decision of the Supreme Court in *GKN Driveshafts (India)Ltd v. Income Tax Officer and Others reported in 259 ITR 19 (SC),* wherein it has been laid down that whenever a reopening notice is issued under section 148 of the Act, the Assessing Officer was to make available to the assessee, on request, a copy of the reasons recorded while issuing the notice for reopening the Assessment. The assessee is then entitled to file its objection to the grounds in support of the reopening notice and the Assessing Officer is required to dispose of the assessee's objection to the reasons recorded by a speaking order. It is only if the Assessing Officer rejects the objection that he can proceed with the Assessment proceedings of the reopened Assessments.

(ii) In the present case, as the issue involves the provisions with regard to transfer pricing cases, the period of limitation to dispose of an Assessment consequent to reopening notice as provided in 4th proviso to sub-section(2) of section 153 of the Act is two years from the end of the financial year in which the reopening notice was served. In this case, the impugned reopening notice was issued on 6th February, 2013 and the reasons in support were supplied only on 19th March, 2015. This when the Revenue was aware at all times that the period to pass an order of reassessment on the impugned reopening notice dated 6th February 2013 would expire on 31st March, 2015. However, there is no reason forthcoming on the part of the Revenue to satisfactorily explain the delay. The only reason made out in the affidavit dated 3rd September, 2015 by the Assessing Officer was that the issue was pending before the Transfer Pricing Officer (TPO) and it was only after the TPO had passed his order on transfer pricing were the reasons for reopening provided to the Petitioner. We are unable to understand how the TPO could at all exercise jurisdiction and enter upon enquiry on the reopening notice before the same is upheld by an order of the Assessing Officer passed on objections. Besides the recording of reasons for issuing the reopening notice is to be on the basis of the Assessing Officer's reasons. The TPO's reasons on merits much after the issue of the reopening notice does not have any bearing on serving the reasons recorded upon the party whose assessment is being sought to be reopened.

(iii) One more peculiar fact to note is that in the affidavit dated 10th July, 2015 filed by one Prabhakar Ranjan on behalf of the Revenue it is stated that the Assessing

Officer was under a *bona fide* impression that the TPO would pass an order in favour of the assessee. In fact, if that be so, we are unable to understand how the assessing officer could have any reason to believe that income chargeable to tax has escaped assessment. Be that as it may, this petition was adjourned from time to time to enable the revenue to file the necessary affidavits explaining their contention.

(v) In fact, on 23rd December 2015 the revenue again sought time. At that stage, we indicated that in view of the gross facts of this case, the Principal Commissioner of Income Tax would take serious note of the above and after examining the facts, if necessary, take appropriate remedial action to ensure that an assessee is not made to suffer for no fault on its part. This is particularly so as almost the entire period of two years from the end of the financial year in which the notice is issued was consumed by the Assessing Officer in failing to give reasons recorded in support of the impugned notice. Nevertheless, the Assessing Officer proceeds to pass a draft Assessment order without dealing with the objections filed by the petitioner. We could have on that date or even earlier passed an order setting aside the draft assessment order dated 30th March 2015 as it was passed without disposing of the objections. Thus, clearly without jurisdiction. However, we were of the view that although this appears to be a gross case of harassing an assessee, the Principal Commissioner would take note and adopt remedial action / proceedings. (AY. 2007-08)

Bayer Material Science Pvt. Ltd. v. DCIT (2016) 382 ITR 333 / 133 DTR 53 / 237 Taxman 723 (Bom.)(HC)

1832 **S. 147 : Reassessment – Reason to believe – It is open to the assessee to challenge a notice issued u/s. 148 as being without jurisdiction for absence of reason to believe even in case where the assessment has been completed earlier by Intimation u/s. 143(1) of the Act. [S. 143(1), 148]**

The assessee filed a Writ Petition to challenge a notice issued u/s. 148 in a case where only an intimation u/s. 143(1) had been passed. The Department contented that the Writ Petition was not maintainable in view of the judgment of the Supreme Court in *Dy. CIT v. Zuari Estate Development and Investment Co. Ltd. (2015) 373 ITR 661* where the order of the Bombay High Court in *Zuari Estate Development Co. Ltd. v. Dy. CIT (2004) 271 ITR 269* had been set aside. The Supreme Court held that where the original Return has been accepted by Intimation under Section 143(1) of the Act, there could be no change of opinion. Further, it was contended that the Supreme Court impliedly held that in such cases where assessment is completed by Intimation under Section 143(1) of the Act, there is no requirement for the Assessing Officer to have reason to believe that income chargeable to tax has escaped assessment, so as to exercise jurisdiction under Section 148 of the Act. HELD by the Bombay High Court:

(i) The Apex Court in *ACIT v. Rajesh Jhaveri Stock Brokers P. Ltd. (2007) 291 ITR 500,* had an occasion to deal with identical facts, namely reopening Notices issued under Section 148 of the Act where assessment is completed earlier by intimation under Section 143(1) of the Act. In the above case, the Apex Court held that a Notice for reopening an assessment under Section 148 of the Act could only be justified if the Assessing Officer has reason to believe that income chargeable to

tax has escaped assessment. This decision of the Supreme Court in Rajesh Jhaveri Stock Brokers P. Ltd. (Supra) has not been disturbed by the Apex Court in Zuari Estate Development and Investment Co. Ltd. (Supra). In fact, the Supreme Court in Zuari Estate Development and Investment Co. Ltd. (Supra) makes a specific reference to its decision in Rajesh Jhaveri Stock Brokers P. Ltd. (Supra) to hold that where the assessment has been completed by intimation under Section 143(1) of the Act, there can be no question of change of opinion.

(ii) The Apex Court in Zuari Estate Development and Investment Co. Ltd. (Supra) has not dealt with the issue whether before invoking Section 148 of the Act, the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment, where the original assessment has been completed by Intimation under Section 143(1) of the Act. The Revenue is trying to infer that because the Apex Court in Zuari Estate Development and Investment Co. Ltd. (Supra) has set aside the order of this Court and restored the issue to be decided on merits by the Tribunal, it must be inferred that the Apex Court had come to the conclusion that reason to believe was not necessary for issuing reassessment Notices where the regular assessment was completed under Section 143(1) of the Act. As rightly pointed out by Mr. Pardiwalla, it can equally be inferred that the Apex Court in the above case had come to the conclusion that there is reason to believe that income had escaped assessment and consequently restored the issue to the Tribunal to decide the reassessment proceedings on merits.

(iii) It is settled position in law that the decision of the Court has to be read in the context of the facts involved therein and not on the basis of what logically flows therefrom as held by the Supreme Court in *Ambica Quarry Works v. State of Gujarat, 1987(1) SCC 213*. The Apex Court in Zuari Estate Development and Investment Co. Ltd. (Supra) not having dealt with the issue of reason to believe that income chargeable to tax has escaped assessment on the part of the Assessing Officer in cases where regular assessment was completed by Intimation under Section 143(1) of the Act, it would not be wise for us to infer that the Supreme Court in Zuari Estate Development and Investment Co. Ltd. (Supra) has held that the condition precedent for the issue of reopening notice namely, reason to believe that income chargeable to tax has escaped assessment, has no application where the assessment has been completed by Intimation under Section 143(1) of the Act. The law on this point has been expressly laid down by the Apex Court in the case of Rajesh Jhaveri Stock Brokers P. Ltd. (Supra) and the same would continue to apply and be binding upon us. Thus, even in cases where no assessment order is passed and assessment is completed by Intimation under Section 143(1) of the Act, the *sine qua non* to issue a reopening notice is reason to believe that income chargeable to tax has escaped assessment. In the above view, it is open for the petitioner to challenge a notice issued under Section 148 of the Act as being without jurisdiction for absence of reason to believe even in case where the Assessment has been completed earlier by Intimation under Section 143(1) of the Act. (AY. 2010-11)

Khubchandani Healthparks Pvt. Ltd. v. ITO (2016) 384 ITR 322 (Bom.)(HC)

1833 **S. 147 : Reassessment – The reopening of the assessment is not valid if the reasons recorded are incoherent and do not indicate what the basis for reopening. [S. 143(1), 148]**

(i) A plain reading of the reasons recorded for reopening reveals that the reasons are totally incoherent. In fact, a plain reading of it gives rise to doubts whether some lines have gone missing or some punctuation marks have been left out. Grammatically also the reasons recorded make little sense. However, this is the least of the problems. Essentially, the reasons recorded do not indicate what the basis for the reopening of the assessments is;

(ii) Under Section 147(1) of the Act, the reasons recorded for reopening an assessment should state that the Assessee had failed to disclose fully and truly all the material facts necessary for his assessment in the returns as originally filed and the reasons recorded should provide a live link to the formation of the belief that income has escaped assessment (*Madhukar Khosla v. Assistant Commissioner of Income Tax (2014) 367 ITR 165 (Del.*);

(iii) It is well-settled that the reasons recorded for reopening the assessment have to speak for themselves. They have to spell out that (i) there was a failure of the assessee to disclose fully and truly all the material facts necessary for the assessment and (ii) the reasons must provide a live link to the formation of the belief that income had escaped assessment. These reasons cannot be supplied subsequent to the recording of such reasons either in the form of an order rejecting the objections or an affidavit filed by the Revenue (*Northern Exim (P) Ltd. v. DCIT [2013] 357 ITR 586 (Del.)* referred);

(iv) Even otherwise even the above reasons given subsequently do not satisfy the jurisdictional requirements of Section 147(1) of the Act inasmuch as they do not indicate that there was a failure by the Assessee to disclose fully and truly all the material facts necessary for the assessment. The reasons also do not provide a live link to the formation of the belief that income had escaped assessment. (WP No. 8994/2014 & CM 20547/2014, dt. 18.02.2016)(AY. 2007-08 to 2012-13)

Sabharwal Properties Industries Pvt. Ltd. v. ITO (2016) 382 ITR 547 (Delhi)(HC)
Sabharwal Apartments Pvt. Ltd. v. ITO (2016) 382 ITR 547 (Delhi)(HC)

1834 **S. 147 : Reassessment – After the expiry of four years – Query raised during the course of original assessment proceedings – Assessment order under section 143(3) passed after considering the assessee's reply – Notice issued under s.148 to examine the same amounts to change of opinion – Reassessment was held to be not valid. [S.148]**

AO having raised specific query regarding the interest paid by the assessee on the secured loan and passed the assessment order under S.143(3) after considering the replies of the assessee, reassessment proceedings initiated by the AO after the expiry of four years from the end of the relevant assessment year is based on change of opinion. (AY. 2002-03)

ACIT v. Tata Consultancy Services Ltd. (2016) 130 DTR 90 (Mum.)(Trib.)

S. 147 : Reassessment – After the expiry of four years – Reopening cannot be based on same material as was considered by AO in course of original assessment proceeding. [S.148] 1835

Allowing the appeal of the assessee, the Tribunal held that no reopening on reason to suspect, belief cannot be based on same material as was considered by AO in course of original assessment proceeding. (AY. 2005-06)

Fibres and Fabrics International P. Ltd. v. Dy. CIT (2016) 48 ITR 46 (Bang.)(Trib.)

S. 147 : Reassessment – After the expiry of four years – Details of commission and professional charges available at original assessment – Reassessment invalid. [S. 148] 1836

The Assessing Officer issued notice under section 148 of the Act on the ground that in terms of the Explanation to subsection (2) of section 9 inserted by the Finance Act, 2010, with retrospective effect from June 1, 1976, the income of a non-resident would be deemed to accrue or arise in India under clause (v), (vi) or (vii) of subsection (1) of section 9 and to be included in the total income of nonresident and since the assessee had not deducted tax at source on certain payments towards expenditure incurred in foreign currency, the income had escaped the assessment. The Tribunal held that the notice was issued after four years. Therefore, to confer jurisdiction under section 147 the Assessing Officer has to satisfy two conditions simultaneously: (i) he must have reason to believe that income chargeable to tax has been underassessed, and (ii) he must have reason that such underassessment had occurred by reason of either omission or failure on the part of the assessee to make its return of income or to disclose fully and truly all material facts necessary for its assessment for that year. When the assessee had submitted all details of payment of commission, professional fees and others, before the Assessing Officer at the time of original assessment u/s. 143(3), there was no failure on the part of the assessee to disclose all facts truly and fully for its assessment and the reasons recorded by the Assessing Officer that there was failure on the part of the assessee to disclose all facts truly and fully for reopening the assessment after four years from the end of relevant assessment year were not justified. (AY 2005-06)

Brakes India Ltd. v. DCIT (2016) 46 ITR 212 (Chennai)(Trib.)

S. 147 : Reassessment – After the expiry of four years – No indication in reasons recorded about failure on part of assessee to disclose fully and truly all material facts necessary for assessment – reassessment not valid [S. 148] 1837

The original assessment of the assessee were completed under Section 143(3) of the Act. After a period of 4 years from the end of assessment years, the AO issued notices under Section 148 of the Act to the assessee and passed reassessment orders on the ground that the assessee had obtained accommodation entries on bogus purchases of software. On appeal to Tribunal, it was held that there was no allegation by the AO in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. In the absence of that finding, the AO's action was wholly without jurisdiction. The genesis of the reassessment proceedings is the reasons to be recorded and in compliance with the first proviso to Section 147, such reasons to believe must comprise the specific

mention of the assessee's failure to disclose fully and truly all material facts necessary for assessment for the relevant assessment year. (AY. 2006-07, 2007-08)
Apeejay Education Society v. ACIT (2016) 47 ITR 33 (Amritsar)(Trib.)
Rajeshwari Sangeet Academy v. ACIT (2016) 47 ITR 33 (Amritsar)(Trib.)

1838 **S. 147 : Reassessment – After the expiry of four years – Full and true disclosure made during assessment proceedings – No failure on part of assessee – Reopening assessment held not valid. [S. 40(a)(ia), 148]**
During the year under consideration, the assessee had made payments in foreign currency towards interest, professional fees and others paid to non-residents. The said payments were claimed as expenditure. In the regular assessment under Section 143(3), the details of payments made were furnished. The AO after examining all, disallowed machinery charges by invoking provisions of Section 40(a)(i) but allowed others. The other payments which were allowed earlier were disallowed in the reassessment proceedings *vide* order under Section 147 in view of restrospective amendment in Section 9(2) which taxed any services provided by non-residents in India. On appeal to Tribunal, it was held that assessee having submitted all details of payments of commission, professional fees and other expenses made to non residents in foreign currency at the time of original assessment, there was no failure on part of assessee to disclose all facts fully and truly for its assessment and therefore the assessment could not be reopened beyond 4 years from the end of the relevant assessment year on the ground that the said payments were taxable in view of retrospective operation of Explanation below Section 9(2) and consequently the payments were liable to be disallowed under Section 40(a)(i). (AY 2005-06, 2008-09, 2009-10)
Brakes India Ltd. v. DCIT (2016) 176 TTJ 716 / 140 DTR 207 (Chennai)(Trib.)

1839 **S. 147 : Reassessment – After the expiry of four years – Audit objection – No independent mind – Reassessment was quashed. [S 10A, 148]**
On appeal, the Tribunal held that the assessee had truly and fully disclosed all the material facts in the return and also during the assessment proceedings with respect to material and relevant facts concerning setting up and commencement of operations and its claim of deduction which had been duly considered while framing the original assessment and granting deduction. The proceedings u/s. 147 and 148 initiated against the assessee need to be dropped as the proceedings were not validly initiated but merely on a change of opinion based upon the audit objections and the AO has not independently applied his mind before reopening the proceedings. As the proceedings were initiated after four years from the end of the relevant AY. and the proviso to section 147 was applicable. The assessee was not hit by section 10A(2) as it could not be said that it was formed by splitting up or reconstruction of business already in existence nor was it brought on record that there was transfer to a new business of machineries or plant previously used for any purpose. Circular No.1 of 2005 issued in the context of section 10B supported the stand of the assessee. Thus, the assessee was entitled to deduction u/s. 10A (AY. 2006-07)
Prothious Engineering Services Pvt. Ltd. v. ITO (2016) 46 ITR 438 (Mum.)(Trib.)

S. 147 : Reassessment – Commissioner simply put 'approved' and signed report giving sanction to reopen assessment – Does not amount to recording of proper satisfaction in terms of section 151(1) – Re-assessment proceedings was quashed – Order passed with in four weeks of rejection was held to be invalid. [S. 148, 151(1)] 1840

Section 147 and 148 are charter to the Revenue to reopen earlier assessments and are, therefore protected by safeguards against unnecessary harassment of the assessee. They are sword for the Revenue and shield for the assessee. Section 151 guards that the sword of Sec. 147 may not be used unless a superior officer is satisfied that the AO has good and adequate reasons to invoke the provisions of Sec. 147. The superior authority has to examine the reasons, material or grounds and to judge whether they are sufficient and adequate to the formation of the necessary belief on the part of the assessing officer. If, after applying his mind and also recording his reasons, howsoever briefly, the Commissioner is of the opinion that the AO's belief is well reasoned and bonafide, he is to accord his sanction to the issue of notice u/s. 148 of the Act. In the instant case, from the perusal of the order sheet which is on record it is seen that the Commissioner has simply put "approved" and signed the report thereby giving sanction to the AO. Nowhere the Commissioner has recorded a satisfaction note not even in brief. Therefore, it cannot be said that the Commissioner has accorded sanction after applying his mind and after recording his satisfaction. The reassessment order was quashed. Order passed with in four weeks of rejection was held to be invalid. (AY. 2003-04)

Hirachand Kanuga v. DY. CIT (2015) 68 SOT 205 (URO)(Mum.)(Trib.)

S. 147 : Reassessment – Reasons cannot be based on mere doubts or to verify the facts – Reassessment was quashed. [S. 148] 1841

Allowing the appeal of assessee the Tribunal held that reopening opens a "Pandora's box" and cannot be done in a casual manner. The reasons cannot be based on mere doubts or with a view to verify basic facts. If the AO takes the view that the income referred to in the reasons has not escaped assessment, he loses jurisdiction to assess other escaped income that comes to his notice during reassessment. (AY. 2006-07 & 2007-08)

Shipping Torm India Pvt. Ltd. v. ITO (2017) 145 DTR 152 / 183 TTJ 145 (Mum.)(Trib.)

S. 147 : Reassessment – HUF is not in existence – Reassessment based on return of an individual is held to be bad in law. [S. 2, 148, 292B] 1842

Allowing the appeal of the assessee, the Tribunal held that where the HUF was not in existence, initiation of reassessment proceedings based on the return of income is held to be bad in law. (AY. 2007-08)

Dnyaneshwar Govind Kalbhor (HUF) v. ACIT (2016) 161 ITD 243 / (2017) 183 TTJ 203 / (2017) 151 DTR 21 (Pune)(Trib.)

S. 147 : Reassessment – Capital gains – Transfer of land to developer – Reassessment was held to be justified. [S. 45, 148] 1843

Tribunal held that in return of income, assessee did not disclose capital gains arising from transfer of land to developer and it was only because of search conducted on developer that Assessing Officer came to know same, reassessment was proper. (AY. 2005-06)

Essae Teraoka Ltd. v. DCIT (2016) 157 ITD 728 (Bang.)(Trib.)

1844 **S. 147 : Reassessment – Deposit of cash in savings bank account – Power to call information – Notice u/s. 133 cannot be sent if no proceeding was pending – Reassessment was held to be bad in law. [S. 133, 148]**

Assessee deposited cash in his savings bank account but did not file return of income. AO sent a letter of inquiry to assessee to verify source of said cash deposit. In absence of any response, AO formed belief that income of assessee had escaped assessment and, consequently, assessed such cash deposits. On appeal allowing the appeal, the Tribunal held that; The AO has sent an invalid letter of enquiry as no proceeding was pending before him and, consequently, it was not obligatory on assessee to respond. Therefore, assessee's non-response could not constitute material to form belief of escapement of income. AO proceeded on fallacious assumption that bank deposits constituted undisclosed income, over-looking fact that source of deposits need not necessarily be income of assessee and, therefore, action of AO not justified. (AY. 2006-07)

Amrik Singh v. ITO (2016) 159 ITD 329 / 181 TTJ 95 (Asr.)(Trib.)

1845 **S. 147 : Reassessment – Value determined by the valuation cell and the income disclosed – Reassessment was held to be valid. [S. 148]**

The Tribunal held that there is difference between the value determined by the valuation cell and the income disclosed by the assessee and a person of ordinary prudence would have believed that income has escaped assessment. At the time of recording of the reasons, only *prima facie* satisfaction of the AO is necessary. Therefore, the initiation of proceedings under section 147 is valid. (AY. 2007-08)

Banwarilal Jain v. ITO (2016) 181 TTJ 341 (Luck.)(Trib.)

1846 **S. 147 : Reassessment – Cash credits – Bank deposits – Mere deposits in the banks cannot be presumed as undisclosed income hence reassessment was held to be bad in law. [S. 68, 131, 133, 148]**

Allowing the appeal of the assessee, the Tribunal held that mere deposits in the banks cannot presumed as undisclosed income hence reassessment was held to be bad in law. The AO's fallacious assumption that bank deposits constituted undisclosed income, over-looking fact that source of deposits need not necessarily be income of assessee and, therefore, action of Assessing Officer was not justified. (AY. 2006-07)

Gurpal Singh v. ITO (2016) 159 ITD 797 (Amritsar)(Trib.)

1847 **S. 147 : Reassessment – Mere fact that huge cash withdrawal from bank for purchase which was very much doubtful, could not be a ground for reopening assessment. [S. 69, 148]**

Dismissing the appeal of the Revenue, the Tribunal held that in reasons recorded in reopening of assessment was mere suspicion or apprehension from fact that assessee did make cash withdrawal from bank but same did not indicate escapement of income, reopening of assessment was held to be bad in law. (AY. 2007-08)

ITO v. Amit K. Shah (2016) 159 ITD 767 (Ahd.)(Trib.)

S. 147 : Reassessment – In original assessment due to oversight and inadvertence or a mistake committed by ITO, AO has jurisdiction to re-open assessment, however on merit allowed as revenue expenditure. [S. 37(1), 145, 148] 1848

Assessee filed return and the assessment was completed accepting the income returned. Subsequently, AO found that an amount was included as expenditure on replacement of tools which requires be disallowing and capitalizing. Therefore, the assessment was re-opened by issue of notice u/s. 148. The ITAT has taken a view that after amendment to s. 147 w.e.f. 1-4-1989, where an income liable to be taxed has escaped assessment in original assessment due to oversight and inadvertence or a mistake committed by ITO, the AO has jurisdiction to re-open assessment. However on merits allowed as revenue expenditure. (AY. 2008-09 2009-10)

Ucal Machine Tools (P.) Ltd. v. ITO (2016) 159 ITD 1061 (Chennai)(Trib.)

S. 147 : Reassessment – Reassessment to cancel registration could not be initiated if registration was granted prior to initiation of reassessment. [S.11, 12A] 1849

When reassessment was pending, registration was granted to assessee on 5-3-2010 with effect from 1-4-2008. Benefit of S. 11 and 12 could not be denied to assessee as registration was granted to assessee with effect from 1-4-2008, i.e., date prior to initiation and completion of assessment proceedings. Assessee eligible for exemption u/s. 11. (AY. 2004-05 to 2007-08)

ACIT v. Shushrutha Educational Trust (2016) 161 ITD 565 (Bang.)(Trib.)

S. 147 : Reassessment – Notice to HUF which is not in existence was held to be bad in law [S.4, 148, 292B] 1850

The Tribunal held that notice was issued and addressed to HUF which was not in existence and if suffers from multifaceted defects of cardinal active in serious transgression of statutory requirements. Thus, the notice is not sustainable in law and other grounds of assessee infructuous and appeal by revenue is academic. (AY. 2007-08)

Dnyaneshwar Govind Kalbhor (HUF) v. ACIT (2017) 161 ITD 243 / 183 TTJ 203 (Pune) (Trib.)

S. 147 : Reassessment – Service of notice – Affixture at a wrong address – Absence of valid service of notice, reassessment was held to be bad in law. [S. 148] 1851

Tribunal held that the notice under section 148 by affixture at a wrong address where the assessee was not residing, it cannot be said that notice under section 148 was served upon the assessee and therefore the reassessment proceedings were invalid and bad in law. (AY. 2006-07)

ITO v. Om Prakash Kukreja (2016) 159 ITD 190 / 178 TTJ 1 / 134 DTR 208 (Chd.)(Trib.)

S. 147 : Reassessment – Change of opinion – Judgment of Supreme court was already available at the time when original assessment was made – Reassessment was held to be not valid. [S. 148] 1852

The Tribunal held that the assessment made under section 143(3) could not be reopened simply by relying on a ruling of the Supreme Court which was already available at the time when the AO made the original assessment. (AY. 2007-08)

Sanwar Mal Jangid v. ITO (2016) 178 TTJ 25 (UO)(Jodh)(Trib.)

1853 **S. 147 : Reassessment – Within four years – Since, it was held that assessee was required to be treated as registered trust w.e.f. 1.4.2007, therefore, second proviso to sub-section (2) of section 12A was necessary to consider, then it was clear that reopening u/s. 147/148 was not permitted. [S. 12A, 148]**

Allowing the appeal the Tribunal held that Since it was held that reopening u/s. 147/148 was bad in law, therefore, it was not find appropriate to examine other grounds mentioned by assessee as other grounds originated from reopening of assessment proceedings. Since it was held that reopening was bad in law, therefore, all the other grounds were also decided in favour of assessee and against revenue. (AY. 2007-08)

Shyam Mandir Committee, Khatushyamji v. ACIT (2016) 138 DTR 367 / 179 TTJ 752 (Jaipur)(Trib.)

1854 **S. 147 : Reassessment – Within four years – No fresh tangible material in possession of AO when recording reasons – Reassessment not valid [S. 148]**

The assessee's case was reopened under Section 147 and the AO framed reassessment under Section 143(3) r.w.s. 147. The CIT(A) confirmed the reassessment and even upheld the disallowances made by AO. On appeal to Tribunal, it was held that the 'reasons' recorded by the AO revealed that at the time of recording them the AO had examined the original assessment records and no fresh material had come in possession of the AO. The Department could not point out any fresh material available with the AO at the time of reopening of the case of the assessee. Thus, there being no fresh material with the AO for reopening, the case of reopening was not permissible. (AY 2006-07)

Motilal R. Todi v. ACIT (2016) 47 ITR 149 (Mum.)(Trib.)

1855 **S. 147 : Reassessment – AO objects to audit objections – later reopens the assessment – No reason to believe that income had escaped assessment – Reopening was held to be invalid [S. 148]**

The AO recorded reasons pursuant to an audit objection and reopened assessee's assessment. However, the AO replied to the audit objection stating that the issue was debatable in nature. The AO replied that in principle the objections raised by the audit were not acceptable. However, still the AO proceeded to reopen the assessment. On appeal to Tribunal, it was held that once the AO himself disagreed with the audit objections, reopening could not be done. The requirement of law for reopening of the case is that the AO should be in a position to form a belief about escapement of income. Although, at the stage of reopening, the belief need not be conclusive, but it was equally expected that the position of law should be clear in the mind of the AO, at least prima–facie. The belief need not be conclusive but it should be firm and clear. No belief can be formed out of confusion and doubtful thoughts. (AY 2001-02, 2002-03)

Sunil Gavaskar v. ITO (IT) (2016) 47 ITR 243 / 177 TTJ 500 / 134 DTR 113 (Mum.)(Trib.)

1856 **S. 147 : Reassessment – Within four years – Procedure – Reasons for reassessment must be furnished to assessee before completion of reassessment – Copy of reasons not provided despite multiple requests by assessee – Reassessment held invalid. [S.148]**

During the course of reassessment proceedings, the assessee made several requests to the AO to provide the copy of reasons but the same was not provided. The AO passed

the order making addition on account of transfer of trade mark. On appeal to Tribunal, it was held that it is mandatory on the part of the AO to provide the assessee with a copy of reasons and to meet the objections filed by the assessee thereto, if any, before he could frame the reassessment order. If the reasons were not furnished by him to the assessee before completion of reassessment proceedings, the reassessment order could not be upheld. It further held that the undisputed fact were that no reasons were available in the assessment record and there was nothing on record to show that the certified copy of reasons was ever provided to the assessee, despite the request made by the assessee before the AO, more than once. Thus the reopening was invalid and the consequent reassessment order as framed by the AO was also illegal and liable to be set aside. (AY. 2001-02)
Muller and Philips (India) Ltd v. ITO (2016) 47 ITR 69 (Mum.)(Trib.)

S. 147 : Reassessment – Reopening on basis of same set of facts available at time of original assessment – change of opinion – No failure on part of assessee to disclose facts – reassessment was held to be invalid [S. 148] 1857
The assessee challenged the additions on account of GPF contribution, prior period expenditure and disallowance of miscellaneous expenditure before CIT(A) alongwith the ground of reassessment. The CIT(A) rejected the assessee's ground pertaining to initiation of reassessment proceedings and upheld the disallowances. On appeal to Tribunal, it was held that reassessment proceedings were initiated by AO on the same set of facts as available at the time of original assessment proceedings. It was a case of change of opinion on the material which was already available on record at the completion of the original assessment. There was no new tangible material but simply a fresh scrutiny of assessment records and documents. There was no failure on the part of assessee to disclose fully and truly all material facts. The reassessment was invalid. (AY. 2002-03)
Uttaranchal Jal Vidyut Nigam Ltd. v. ACIT (2016) 47 ITR 198 (Delhi)(Trib.)

S. 147 : Reassessment – Reopening on the basis of statement given to police under section 161 of Criminal Procedure Code, 1973 – Unjustified. [S. 69C] 1858
Statement recorded by Police Officer under section 161 of Code of Criminal Procedure, 1973, is neither given 'on oath' nor it is tested by cross examination. Therefore, such a statement cannot be treated as substantive evidence to reopen assessment proceedings. (AY. 2006-07)
Subhash Chander Goel v. ITO (2016) 156 ITD 808 / 177 TTJ 353 / 137 DTR 22 (Chd.) (Trib.)

S. 147 : Reassessment – Change of opinion – Reassessment was held to be bad in law. 1859
The Tribunal held that no fresh facts came to the knowledge of AO justifying a fresh initiation of action under section 147. Therefore, the assumption of jurisdiction under section 147 is bad in law. (AY. 2003-04, 2008-09, 2009-10)
C. J. International Hotels Ltd. v. Dy. CIT (2016) 177 TTJ 124 / 133 DTR 81 (Delhi)(Trib.)

1860 **S. 147 : Reassessment – Assessing Officer in issuing notice u/s. 148 within time limit available for issue of notice u/s. 143(2) was not as per law – Reassessment proceedings was quashed. [S. 143(1), 143(2), 148]**

For AY. 2002-03, assessee filed original return of income on 31-10-2002. Later on 31-3-2004, it filed revised return which was processed u/s. 143(1). Subsequently AO. issued notice u/s. 148 on 28-5-2004. Assessee raised objection with regard to issue of notice u/s. 148 instead of issuing same u/s. 143(2). Time available with AO. for issuing notice u/s. 143(2) was up to 31-3-2005. Therefore, act of AO in issuing notice u/s.148 within time limit available for issue of notice u/s. 143(2) was not as per law. Reassessment proceedings was quashed. (AY. 2002-03)

Vardhman Holdings Ltd. v. ACIT (2016) 158 ITD 843 (Chd.)(Trib.)

1861 **S. 147 : Reassessment – On basis of suspicion and non-existent and incorrect facts hence were held to be invalid. [S. 143(1)]**

AO processed u/s. 143(1) returns of income filed by assessee for AY. 2001-02 to 2003-04 and subsequently he reopened said assessments on sole basis that assessee had not filed returns for years preceding to AY. 2004-05. Reopening of assessment was only on basis of suspicion and non-existent and incorrect facts hence was held to be invalid. (AY. 2001-02 to 2003-04)

Baba Kartar Singh Dukki Educational Trust v. ITO (2015) 171 TTJ 25 / (2016) 158 ITD 965 (Chd.)(Trib.)

1862 **S. 147 : Reassessment – The AO is duty bound to provide to the assessee the reasons recorded for reopening the assessment within a reasonable time. Failure to do so renders the reassessment order unsustainable in law. [S.148]**

Allowing the appeal of assessee the Tribunal held that the Hon'ble Apex Court in *GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19* has held that "it is clear that the completion of assessment/ reassessment without furnishing the reasons recorded by the AO for initiation of proceedings under section 147/148 of the Act is not sustainable in law as it is incumbent on the AO to supply them within reasonable time. We note that on the anvil of this judgment, on the request of the Assessee, the AO is bound to furnish the reasons recorded for initiation of proceedings under section 147 of the Act within a reasonable period of time so that the assessee could file its objections thereto and the AO was to dispose of the same by passing a speaking order thereon, which the AO has not done. We also note that even as per the rules of natural justice, the assessee is entitled to know the reasons on the basis of which the AO has formed an opinion that income assessable to tax has escaped assessment. The furnishing of reasons to the assessee is to enable/facilitate it to present its defence and objections to the initiation of proceedings under section 147/148 of the Act. Therefore, we are of the considered opinion that there was no justifiable reasons for the AO to deprive the assessee of the recorded reasons by him for initiating proceedings under section 147/148 of the Act. Therefore, in our considered opinion, the reopening in question is not sustainable in the eyes of law. Accordingly, we allow the assessee's appeal on legality aspect without proceeding to adjudicate on merits by quashing the assessment order. (ITA No. 6611/Del/2013, dt. 03.06.2016)(AY. 2001-02)

Inderjeet Singh Sachdeva v. DCIT (Delhi)(Trib.), www.itatonline.org

S. 147 : Reassessment – Non-furnishing by the AO of reasons recorded for reopening the assessment, renders the reopening void. [S.148] 1863

Despite repeated letters requesting to provide copy of the reasons recorded or the grounds on which the assessment was reopened, no such reasons were provided to the assessee. We find that the DR could not substantiate whether any reasons were provided by the Assessing Officer to the assessee and merely relying on the fact that general practice was followed in Department of supplying reasons, it cannot be presumed that reasons were supplied in the case of the assessee. On the other hand, the assessee has filed evidences in support of its claim of request for providing grounds of initiation of the reassessment proceedings in almost every submission made before the Assessing Officer. Therefore, in our considered view, the Assessing Officer has not complied with the direction of the Hon'ble Supreme Court in the case of *GKN Driveshaft (India) limited v. CIT (2003) 259 ITR 19 (SC)* providing reasons for reassessment within a reasonable time, and therefore respectfully following the decisions cited above, the reassessment completed by the Assessing Officer under section 147 of the Act cannot be sustained in the case of the assessee and quashed. (ITA No. 2205/Del/2015, dt. 16.05.2016)(AY. 2006-07)

Ujagar Holding Pvt. Ltd. v. ITO (Delhi)(Trib.), www.itatonline.org

S. 147 : Reassessment – Absence of new tangible material, reassessment was held to be not valid. [S. 148] 1864

AO having issued notice u/s. 148 on the basis of the recommendation of the Addl. DIT (Inv.) and relying on the contents of the very same flowchart of manufacturing process which was produced by the assessee during the original assessment, there was no new tangible material to form reason to believe that income had escaped assessment and, therefore, reopening of assessment is vitiated on this count. Further, assessment made u/s. 143(3) could not be reopened after expiry of four years form the end of the relevant assessment year, since all the material facts were fully and truly disclosed during the original assessment u/s. 143(3) and the issue of deduction u/s. 80IC was subject matter of assessment proceedings as well as revisional proceedings u/s. 264 impugned reassessment is based upon change of opinion on the same set of facts which is not permissible. (AY. 2004-05)

Dy. CIT v. Dharampal Satyapal Ltd. (2016) 130 DTR 241 / 175 TTJ 663 (Delhi)(Trib.)

S. 147 : Reassessment – Within four years – No reassessment on mere change of opinion as the assessee had submitted all relevant details at the time of assessment and genuineness of transaction was not doubted by the AO. [S.143(3)] 1865

After the original assessment was completed u/s. 143(3), it was reopened based on information received from the Investigation Wing of the Income-tax department pursuant to a search at the premise of an individual that the Assessee has received accommodation entries as share application money. On appeal, the Tribunal quashed the reassessment on the basis that the Assessee had disclosed all relevant facts to the AO during the course of assessment and the reassessment was simiplicitor based on a change of opinion. Based on the confirmation of the parties, the genuineness of the transaction was not doubted by the AO. Further, the AO had appended a note to the

order u/s. 143(3) that the investments in the company had been considered and passed on the respective AOs. (AY. 2009-10)
A.P. Refinery P. Ltd. v. Addl. CIT (2016) 45 ITR 724 (Chd.)(Trib.)

1866 **S. 147 : Reassessment – There has to be tangible material to reopen the assessment – Reassessment was held to be bad in law. [S. 80IC, 143(1), 148]**
Tribunal held that though in case of section 143(1)(a), any argument of it being illegal because of change of opinion is not sustainable, however, there has to be some tangible material in possession of Assessing Officer to reopen such cases. (AY. 2011-12)
Amit Engineers v. ACIT (2016) 156 ITD 556 (Chd.)(Trib.)

1867 **S. 147 : Reassessment – Approval from prescribed authority was not obtained for earlier years – Reassessment was held to be valid. [S. 10(23C), 143(1), 148]**
Assessee had furnished return of income declaring loss of ₹ 33,60,746/-. The return was processed under section 143(1) of the Act and no scrutiny assessment under section 143(3) of the Act was completed against the assessee for captioned assessment year. AO recorded reasons for reopening the assessment on the ground that deduction under section 10(23C)(vi) of the Act was claimed by the assessee in the return of income, which was not allowable to the assessee in the absence of certificate issued for recognizing the assessee under section 10(23C)(vi) of the Act. In view of no assessment being completed under section 143(3) of the Act, we find merit in the order of CIT(A) in holding that the reopening of assessment was valid, in view of the ratio laid down by the Hon'ble Supreme Court in Rajesh Jhaveri Stock Brokers (P.) Ltd 291 ITR 500. Reasons recorded by the AO for reopening the assessment pursuant to assessment being completed in the hands of assessee relating to assessment year 2006-07, wherein it came to the knowledge of the Assessing Officer that the assessee has no approval from the prescribed authority for availing the said exemption under section 10(23C)(vi) of the Act and in view of the material which had come to the notice of Assessing Officer on a later date, there were appropriate reasons with the Assessing Officer for formation of belief that the income had escaped assessment for the year for issue of notice under section 148 of the Act. Since all the conditions necessary for reopening of the assessment were attracted, we uphold the recording of reasons under section 147 of the Act and thereafter, issue of notice under section 148 of the Act as both legal and valid. (AY. 2002-03, 2004-05 to 2007-08)
Mercedes Benz Education Academy v. ITO (2016) 156 ITD 488 / 176 TTJ 365 / 131 DTR 302 (Pune)(Trib.)

1868 **S. 147 : Reassessment – Reassessment based on an illegal TPO's order is void *ab initio* and hence liable to be quashed. [S. 143(2), 148]**
The AO could not pass a draft assessment order pursuant to the order of the TPO since no notice u/s. 143(2) was issued to the Assessee. Subsequently, the AO treated the order of the TPO as information and sought to reopen the assessment by issuing a notice u/s. 148. The ITAT quashed the reassessment on the basis that the reference to the TPO was illegal since no notice u/s. 143(2) was issued by the AO. Consequently, the order of the TPO pursuant to an illegal reference cannot be used in the reassessment proceedings. (AY. 2010-11)
Bucyrus India P. Ltd. v. DCIT (2016) 45 ITR 216 / 176 TTJ 774 / 140 DTR 202 / 65 taxmann.com 53 (Kol.)(Trib.)

S. 147 : Reassessment – Book profit – Foreign exchange fluctuation gains – Computation was available on record – No new tangible material – Reassessment was bad in law. [S. 4, 115JB, 143(1), 148] 1869

Tribunal held that; where reassessment was initiated on ground that assessee had excluded foreign exchange fluctuation gains while computing total income while, in fact, same computation was available on record during assessment, reassessment was bad. (AY. 2004-05, 2005-06)

Sabic Research & Technology (P.) Ltd. v. ITO (2016) 156 ITD 327 (Ahd.)(Trib.)

S. 147 : Reassessment – Search – Where the AO detects incriminating material in search has to be processed only u/s. 153C and not u/s. 147. A notice u/s. 148 to assess such undisclosed income is void *ab initio*. [S. 148, 153C] 1870

Allowing the appeal the Tribunal held that;On having gone through the decisions cited above especially the decision of Amritsar Bench in the case of *ITO v. Arun Kumar Kapoor (2011) 140 TTJ 249 (Amritsar)(Trib.),* we find that in that case as in the present case before us, reassessment was initiated on the basis of incriminating material found in search of third party and the validity of the same was challenged by the assessee before the Learned CIT(Appeals) and the Learned CIT(Appeals) vitiated the proceedings. The same was questioned by the Revenue before the ITAT and the ITAT after discussing the cases of the parties and the relevant provisions in details has come to the conclusion that in the above situation, provisions of S.153C were applicable which excludes the application of sections 147 and 148 of the Act. The ITAT held the notice issued under S.148 and proceedings under sec. 147 as illegal and void ab initio. It was held that Assessing Officer having not followed procedure under S. 153C, reassessment order was rightly quashed by the CIT(Appeals). In the present case before us, it is an admitted fact, as also evident from the reasons recorded and the assessment order that the initiation of reopening proceedings was made by the Assessing Officer on the basis of information received from the Directorate of Income-tax (Inv.) on the basis of search & seizure operation conducted at the premises of Rock Land Group of Cases and the documents related to the assessee found during the course of search were made available to the Assessing Officer of the present assessee. We thus respectfully following the decision of Co-ordinate Bench of the ITAT in the case of *ACIT v. Arun Kapur (2011) 140 TTJ 249 (Amritsar)* hold that provisions of S. 153C of the Act were applicable in the present case for framing the assessment, if any, which excludes the application of S. 147 of the Act, hence, notice issued under S. 148 of the Act and assessment framed in furtherance thereto under S.147 read with section 143(3) of the Act are void *ab initio*.(ITA No. 2430/Del/2015, dt. 20.05.2016)(AY. 2007-08)

Rajat Saurabh Chatterji v. ACIT (Delhi)(Trib.), www.itatonline.org

S. 147 : Reassessment – Notice is issued in a mechanical manner, based on information received from another AO, and sanction is accorded by the CIT in a mechanical explained – Reassessment was held to be bad in law. [S. 148, 151] 1871

After going through the reasons recorded by the Assessing Officer for reopening and the approval thereof by the Addl. CIT we are of the view that AO has not applied his mind so as to come to an independent conclusion that he has reason to believe that

income has escaped during the year. In our view the reasons are vague and are not based on any tangible material as well as are not acceptable in the eyes of law. The AO has mechanically issued notice u/s. 148 of the Act, on the basis of information allegedly received by him from the Directorate of Income Tax (Investigation), New Delhi. Keeping in view of the facts and circumstances of the present case and the case law applicable in the case of the assessee, we are of the considered view that the reopening in the case of the assessee for the Asstt. Year in dispute is bad in law and deserves to be quashed. Even otherwise, a perusal of the above demonstrates that the Addl. CIT has written "Approved" which establishes that he has not recorded proper satisfaction / approval, before issue of notice u/s. 148 of the I.T. Act. Thereafter, the AO has mechanically issued notice u/s. 148 of the Act, on the basis of information allegedly received by him from the Directorate of Income Tax (Investigation), New Delhi. Keeping in view of the facts and circumstances of the present case and the case law applicable in the case of the assessee, we are of the considered view that the reopening in the case of the assessee for the Asstt. Year in dispute is bad in law and deserves to be quashed.(ITA No. 5128/del/2015, dt. 22.04.2016)(AY. 2006-07)
Banke Bihar Properties Pvt. Ltd. v. ITO (Delhi)(Trib); www.itatonline.org

1872 **S. 147 : Reassessment – Issue concluded in original assessment proceedings cannot be re-agitated during course of reassessment proceedings. [S.148]**
The additional claim on account of loss on sale of securities was made only in the return of income filed in response to the notice u/s.148. The additional claim was obviously not made in the original assessment proceedings nor sought to be re-considered by the AO during the course of re-assessment proceedings. Even assuming that it was only readjustment of a claim already made, such readjustment was not possible in the proceedings of reassessment.(AY. 2007-08)
Karnataka State Co-operative Apex Bank Ltd. v. Dy. CIT (2016) 46 ITR 728 (Bang.)(Trib.)

1873 **S. 147 : Reassessment – Within four years – Search operations in premises of third person – Documents found belonging to third person and not to assessee – Reassessment was held to be justified. [S. 148, 153C]**
The condition precedent for issuance of notice u/s. 153C was not fulfilled. The re-opening of the assessment was done within the limitation period and there was no specific evidence in corroboration with regard to the contention that no sanction taken from the authorities. Therefore, the reopening of the assessment was rightly done u/s.147 of the Act. (AY. 2003-04)
Yamuna Estate P.Ltd. v. ITO (2016) 45 ITR 517 (Mum.)(Trib.)

1874 **S. 147 : Reassessment – No information about any bogus gift – No tangible material to justify income chargeable to tax had escaped assessment – Reassessment was held to be invalid. [S. 69A, 148]**
The AO reopened the assessment u/s. 147 of the Act on the ground that the assessee had shown a gift of ₹ 21 lakhs from two persons and since they did not have any blood relationship with the assessee nor was there any occasion for the gift. He made and addition on account of income from undisclosed sources u/s. 69A of the Act. The CIT(A) confirmed this.

On appeal, the Tribunal held that the reasons recorded did not clarify how there was a failure on the part of the assessee to disclose fully and truly all material facts. There was no material available with the AO of the donors to give any information to the AO of the assessee to make out a case of escapement of income in the case of the assessee. A valid reopening of assessment had to be based only on tangible material to justify the conclusion that there was escapement of income. The AO had not validly assumed jurisdiction under section 147 and 148 of the Act for reopening of the assessment. The addition was to be deleted. (AY. 2005-06)
Sarika Jain (Smt.) v. ITO (2016) 46 ITR 246 (Chd.)(Trib.)
Vikram Jain and Sons, HUF v. ITO (2016) 46 ITR 246 (Chd.)(Trib.)
Santosh R. Jain (Smt.) v. ITO (2016) 46 ITR 246 (Chd.)(Trib.)

S. 147 : Reassessment – Reopening in the absence of fresh material and merely on change of opinion is not permissible. [S.148] 1875
"Therefore, we are of the considered view that assessee had made full and true disclosure during the original assessment proceedings. We are also of the view that reopening had been done merely on change of opinion in as much as that in the original assessment made u/s. 143(3) of the I.T. Act. We also find that AO has no fresh material to form his opinion regarding escapement of assessment and he has also not found any tangible material to record the reasons for reopening of the assessment of the assessee. It is a settled law that merely change of opinion is not permissible under the law."(ITA No. 4086/Del/2013, dt. 30.03.2016) (AY. 2004-05)
Vijay Power Generators Ltd. v. ACIT (Delhi)(Trib.); www.itatonline.org

S. 147 : Reassessment – Reopening of assessment is not permissible in the absence of "fresh tangible material" – Reassessment was quashed. [S.148] 1876
Allowing the appeal the Tribunal held that in the present case, it was noticed by us that the case of the assessee is that there was no fresh tangible material in the possession of AO at the time of recording of impugned reasons. A perusal of the 'Reasons' recorded by the AO in this case reveals that at the time of recording of these 'Reasons' the AO had examined original assessment records only and no fresh material had come in the possession of the AO. In response to our specific query also, Ld DR could not point out any fresh material available with the AO at the time of reopening of the case of the assessee. Thus, assertion of the assessee that there was no fresh material with AO for reopening of this case, remained uncontroverted. Under these facts and circumstances, let us now examine settled position of law on this issue. It has been held in various judgments coming from various courts that availability of fresh tangible material in the possession of AO at the time of recording of impugned reasons is a *sine qua none*, before the AO can record reasons for reopening of the case. We begin with the judgment of Hon'ble Supreme Court in the case of *CIT v. Kelvinator India Ltd. 320 ITR 561 (SC)*, laying down that for reopening of the assessment, the AO should have in its possession 'tangible material'. The term 'tangible material' has been understood and explained by various courts subsequently. There has been unanimity of the courts on this issue that in absence of fresh material indicating escaped income, the AO cannot assume jurisdiction to reopen already concluded assessment. (ITA No. 5858 & 5859/Mum/2012, dt. 28.10.2015) (AY. 2005-06, 2006-07)
Golden Tobacco Limited v. DCI (Mum.)(Trib.); www.itatonline.org

1877 **S. 147 : Reassessment – On the wrong and invalid assumption of jurisdictional and all subsequent proceedings is pursuance thereto can't be held as sustainable and valid, hence the same deserve to be quashed and we quash the same. [S.148]**

When we logically analyse the facts of the case, specially averments of the AO in the reasons recorded, then we note that in the operative paragraph the AO has held that "since the expenditure of ₹ 2,47,468/- were incurred by the assessee through credit card remained unexplained, I have reason to believe that income to the tune of ₹ 2,47,468/- has escaped assessment". This conclusion of the AO is factually baseless as this issue was posed to the assessee by DCIT, Bangalore replying to his notices and the ld. DR has not disputed that copies of the said notices and reply was filed before the AO on the assessment record. In this situation it was on the AO to peruse the relevant assessment record of AY 2005-06 which forming reason to believe and thus it is safely presumed that the AO initiated reassessment proceedings u/s. 147 of the Act and issued notice u/s. 148 of the Act without application of mind working in a mechanical manner and thus the same are not sustainable in the facts and on law. Respectfully following the dicta laid down by jurisdictional High Court in the case of *CIT v. G & G Pharma* we are inclined to hold that the AO issued notice u/s. 148 of Act on the wrong and invalid assumption of Jurisdictional and all subsequent proceedings is pursuance thereto can't be held as sustainable and valid hence, the same deserve to be quashed and we quash the same. It is ordered accordingly. (ITA No. 7/Del/2013, dt. 19.02.2016)(AY 2004-05)
Suresh M. Bajaj v. ITO (Delhi)(Trib.); www.itatonline.org

1878 **S. 147 : Reassessment – If AO does not make any addition for the reason stated for reopening, he cannot add any other income holds good even for years when Explanation 3 to s. 147 is operative. [S.148]**

Allowing the appeal of assessee the Tribunal held that the argument of the Ld. DR that the ratio propounded in *Jet Airways India v. CIT 331 ITR 236* and *Ranbaxy Laboratories Ltd. v. CIT (2011) 336 ITR 136* does not apply since those cases related to assessment years when Explanation 3 to section 147 was not on the statute, we find has not merit since in the above mentioned decisions the Court has interpreted the provision of section 147 on first principle to hold that only if addition are made on account of income which the AO had reason to believe had escaped assessment that any other addition can be made. It is not Explanation 3 which had been interpreted in favour of the assessee in these cases. In fact we find that Explanation 3 empowers AO's to make assessment on any matter which comes to their notice during assessment proceedings. But the same along with section 147 has been interpreted as stated above. Therefore, the presence or absence of Explanation 3 to section 147 does not nullify the interpretation given by the courts in the above stated judgments. Further the argument of the Ld. DR that the reason is not rendered invalid merely because no addition has been made on account of incomes which the AO had reason to believe had escaped assessment, is also of no consequence, since as is evident from the order cited above, the courts have not held the reasons to be invalid in such cases and quashed the proceedings. The validity of the reasons had not been in issue in these cases, but the courts have interpreted the provisions of section 147 on first principles and held that the AO had no power to assess any other income to tax unless addition is made of income which he had reason to believe had escaped assessment.

(ii) Respectfully following the above judgments, we hold that in the absence of any addition having been made on incomes which the AO had reason to believe had escaped assessment, no addition of any other income could have been made and that the AO had exceeded his jurisdiction in passing the impugned order u/s 147. The same is liable to be quashed. We quash accordingly. (ITA No.134/Ag/2014, dt. 05.04.2016)(AY. 2003-04) *Anugrah Varhney v. ITO (Agra)(Trib.); www.itatonline.org*

S. 148. Issue of notice where income has escaped assessment.

S. 148 : Reassessment – Notice affixed on the door of the place of business after the assessee refusing to accept the Notice is a valid service of Notice – Assessing Officer must supply information demanded by the assessee. [S. 143(2), 147, 282, Order V, Rule 17 & 18 of CPC, 1908] 1879

Assessee was a Doctor by Profession. A Notice under section 148 was issued by the Assessing Officer which returned unserved. Thereafter, the Assessing Officer deputed 2 Inspectors to make Personal service of the Notice upon the assessee. The Inspectors went to the assessee's residence however, the assessee had gone to his clinic. The Inspectors followed the assessee to his clinic and made efforts to serve the Notice on him personally. However, the assessee refused to accept the Notice and left the Clinic citing emergency call as a reason. Thereafter, the Inspectors tried to serve the Notice on the staff in the Clinic but, nobody accepted the Notice. Finally, the Inspectors affixed the Notice on the door of the Clinic. Later on, the assessee received Notice under section 142(1) requesting submission of certain details. The assessee challenged the reassessment proceeding in a Writ Petition on the ground that no valid Notice has been served on him. The High Court held that when Notice cannot be served on the assessee, it must be affixed at some conspicuous part of the residence or place of business as per Order V, Rule 17 & 18 of CPC, 1908. Therefore, Notice affixed by the Inspector on the door of the clinic was a valid service. Court also held that the Assessing Officer must supply information demanded by the Assessee. Compliance with notice u/s. 143(2) is not necessary. (AY. 2008-09)

Sheo Murti Singh (Dr.) v. CIT (2016) 383 ITR 174 / 236 Taxman 405 (All.)(HC)

S. 149. Time limit for notice.

S. 149 : Reassessment – Time limit – Provision at relevant time was ten years – Notice could be issued on or before 31-5-2001 – Notice issued on 11-4-2001 – Not barred by limitation. [S.147, 148/150(1)] 1880

Court held that the dispute related to the AY. 1992-93 and under the then existing provision u/s. 149 the period of limitation was ten years. Accordingly, the reassessment notice could be issued on or before May 31, 2001. The notice u/s. 148 issued on April 11, 2001 was within the period of limitation. (AY. 1992-93)

CIT v. Hemkunt Timbers Ltd. (2016) 380 ITR 658 / 283 CTR 1 / 67 taxmann.com 231 (All.)(HC)

S. 150. Provision for cases where assessment is in pursuance of an order on appeal, etc.

1881 **S. 150 : Assessment – Order on appeal – Reassessment – In respect of any assessment year wherein further proceedings are barred by limitation, assessment cannot be reopened merely by virtue of an opinion expressed by any higher forum at a later date, i.e., subsequent to date of limitation period. [S. 147, 148]**

The ITAT held that noticed from the observations made by the Tribunal, while disposing of the appeals for assessment years 2003-04 and 2004-05, a casual observation was made to deal with the issue before them as to whether the capital gains is attracted in assessment year 2003-04 and 2004-05; but there is no specific finding or direction that it is assessable to tax in assessment year 2001-02. Even if it is assumed that there is a finding or direction, in respect of any assessment year wherein further proceedings are barred by limitation, the same cannot be reopened merely by virtue of an opinion expressed by any higher forum at a later date i.e. subsequent to the date of limitation period. In fact, the judgments of the Apex Court are also on the same lines. Reopening of assessment is bad in law since the proceedings u/s 148 are sought to be initiated by issuing a notice after the period of limitation. (AY. 2001-02)

Emgeeyar Pictures (P.) Ltd. v. DCIT (2016) 159 ITD 1 / 138 DTR 20 / 179 TTJ 383 (TM) (Chennai)(Trib.)

S. 151. Sanction for issue of notice

1882 **S. 151 : Reassessment – Sanction for issue of notice–Return processed u/s. 143(1)(a) in pursuance of notice u/s. 147 – Held, not an assessment – Held, provision of section 151(1) not attracted. [S. 143(1)(a), 147, 148]**

The assessee, an individual, did not file return for the relevant year. A notice was issued u/s. 148 to tax certain interest income. In response to said notice, the assessee filed his return. An intimation under section 143(1)(a) was issued. AO subsequently issued another notice u/s. 148 for the purpose of bringing to tax certain amount received as commission. Assessee challenged such reopening on the ground that pursuant to the first notice issued u/s. 148, intimation was issued by the AO u/s. 143(1)(a) which constituted assessment and therefore, in the light of specific provisions of section 151(1), no notice could be issued u/s. 148 unless the CCIT or CIT was satisfied that it was a fit case for issue of such a notice. High Court held that intimation issued u/s. 143(1)(a) was not an assessment and therefore, provisions of section 151(1) are not attracted. (AY. 1991-92)

Ranjeet Singh v. CIT (2016) 382 ITR 409 / 238 Taxman 522 (P&H)(HC)

1883 **S. 151 : Reassessment – Sanction for issue of notice – Mechanical grant of approval by affixing signature without recording any satisfaction – Held, mere fact that the Additional Commissioner did not record his satisfaction in so many words would not render invalid the sanction granted u/s. 151(2) when the reasons on the basis of which sanction was sought for was not challenged. [S. 147, 148]**

The assessee a proprietorship concern was engaged in the business of trading in various goods. AO issued notice u/s 148 for reopening of assessments in respect of AY 1990-

91, 1991-92 and 1992-93. AO obtained approval of the Additional Commissioner u/s. 151(2) by order and thereafter issued notice u/s. 148. Assessee challenged the notice on the ground that Additional Commissioner mechanically granted approval by affixing his signature without recording any satisfaction. High Court held that assessee had not contended that the reasons cited by the AO for initiating reassessment proceedings u/s 147 were irrelevant or that the AO had no reason to believe that income chargeable to tax had escaped assessment, therefore, mere fact that the Additional Commissioner did not record his satisfaction in so many words would not render invalid the sanction granted u/s 151(2) when the reasons on the basis of which sanction was sought for was not assailed. (AY. 1990-91 to 1992-93)
Prem Chand Shaw (Jaisal) v. ACIT (2016) 383 ITR 597 / 238 Taxman 423 / 286 CTR 252 / 135 DTR 172 (Cal.)(HC)

S. 151 : Reassessment – Sanction for issue of notice – Notice was issued after obtaining the sanction of the Commissioner, instead of Joint Commissioner of Income tax – Reassessment was held to be void *ab-initio*. [S. 147, 148] 1884
Allowing the appeal of assessee following the ratio in *Ghansham K. Khabrani v. ACIT (2012) 346 ITR 443 (Bom.)(HC)*, the court held that, on the facts of the case the notice was issued after obtaining the sanction of the Commissioner, instead of Joint commissioner of Income tax hence, reassessment was held to be void *ab initio*. (AY. 2002-03)
Purse Holdings India P. Ltd. v. ADDIT(IT) (2016) 143 DTR 1 (Mum.)(Trib.)

S. 151 : Reassessment – Sanction for issue of notice – Non application of mind – Reassessment was held to be bad in law. [S. 147,148] 1885
Addl. CIT and the CIT having simply written "Yes. I am satisfied" on the same day while according sanction under s. 151, it does not in any manner shed any light as to whether there was any application of mind at all by the two senior officers. Therefore, sanction granted by the CIT is invalid and consequently, the notice u/s. 148 issued by the AO is bad in law. (AY. 2004-05).
Dy. CIT v. Dharampal Satyapal Ltd. (2016) 130 DTR 241 / 175 TTJ 217 (Delhi)(Trib.)

S. 152 : Other provisions.

S. 152 : Assessment – Reassessment not resulting in assessment of higher income – Assessed book profit – Reassessment notice not valid. [S. 115JB, 147, 148] 1886
Allowing the petition the Court held that having regard to the fact that even if the entire amount which was proposed to be added by the AO were sustained, there would be no addition to the tax liability of the assessee and the assessee would still be governed by the provisions of section 115JB of the Act and assessed on the same book profits, it could not be said that there was sufficient material before the AO to form the belief that income chargeable to tax has escaped assessment. The notice issued under section 148 of the Act, therefore, could not be sustained by virtue of section 152(2). (AY. 2011-12)
Motto Tiles P. Ltd. v. ACIT (2016) 386 ITR 280 / 73 taxmann.com 176 (Guj.)(HC)

S. 153. Time limit for completion of assessment, reassessment and recomputation.

1887 **S. 153 : Assessment – Limitation – Draft assessment order – Where inspecting Assistant Commissioner did not exercise power of Income tax Officer but only issued instructions on basis of which Assessing Officer completed the assessment, period in which said Commissioner issued instructions would be excluded while counting period of limitation to complete assessment. [S. 125A, 143(3), 144A, 144B]**

The Assessing Officer has passed the draft assessment order within the period of limitation. He forwarded the draft assessment order to Assistant Commissioner who in turn has given instructions to the Assessing Officer. The Assessing Officer passed the order as per the instructions. The total period in which the Inspecting Assistant Commissioner issued instructions exceeded said stipulated period. The Assessee contended that the order passed was beyond period of limitation. The Tribunal negatived the order of the Assessing Officer. On reference High Court also affirmed the order of Tribunal. On revenue's appeal before the Supreme Court, allowing the appeal the Court held that where Inspecting Assistant Commissioner though authorised has not exercised power or performed functions of Income-tax Officer, Income-tax Officer can invoke procedure. In such case period during which draft assessment was forwarded to Inspecting Assistant Commissioner till date of receipt of instructions from him is to be excluded in reckoning limitation. (AY. 1977-78, 1981-82)

CIT v. Saurasthra Cement & Chemical Industries Ltd. (2016) 384 ITR 186 / 239 Taxman 499 / 286 CTR 345 (SC)

Saraya Sugar Mills P. Ltd. v. CIT (2016) 384 ITR 186 / 239 Taxman 499 / 286 CTR 345(SC)

Editorial: Arising out of decision of Gujarat High Court dt. 20-01-2005 and CIT v. Saraya Sugar Mills (P) Ltd (2011) 336 ITR 572 (All)(HC). Decision in CIT v. Saurashtra Cement & Chemical Industries Ltd. (2005) 274 ITR 327 (Guj.)(HC) is reversed. Section 125A, which provided for concurrent jurisdiction of Inspecting Assistant Commissioner and Income Tax Officer had been omitted vide the Direct Tax laws (Amendment) Act, 1972 and section 144B which provided for reference to Deputy Commissioner in certain cases had been omitted vide said Act with effect from 1-4-1989.

1888 **S. 153 : Assessment – limitation – Enquiry before assessment – Special audit – Stay – Interim injunction – Assessment completed beyond statutorily prescribed period – Barred by limitation. [S. 142(2A)]**

Dismissing the appeal of revenue, the Court hold that the assessment was barred by limitation. The time limit available to the Assessing Officer under section 153 of the Act was a period of 17 days. Even if it was assumed that he had 60 days' time under the Explanation to sub-section (4) of section 153, the assessment ought to have been completed on January 25, 2003, whereas it was completed only on March 31, 2003. The Department had not been able to find any fault with the view taken by the Tribunal.(AY. 1988-89)

CIT v. Bata India Ltd. (2016) 385 ITR 539 / (2017) 152 DTR 145 (Cal.)(HC)

S. 153 : Assessment – Reassessment – Limitation – Limitation for the purpose of section 153 shall start from the end of the year in which the notice is served on the assessee and not from the end of year in which it is issued. [S. 147, 148] 1889

A notice u/s. 148 for AY 1959-60 dated 23-1-1965 was issued to the assessee. The said notice was served on the assessee only in September 1965. The provisions of section 153(2) at the relevant time prescribed limitation of four years for making assessment from the end of assessment year in which notice u/s. 148 was served upon assessee. The assessment order came to be passed on 18-3-1970. Held, time limit for completion of assessment was four years from the end of the year in which notice was served and not the year in which it was issued. Accordingly, reassessment held to be valid.)(AY. 1959-60)
R.B. Shreeram Durgaprasad v. CIT (2016) 237 Taxman 189 / 137 DTR 332 / 287 CTR 228 (Bom.)(HC)

S. 153 : Assessment – Reassessment – Limitation – When the Tribunal has set aside the matter, limitation for completion of assessment under section 153(2A) would apply. Reassessment was held to be nullity [S. 153(2A), 254(1)] 1890

The original assessment of assessee was completed under section 143(3) determining certain income. On first appeal, the assessee was granted partial relief. Both assessee as well as the revenue preferred further appeal before the Tribunal and the Tribunal *vide* its order dated 28-9-2007 had restored the two additions made by the Assessing Officer to the file of the Assessing Officer for fresh decision. Fresh assessment order was passed by the Assessing Officer on 25-3-2009 repeating the same additions as were made in the original assessment. On appeal, the assessee contended that the fresh assessment pursuant to Tribunal's order should have been framed by the Assessing Officer on or before 31-12-2008 in terms of section 153(2A) and since the assessment was framed on 25-3-2009, the same was barred by limitation. The Assessing Officer, on the other hand, contended that the Tribunal had only restored the assessment to the file of the Assessing Officer and not set aside the same. According to him, restoration has a meaning different from the meaning of the expression 'set aside' and, hence, it is outside the ambit of limitation prescribed in section 153(2A). Order of AO was affirmed by CIT(A). On appeal allowing the appeal the Tribunal held that when Tribunal asked Assessing Officer to determine total income by redeciding issues involved in additions made therein, it implied indisputably a mandate for fresh determination of total income and in such case limitation for completion of assessment under section 153(2A) would apply. Reassessment was held to be nullity. (AY. 2004-05)
DCIT v. Sanjay Jaiswal (2016) 158 ITD 397 (Kol.)(Trib.)

S. 153A. Assessment in case of search or requisition.

S. 153A : Assessment – Search and seizure – Statements were made under oath and were part of record and continued to be so, their probative value is undeniable, hence additions based on the same ought to be sustained. [S.139(1)] 1891

Dismissing the appeal of the assessee, the Court held that assessee's submissions was that statements were not recorded during search but later and that they couldn't be considered of any value. The High Court observed that the search was conducted on 22-3-2006 and various materials i.e. documents, agreements, invoices and statements in

form of accounts and calculations were seized and assessee's sons recorded statements under oath. Assessee too made her statement under oath, admitting that though returns were filed ostensibly on her behalf, she was not in control of business. Assessee and all other family members made short statements and endorsed statements under oath. These statements under oath were part of record and continued to be so and hence, their probative value was undeniable. High Court observed that because of search and seizure that occurred it was noticed that assessee had undeclared income and hence it was held that assessee's argument that they could not be acted upon or given any weight was insubstantial and meritless. Hence, the question of law was decided against the Assessee and in favour of the Department. (AY. 1998-99)
Dalmia Cement (Bharat) Ltd. v. CIT (2016) 137 DTR 217 (Delhi)(HC)

1892 **S. 153A : Assessment – Search – Assessment finalised before date of search – No incriminating material found during search – Allowance of special deduction in initial assessment cannot be disturbed. [S. 80-IA, 132]**
Dismissing the appeal of revenue the Court held that; Assessment was finalised before date of search and no incriminating material found during search, therefore, allowance of special deduction in initial assessment cannot be disturbed.(AY. 2004-05, 2005-06)
PCIT v. Desai Construction P. Ltd. (2016) 387 ITR 552 (Guj.)(HC)

1893 **S. 153A : Assessment – Search – Return must be filed even if no incriminating material discovered during search – Estimation was held to be proper – Gift from relatives cannot be assessed as undisclosed income. [S. 132]**
Court held as under (1) Return must be filed even if no incriminating material discovered during search. (ii) Additions made by Assessing Officer for assessment years 2002-03 to 2005-06 and 2008-09 on basis of estimation of consultation fees restored-Tribunal's direction to Assessing Officer to calculate cost of lens at 30 per cent of sale value was held to be proper. (iii) Directions by Tribunal to Assessing Officer to make additions on estimation basis and directions by Tribunal to Assessing Officer to reduce disallowance from 80 per cent to 30 per cent.(iv) Gifts from close relatives, burden of proof of source and creditworthiness discharged by assessee, deletion of additions proper. (v) Cash flow statement of relative not reflecting cost of item. Additions made by Assessing Officer restored. (vi) Addition of difference in cost of construction by Assessing Officer restored. (AY. 2002-03 to 2008-09)
CIT v. Dr. P. Sasikumar (2016) 287 ITR 8 (Ker.)(HC)

1894 **S. 153A : Assessment – Search – Assessment on basis of statement of third person was held to be not valid without any incriminating found in the course of search proceedings. [S. 132, 132A]**
Dismissing the appeal of the revenue, the Court held that it was not the case of the Revenue that any incriminating material in respect of the assessment year under consideration was found during the course of search. When the notice came to be issued under section 153A of the Act, the assessee filed its return of income. Much later, when the time limit for framing the assessment as provided under section 153 was about to expire, the notice had been issued seeking to make the proposed addition of ₹ 11,05,51,000/- not on the basis of material which was found during the course of

search, but on the basis of a statement of another person. The Tribunal was correct in deleting the addition. (AY. 2006-07)
PCIT v. Saumya Construction P. Ltd. (2016) 387 ITR 529 (Guj.)(HC)

S. 153A : Assessment – Search – Seized material was destroyed in fire that took place at revenue's premises – Assessment made relying on some information not unearthed during search, assessment was held to be bad in law. 1895
Dismissing the appeal of the revenue, the Court held that the AO framed the assessments under section 153A relying on some information not unearthed during the search. Further, whatever was recovered during the search having been destroyed in a fire was not available with the Assessing Officer when the framed the assessments. Consequently, the assessment orders passed with reference to section 153A(1) were unsustainable in law. (AY. 2004-05 2005-06)
CIT v. MGF Automobiles Ltd. (2015)63 taxmann.com 137 (Delhi)(HC)
Editorial: SLP was granted to the revenue, CIT v. MGF Automobiles Ltd. (2016) 241 Taxman 440 (SC)

S. 153A : Assessment – Search and seizure – No assessments pending at time of initiation of proceedings – Finding by Tribunal that no incriminating evidence found during course of search – Finalised assessment or reassessment shall not abate. [S. 132] 1896
Once an assessment was not pending but had attained finality for a particular year, it could not be subject to proceedings under section 153A of the Act, if no incriminating materials were gathered in the course of the search or during the proceedings under section 153A, which were contrary to and were not disclosed during the regular assessment proceedings. (AY. 2005-06)
CIT v. Gurinder Singh Bawa (2016) 386 ITR 483 (Bom)(HC)
Editorial : SLP was granted to the Department, CIT v. Gurinder Singh Bawa (2016) 383 ITR 7 (St.)

S. 153A : Assessment – Assessment in case of search – Limitation – No mandatory requirement of issuance of notice under section 143(2) in respect of search assessment proceedings – Notices under sections 142(1) and 143(2) issued beyond period of six months – Will not invalidate assessment [S. 142(1), 143(2), 153A] 1897
Consequent to a search and seizure carried out at the premises of the assessee, notice under section 153A of the Act, for the Assessment Year 2004-05 was issued to the assessee on December 5, 2008 and in compliance therewith, the assessee filed a return of income on January 30, 2009. Thereafter, notices under sections 142(1) and 143(2) of the Act were issued to the assessee on June 10, 2010, i.e., beyond a period of six months. The Assessing Officer passed an assessment order. Penalty proceedings were also ordered to be carried out. The Commissioner (Appeals) allowed partial relief to the assessee. Before the Tribunal, the assessee contended that the stipulated time period for service of notice under section 143(2) of the Act would also be applicable in respect of assessment framed under section 153A of the Act. The Tribunal rejected the contention of the assessee and confirmed the decision of the Commissioner (Appeals). On appeal: Held, dismissing the appeal, that the order of the Tribunal was justified. (AY. 2004-05)
Tarsem Singla v. DCIT (2016) 385 ITR 138 (P&H)(HC)

1898 **S. 153A : Assessment – Search – Once notice is issued under section 153A – Return must be filed even if no incriminating documents discovered during search [S. 132].**
Allowing the appeal of revenue, the Court held that once a notice is issued u/s. 153A(1) and the Assessing Officer has required the assessee to furnish return for a period of six assessment years as contemplated under clause (b) then the assessee has to furnish all details with respect to each assessment year since it is treated as a return filed under section 139. Even if no documents are unearthed or any statement made by the assessee during the course of search under section 132 and no materials are received for the period of six years, the assessee is bound to file a return, is the scheme of the provision. Even though the second proviso to section 153A speaks of abatement of assessment or reassessment pending on the date of the initiation of search within the period of six assessment years specified under the provision that will also not absolve the assessee of his liability to submit returns as provided under section 153A(1)(a). (AY. 2002-03 to 2008-09)
CIT v. St. Francis Clay Décor Tiles (2016) 385 ITR 624 / 240 Taxman 168 / 137 DTR 340 / 287 CTR 187 (Ker.)(HC)

1899 **S. 153A : Assessment – Search – No incriminating material found for particular year – Assessment is not permissible.**
Dismissing the appeal of revenue, the Court held that the Tribunal was right in holding that there had to be incriminating material recovered during the search *qua* the assessee in each of the years for the purposes of framing an assessment under section 153A of the Act. (AY. 1998-99, 1999-2000)
PCIT v. Mitsui and Co. India P. Ltd. (2016) 384 ITR 360 (Delhi)(HC)

1900 **S. 153A : Assessment– Search – Limitation – Assessment to be completed within sixty days from date on which special auditor's report due – Assessment order dated 27-4-2007 served on assessee on 30-4-2007 – No proof to establish that order issued beyond control of authority within period of limitation being 29-4-2007 – Assessment was held to be barred by limitation. [S. 142(2A), 142(2C)]**
Held, dismissing the appeals, that the period prescribed under law being sixty days, the assessment orders were required to be issued on or before March 26, 2007 considering sixty days from January 27, 2007, the due date for the special auditor's report as specified under section 142(2C) of the Act. The assessment orders were dated April 27, 2007. The due date for submission of the special audit report upon second reference of the Commissioner dated December 18, 2006 being February 28, 2007, the assessment orders were to be issued on or before April 29, 2007. Copies of the assessment orders were served on the assessee on April 30, 2007. The Department was unable to prove from the records that the assessment orders were despatched on April 27, 2007 nor was the despatch register produced to establish that the orders were complete and effective, i.e., issued beyond the control of the authority within the period of limitation being April 29, 2007. Admittedly, the assessment orders were served on the assessee on April, 30, 2007. The assessment orders were barred by limitation. (AY 2001-02 to 2005-06)
CIT v. B. J. N. Hotels Ltd. (2016) 382 ITR 110 (Karn.)(HC)

S. 153A : Assessment – Search – If the assessee stands amalgamated with another Co., it ceases to exists and all proceedings of search u/s. 132, notice and assessment u/s. 153C on the assessee are a nullity and void *ab initio*. [S. 132, 153C] 1901

(i) The Assessee which was initially incorporated on 1st January, 1999 merged with M/s. B. S. Infratech Pvt. Ltd. with effect from 1st April, 2008 by the order of the Court. A search took place on 20th October, 2008 in the cases of Mr. B. K. Dhingra, Smt. Poonam Dhingra and M/s Madhusudan Buildcon Pvt. Ltd. On the basis that in the course of search certain documents belonging to the assessee company were found, notice was issued to the assessee under Section 153C (1) on 10th September, 2010. Therefore, not only on the date on which notice was issued but even on the date of the search, the Assessee had ceased to exist in the eyes of law.

(ii) In identical circumstances, in cases arising out of the same search, this Court has by its order dated 19th August, 2015 in the Revenue's appeals ITA Nos.582, 584, 431, 533, 432 & 433 of 2015 (*Pr. Commissioner of Income Tax (Central-II) v. Images Credit And Portfolio Pvt. Ltd.*) and order dated 29th September, 2015 in ITA Nos.745, 746,748, 749 and 750/2015 (Pr. Commissioner of Income Tax (Central-2) v. M/s Mevron Projects Pvt. Ltd.) invalidated the assessment proceedings against the Assessee in those cases which, on account of having merged with another entity with effect from a date anterior to the search, also no longer existed on the date of search, on the date of the issue of notice and consequent assessment order passed under Section 153 C of the Act is nullity and void *ab initio*. (ITA Nos.365, 366, 367, 368, 371 & 372 of 2013, dt. 15.10.2015)

CIT v. Indu Surveyors & Loss Assessors Pvt. Ltd. (Delhi)(HC); www.itatonline.org

S. 153A : Assessment – Search – Assessment cannot be made for the AYs in which incriminating material is not recovered even though incriminating material may be recovered for other years in the block of 6 years. 1902

The High Court had to consider whether there had to be incriminating material recovered during the search *qua* the assessee in each of the years for the purposes of framing an assessment under Section 153A of the Act. HELD by the High Court:

(i) It is not in dispute that in respect of the assessee for the AYs in question the initial assessment proceedings took place under Section 143(3) of the Act. Thereafter they were sought to be reopened by issuing notice under Section 147 of the Act and re-assessment orders were passed under Section 147 read with Section 143(3) of the Act. During both the aforementioned proceedings the question whether the gold and silver utensils were the capital assets or personal effects of the Assessee was examined. They were held not to be the personal effects.

(i) It has been noticed by the ITAT in the impugned order that for the AYs in question no incriminating material *qua* the assessee was found. In that view of the matter, and in light of the decision of this Court in *CIT v. Kabul Chawla (2016) 380 ITR 573 (Delhi)*, the Court is of the view that the impugned order of the ITAT suffers from no legal infirmity and no substantial question of law arises for determination. (AY. 1998-99, 1999-2000)

Pr. CIT v. Lata Jain (Ms.) (2016) 384 ITR 543 (Delhi)(HC)

1903 **S. 153A : Assessment – Search – No incriminating evidence related to share capital issued found during course of search – Deletion of addition was held to be justified. [S.68]**
Held, dismissing the appeal, that the order of the Commissioner (Appeals) revealed that there was a factual finding that no incriminating evidence related to share capital issued was found during the course of search as was manifest from the order of the Assessing Officer. Consequently, it was held that the Assessing Officer was not justified in invoking section 68 for the purposes of making additions on account of share capital. There was nothing to show that the factual determination was perverse. (AY. 2002-03)
PCIT v. Kurele Paper Mills P. Ltd. (2016) 380 ITR 571 (Delhi)(HC)
Editorial: The Supreme Court has dismissed the special leave petition filed by the Department against this judgment [2016] 380 ITR 64 (St.)

1904 **S. 153A : Assessment – Search – Accounts which were duly verified during regular assessment of assessee could not be re-appreciated merely because further a search was conducted in premises of assessee as same would amount to reopening of concluded assessment. [S.143(1)]**
Assessments had been completed under section 143(3) and under section 143(1). Thereafter, a search was conducted in the premises of the assessee. The AO made certain additions after holding that the accounts of the assessee did not tally with the corresponding accounts of the creditors and debtors. The CIT(A) allowed the assessee's appeal, after concluding that no incriminating documents were found during the course of search, on the basis of which additions had been made by the AO. This finding was upheld by the Tribunal.
On appeal, the High Court observed that there were specific findings of fact recorded by both the CIT(A) and the Tribunal that there were no incriminating documents found during the course of search, on the basis of which the additions had been made by the AO and that the accounts were submitted by the assessee at the time of regular assessment which were duly verified and accepted by the AO. In the absence of any incriminating documents having been found, if the assessment was allowed to be reopened the same would amount to the revenue getting a second opportunity to reopen a concluded assessment, which is not permissible. The High Court held that, merely because a search was conducted in the premises of the assessee, would not entitle the revenue to initiate the process of reassessment, for which there was a separate procedure prescribed in the statute. It was only when the conditions prescribed for reassessment were fulfilled that a concluded assessment could be reopened. The very same accounts which were submitted by the assessee, on the basis of which assessment had been concluded, could not be re-appreciated by the AO merely because a search had been conducted in the premises of the assessee. (AY. 2005-06 to 2008-09)
CIT v. Lancy Constructions (2016) 237 Taxman 728 (Karn.)(HC)

1905 **S. 153A : Assessment – Search – Assessments completed on date of search – No incriminating materials found during search – Block assessment was held to be not valid. [S. 132]**
(i) Once a search takes place u/s. 132 of the Act, notice u/s. 153A(1) will have to be mandatorily issued to the person in respect of whom search was conducted requiring him to file returns for six AYs immediately preceding the previous year relevant to the AY in which the search takes place. (ii) Assessments and reassessments pending on

the date of the search shall abate. In so far as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment u/s. 153A merges into one. (iii) The Assessing Officer will exercise normal assessment powers in respect of the six years previous to the relevant AY in which the search takes place. The Assessing Officer has the power to assess and reassess the "total income" of the six years in separate assessment orders for each of the six years. In other words, there will be only one assessment order in respect of each of the six AYs in which both the disclosed and the undisclosed income would be brought to tax. (iv) Although section 153A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the Assessing Officer which can be related to the evidence found, it does not mean that the assessment can be arbitrary or made without any relevance or nexus with the seized material. Assessment has to be made under this section only on the basis of the seized material. (v) In the absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. (vi) Only one assessment shall be made separately for each AY on the basis of the findings of the search and any other material existing or brought on the record of the Assessing Officer. (vii) Completed assessments can be interfered with by the Assessing Officer while making the assessment u/s. 153A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in the course of search which were not produced or not already disclosed or made known in the course of original assessment. (AY. 2002-03, to 2006-07)

CIT v. Kabul Chawla (2015) 281 CTR 45 / 126 DTR 130 / 234 Taxman 300 (2016) 380 ITR 573 (Delhi)(HC)

S. 153A : Assessment – Search – Agricultural income – Additional income was not supported by any evidence hence the addition as undisclosed income was held to be justified. [S. 139] 1906

Return u/s. 153A showed higher income from agriculture as compared to return u/s. 139. Consequently, AO made addition of ₹ 5,50,000 on account of agricultural income. CIT(A) denied deletion of addition made by AO on account of agricultural income as difference in such income between two returns were not reconciled through any evidence on record. The ITAT upheld the addition of amount as agricultural income as such increase in return filed u/s. 153A was not supported by any evidence or material on record and no plausible explanation was given. (AY. 2008-09)

Naresh Chauhan v. Dy. CIT (2016) 48 ITR 1 (Chd.)(Trib.)

S. 153A : Assessment – Search – Onus was on the assessee to provide that he had not received payments even if no inquiry was made in the case of the brother – Addition was held to be justified – Assessment only on the basis of material recovered during search and addition on the basis of DVO's report without incriminating material found during the search was not permissible. [S.132(4)] 1907

During the course of search, loose papers were found. As per these documents a sum of ₹ 1.05 crores was to be paid by Shri Ramesh S. Kasat to the assessee and when this document was confronted to the son of assessee, while recording his statement

under section 132(4) of the Act, he admitted ₹ 75 lakhs as undisclosed income. The statement suggested the execution of this documents, and fulfilment of the obligations for the purpose of this document. No weightage could be given to a simple denial of the assessee *vis-à-vis* the evidence which suggested that the transactions were performed in compliance with the documents. The assessee contended that no inquiry was made in case of his brother. Even if no inquiry was made in the case of the assessee's brother the assessee would not discharge his onus to prove that in compliance with the document, he had not received the payments Thus, there was no reason to interfere in the concurrent finding of the Departmental authorities and in the addition confirmed by the Commissioner (Appeals) to the extent of ₹ 75 lakhs. Addition on the basis of DVO's report without incriminating material found during the search was not permissible. (AY. 2004-05)
Champaklal S. Kasat v. DCIT (2016) 50 ITR 465 (Ahd.)(Trib.)

1908 **S. 153A : Assessment – Search – Even in a case where only a S. 143(1) assessment is made, additions cannot be made without the backing of incriminating material if the S.. 143(1) assessment has not abated. [S. 143(1)]**
Allowing the appeal of assessee, the Tribunal held that ;even in a case where only a s. 143(1) assessment is made, additions cannot be made without the backing of incriminating material if the s. 143(1) assessment has not abated. (ITA No. 638/Mum/2011, dt. 31.08.2016) (AY. 2002-03 to 2005-06)
Anil Mahavir Gupta v. ACIT (Mum.)(Trib.); www.itatonline.org

1909 **S. 153A : Assessment – Search – No incriminating documents found – Additions was to be deleted. [S. 132]**
Dismising the appeal of revenue, the Tribunal held that in the absence of any incriminating material found during the course of the second search. The concluded assessment of the assessee could not be disturbed on the same set of material facts as prevailing when the assessment was framed under section 153A read with section 143(3) in pursuance of the first search. The additions made by the Assessing Officer to be deleted. (AY. 2007-08 to 2009-10)
DCIT v. Himanshu B. Kanakia (2016) 46 ITR 756 (Mum.)(Trib.)

1910 **S. 153A : Assessment – Search – Notice – issued for the Assessment Year which has been completed – No incriminating material found during the course of search action – Assessment under section 153A had to be made only as per original assessment which was made under section 143(1) or under section 143(3).[S. 132, 143(1), 143(3)]**
Where pursuant to search proceedings, notice under section 153A was issued, since assessment in respect of some assessment years covered by said notice had already been completed and, moreover, no incriminating material was found during search, assessment for those assessment years could be made only as per original assessment under section 143(1) or 143(3). (AY. 2005-06 to 2011-12)
Om Shakthy Agencies (Madras) (P.) Ltd. v. Dy. CIT (2016) 157 ITD 1062 / 177 TTJ 419 (Chennai)(Trib.)

S. 153A : Assessment – Search – An assessment made u/s. 153A only on the basis of pre-search enquiries and because the parties did not appear in response to S.133(6) summons is not valid if no incriminating material was found in search. S. 143(1) Intimation is deemed to be a completed assessment if no notice u/s. 143 (2) has been issued prior to the date of search – Addition was deleted. [S. 143(1)] 1911

We are of the considered view that completed assessment interfered with by the AO u/s. 153A and confirmed by the ld. CIT (A) are not sustainable in the eyes of law for the following reasons: –

(i) that in the instant case, undisputedly the AO has not made assessment on the basis of incriminating material unearthed during search and seizure operation conducted u/s. 132 rather proceeded u/s. 153A of the Act on the basis of some pre-search enquiries to make an addition as has specifically been recorded in para 6 of the assessment order that, "Pre-search enquiries revealed that M/s. Jaipuria Infrastructure Developers Pvt. Ltd., the flagship company involved in the real estate business of the S.K. Jaipuria group is indulged in inflating the cost of the project by debiting bogus expenses by raising bills from the non-existing parties or the entry providers."

(ii) that the ratio of the judgment in case of *CIT v. Kabul Chawla 380 ITR 173 (Del.)* is required to be extracted by perusing the judgment in entirety and not by picking up the favourable sentences and by ignoring the unfavourable one. Highlighted portion of paras 37 (iv), (v), (vi) & (vii) of Kabul Chawla (supra) is crux of the issue involved which is applicable to the facts and circumstances of the case;

(iii) that the ratio of the judgment Kabul Chawla (supra) is that in all circumstances, completed assessment can be interfered with by the AO u/s. 153A only on the basis of incriminating material unearthed during the course of search;

(iv) that not only this, the addition in this case has been made by the AO u/s. 153A on the sole ground that assessee has failed to produce the parties with whom the assessee company has transacted during the year under assessment who have failed to turn up despite the issue of notice u/s. 133 (6) of the Act;

(v) that the contention of the ld. DR that the assessment *qua* the AY 2006-07 was pending as on date of search as mere issuances of acknowledgement by the ministerial staff does not imply that assessment has been completed, is not tenable in the face of undisputed fact that when within the prescribed period, no notice u/s. 143 (2) has been issued prior to the date of search, assessment is deemed to be completed;

(vi) that there is not an iota of material with the AO to initiate proceedings u/s. 153A what to talk of incriminating seized material;

(vii) that the ld. CIT(A) affirmed the assessment order by relying upon the decisions relied upon by Hon'ble jurisdictional High Court in the case cited as *Filatex India Ltd. v. CIT-IV – (2014) 49 taxmann.com 465 (Delhi)* which has been distinguished in the Kabul Chawla (supra) on the ground that in the said case, there was some material unearthed during the search whereas in the instant case there is admittedly no incriminating material unearthed during the search to proceed u/s. 153A. (ITA Nos.5522 & 5523/Del./2015, dt. 27.06.2016)(AY. 2006-07, 2007-08)

Jaipuria Infrastructure Developers v. ACIT (Delhi)(Trib.); www.itatonline.org

1912 **S. 153A : Assessment – Search – Not issued notice within prescribed limit – Absence of incriminating material, order was held to be bad in law. [S. 143(2)]**
AO having not issued notice u/s. 143(2) within the prescribed time limit pursuant to the return filed by the assessee under s. 139(1), no proceeding was pending before the AO on the date of initiation of search which had abated, and the Revenue authorities having found no incriminating document during the course of search, the impugned order passed u/s. 153A r.w.s. 143(3) is void *ab initio*. (AY. 2008-09)
Jadau Jewellers & Manufacturers (P) Ltd. v. ACIT (2016) 130 DTR 17 / 175 TTJ 344 (Jaipur)(Trib.)

1913 **S. 153A : Assessment – Search – Income of any other person – No satisfaction recorded by AO in respect of whom the search was conducted prior to issuing notice – Notice and assessment against the assessee was not valid. [S. 153C, 292B]**
In the absence of satisfaction by the AO of the person in respect of whom search was conducted, the AO of the assessee would not get any jurisdiction to issue such notice. Accordingly, notice u/s. 153C issued by the AO of the person in respect of whom search was conducted lacked jurisdiction and this was not curable by virtue of the provisions of section 292B.(AY. 2003-04 to 2008-09)
Parshwa Corporation and others v. Dy. CIT (2016) 46 ITR 266 / 178 TTJ 394 (Ahd.)(Trib.)

1914 **S. 153A : Assessment – Search – Assessment made u/s. 143(1) can be said to have abated in the absence of incriminating material. [S. 143(1)]**
Allowing the appeal of assessee the Tribunal held that assessment made u/s. 143(1) can be said to have abated in the absence of incriminating material. (ITA No. 173 to 177/ Mum/2015, dt. 31.12.2015) (AY. 2005-06 to 2009-10)
Ideal Appliances Co. Pvt. Ltd. v. DCIT (Mum.)(Trib.); www.itatonline.org

S. 153C : Assessment of income of any other person.

1915 **S. 153C : Assessment – Income of any other person – Search Recording of satisfaction is mandatory – Matter was remanded back to Tribunal. [S. 158BC]**
Allowing the appeal the Court held that in accordance with Circular No. 24 of 2015, dated December 31, 2015 at the time of or along with the initiation of proceedings against the assessee under section 153C of the Income-tax Act, 1961, or in the course of assessment proceedings under section 158BC of the Act or immediately after the assessment proceedings are completed under section 158BD of the Act recording of satisfaction is required. Further, even in respect of "all other persons than the searched person such recording of satisfaction by the Assessing Officer is required". The circular further states that, if in the pending matters, the guidelines laid down by the Supreme Court of recording of satisfaction note is not met, such litigation should be withdrawn or not pressed or the appeal should also not be filed. The effect would be that, the requirements of recording of satisfaction for exercise of power under section 153C is a mandatory requirement and cannot be given a go-by, either at the stage of initiation or during the course of assessment or at the conclusion of the assessment. Court held that as there was no examination by the Tribunal on the aspect of satisfaction note. The Tribunal should examine the aspects of satisfaction note if any, and

whether it could be termed sufficient compliance or not for the assessment to be initiated or to be made or finalized under section 153C of the Act. If need arose, the Tribunal may also examine the assessment made on its merits.
Arihant Aluminium Corporation v. ACIT (2016) 388 ITR 450 / 69 taxmann.com 286 (Karn.)(HC)

S.153C : Assessment – Income of any other person – Search – Finding that assessee had adequate explanation for discrepancy in stock and advances, additions was held to be not valid. [S.132, 143(3)] 1916
Dismissing the appeal of revenue, the Court held that; finding that assessee had adequate explanation for discrepancy in stock and advances, additions was held to be not valid. (AY. 2006-07)
CIT v. N.G. Jewellers (2016) 389 ITR 403 (Raj.)(HC)

S. 153C : Assessment – Income of any other person – Search – Satisfaction that incriminating material belonged to third person must be recorded – No incriminating material found – Provisions cannot be invoked. [S. 132, 132A, 133A, 153A] 1917
Dismissing the appeal of the revenue, the Court held that; incriminating material in the seized material was a pre-requisite before power was exercised under section 153C read with section 153A of the Act. The Department had not shown any incriminating material unearthed either during the search or during the requisition or even during the survey which was or might be relatable to the assessee. The Assessing Officer had made disallowances of the expenditure, which were already disclosed, for one reason or the other, but such disallowances were not contemplated by the provisions contained under section 153C read with section 153A. The disallowances were upheld by the Commissioner (Appeals) and that there was no infirmity in the order of the Appellate Tribunal deleting the disallowances. (AY. 1998-99, 1999-2000, 2001-02, 2002-03, 2003-04)
CIT v. Veerprabhu Marketing Ltd. (2016) 388 ITR 574 / 73 taxmann.com 149 / (2017) 149 DTR 87 / 294 CTR 103 (Cal.)(HC)

S. 153C : Assessment – Income of any other person – Search – Cheque book seized – No other evidence of undisclosed income – Proceedings was held to be not valid. [S. 132] 1918
Dismissing the appeal of the revenue the Court held that Since the only document seized during the search was a cheque book pertaining to assessee which reflected the issue of cheques during the period and there was no other evidence of undisclosed income, the proceedings under section 153C were not valid. (AY. 2003-04 to 2008-09)
CIT v. Refam Management Services P. Ltd. (2016) 386 ITR 693 (Delhi)(HC)

S. 153C : Assessment – Income of any other person – Search and seizure – Satisfaction – No incriminating materials found – Assessment was held to be not valid. [S. 132, 158BD] 1919
Held, one of the conditions precedent for invoking a block assessment pursuant to a search in respect of a third party under section 158BD of the Act, i.e., recording satisfaction that undisclosed income belongs to the third party, which was detected pursuant to a search had not been complied with. Though documents belonging to the assessee were seized at the time of search operation, there was no incriminating material

found leading to undisclosed income. Therefore, assessment of income of the assessee was unwarranted. (AY. 2004-05 to 2008-09)
CIT v. IBC Knowledge Park P. Ltd. (2016) 385 ITR 346 / 287 CTR 261 / 69 taxmann.com 108 (Karn.)(HC)

1920 **S. 153C : Assessment – Income of any other person – Absence of incriminating material – Search material – Assessment of third person cannot be made. [S. 132, 153A]**
Absence of incriminating material Search material Assessment of third person cannot be made. Recording of satisfaction by AO having jurisdiction over third person in respect of search conducted that such money, asset or valuables belonged to third person is required (AY. 2001-02 to 2007-08)
CIT v. Promy Kuriakose (2016) 386 ITR 597 / (2017) 148 DTR 287 / 293 CTR 440 (Ker.)(HC)

1921 **S. 153C : Assessment – Income of any other person – Search – Assessing Officer of a person searched, under section 153A, is required to record satisfaction that assets/ documents found during search belong to the other person before handing over the documents to the Assessing Officer of that other person. [S. 153A]**
A search was conducted on group companies of the assessee. During the course of search, copies of resolutions, affidavits, counter foils of Income-tax returns, Share application forms pertaining to the assessee were found by the Assessing Officer of a person searched under section 153A of the Act. The Assessing Officer of the person searched and the assessee was same therefore, notice under section 153C of the Act was issued by the Assessing Officer and assessment was completed after making addition under section 68 of the Act. The Assessee challenged the jurisdiction to make assessment under section 153C of the Act before CIT(A) however, it was rejected by him. On appeal to the Tribunal, assessment under section 153C was quashed on the ground that satisfaction was not recorded by the Assessing Officer of the person searched, under section 153A, that the documents found during the search belong to the assessee before handing over the same to the assessee. The High Court held that satisfaction by the Assessing Officer of the person searched under section 153A is *sine qua non* for initiation of proceedings under section 153C. The High Court further held that section 153C is not attracted where documents pertaining to the other person is found, it is attracted only in case where documents belonging to the other person is found. It was held that satisfaction must be recorded by the Assessing Officer even if the Assessing Officer of the person searched under section 153A and a person sought to be assessed under section 153C is the same. (AY. 2003-04 to 2005-06, 2008-09, 2009-10)
PCIT v. Nikki Drug & Chemicals (P.) Ltd. (2016) 386 ITR 680 / 236 Taxman 305 / 129 DTR 393 / 293 CTR 398 (Delhi)(HC)

1922 **S. 153C : Assessment – Income of any other person – Search – No satisfaction recorded before initiating proceedings – Assessment was held to be not valid.**
Held, the order passed by the Tribunal, the final fact finding authority, clearly states that no satisfaction note had been recorded before initiating the proceedings u/s. 153C. When no satisfaction was recorded the requirement of section 153C was not satisfied. Therefore, there was no reason to interfere with the order passed by the Tribunal, which

had not sustained the proceedings u/s. 153C for the reason that there was no satisfaction at any stage. (AY. 2002-03, 2006-07)
CIT v. Madhu Keshwani (Smt.)(2016) 380 ITR 566 (All.)(HC)
CIT v. Nirmala Keshwani (Smt.)(2016) 380 ITR 566 (All.)(HC)
CIT v. Nisha Keshwani (Smt.)(2016) 380 ITR 566 (All.)(HC)

S. 153C : Assessment – Income of any other person – Search – Affidavits of person in respect of whom search conducted that documents belonged to him – No other evidence of undisclosed income – Proceedings was held to be not valid.[S. 132, 153A] 1923
It was not disputed that the hard disk did not contain any incriminating material as the data on the hard disc only supported the return filed by the assessee. This apart, as the hard disc did not belong to the assessee, proceedings u/s. 153C could not be initiated on the basis of the disk. Thus, the provisions of section 153C, which are to enable an investigation in respect of the seized asset, could not be resorted to. The Assessing Officer had no jurisdiction to make the reassessment u/s. 153C. (AY. 2003-04 to 2008-09)
CIT v. RRJ Securities Ltd. (2015) 62 taxmann.com 391 / (2016) 380 ITR 612 / 282 CTR 321 (Delhi)(HC)

S. 153C : Assessment – Income of any other person – Search – Limitation starts from date on which assets or documents received by Assessing Officer of third person – Limitation will start on date of recording of satisfaction that incriminating material belonged to third person – Satisfaction recorded on 8-9-2010 – Assessments for AYs 2003-04 and 2004-05 was held to be barred by limitation.[S.132, 153A] 1924
Dismissing the appeal of revenue the Court held that; in any case the date of recording of satisfaction u/s. 153C was September 8, 2010. The assessments made in respect of the AYs 2003-04 and 2004-05 would be beyond the period of six Assessment Years. The assessments for the AYs 2003-04 and 2004-05 were outside the scope of section 153C and the Assessing Officer had no jurisdiction to make an assessment of the assessee's income for those years. (AY. 2003-04 to 2008-09)
CIT v. RRJ Securities Ltd. (2015) 62 taxmann.com 391 / (2016) 380 ITR 612 / 282 CTR 321 (Delhi)(HC)

S. 153C : Assessment – Income of any other person – Share premium – An order passed without obtaining the approval of the JCIT is without jurisdiction and void [S. 132, 153A, 153D, 158BD] 1925
Allowing the appeal the Tribunal held that an order passed without obtaining the approval of the JCIT is without jurisdiction and void. (ITA No. 926 to 931/mum/2013, dt. 30.09.2016)(AY. 2002-03 to 2007-08)
HiKlass Moving Picture Pvt. Ltd. v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 153C : Assessment – Income of any other person – Search – No addition in case incriminating material is not found by the AO. 1926
A search was conducted in the premises of Mr. Prakash H. Savla where documents relating to the firm Mahavir Builders was found. Subsequently, Mr. Prakash H. Savla and the assessee's husband gave certain declarations offering undisclosed income of connected persons, including the assessee, on account of undisclosed share purchase

transactions. The declaration relating to the assessee pertained to AY 2007-08. Notice u/s. 153C was issued, pursuant to which return of income for AY 2009-10 was filed by the assessee. The AO made an addition on account of gift received by the assessee and also treated long term capital gains as income from other sources. The ITAT held that addition was made in the absence of any adverse material which was impermissible. The Tribunal thus deleted the addition made by the AO on the basis that no incriminating material was found by the AO on said issue, relating to the Assessee. (AY. 2003-04, 2005-06 to 2008-09)
Chhaya P. Gangar (Ms.) v. DCIT (2016) 47 ITR 328 (Mum.)(Trib.)

1927 **S. 153C : Assessment – Income of any other person – Search – Income declared in partnership firm – addition deleted.**
An addition was also made by the AO on the basis of books of entry of Vividham Sweets and Snacks Shop. The AO assumed that Vividham had paid rent to the Assessee. The ITAT deleted the addition since the rental income was offered to tax and declared in the return of income of the partnership firm. (AY. 2003-04, 2005-06 to 2008-09)
Chhaya P. Gangar (Ms). v. DCIT (2016) 47 ITR 328 (Mum.)(Trib.)

1928 **S. 153C : Assessment – Income of any other person – Search – Telescoping denied – Nexus not proved**
During the course of search certain print outs from accounting software were found and seized, showing that in the ledger account under the name of commission and brokerage, there was an entry of cash received of ₹ 6 lakhs in the books of account of the assessee. The assessee submitted that this entry had already been considered in the offer of income made by the assessee for an aggregate amount of ₹ 30 lakhs, and, therefore, it should be adjusted against that. The Assessing Officer was not satisfied with the explanation and made the addition. The Commissioner (Appeals) granted the benefit of telescoping. On appeal, the ITAT held that in the assessment proceedings before the Assessing Officer, the assessee claimed that the entry of commission and brokerage of ₹ 6 lakhs received in cash was covered in the declaration made on account of amount spent on renovation of house of the assessee. This claim was not accepted by the Assessing Officer on the ground that no correlation could be shown between the two by the assessee. But the Commissioner (Appeals) accepted it and granted the benefit of telescoping. No reasoning had been given by the Commissioner (Appeals) as to how and in what manner the amount of ₹ 6 lakhs earned on account of some brokerage and commission was covered within the offer of ₹ 30 lakhs made by the assessee. The Commissioner (Appeals) had discussed in detail the entire law on telescoping but failed to discuss how and in what manner, the amount was covered in the income offered by the assessee. The contention of the Revenue that the assessee was not able to establish any nexus between the two amounts was justified. (AY. 2003-04, 2005-06 to 2008-09)
Chhaya P. Gangar (Ms.) v. DCIT (2016) 47 ITR 328 (Mum.)(Trib.)

1929 **S. 153C : Assessment – Income of any other person – Search – Loose document – jottings found – AO not made any efforts to contact the said party – addition deleted**
There were certain jottings on a document found during the course of search. The assessee explained that he did not know Arunbhai whose name was mentioned in

the seized document, and that he had nothing to do with this document. But the Assessing Officer made addition. On the ground that the assessee failed to produce Arunbhai before the Assessing Officer for his examination and also failed to submit any documentary evidence to explain the entry, the Commissioner (Appeals) confirmed the addition. The ITAT held that the document was dumb and half a speaking document. Before it could be used for making addition in the hands of the assessee, there was a legal obligation on the Assessing Officer to make it a fully speaking document since he wanted to make addition on the basis of the document. There were no indications or observations in the assessment order showing whether the Assessing Officer made any efforts to contact Arunbhai. There was no mention in the assessment order whether he asked the assessee to produce Arunbhai, whether the amount had been received or given or whether the amount shall be received or shall be given, whether it was income or expense. Nothing emerged from the perusal of the document, and, therefore, no addition could have been made simply relying on the document that too without bringing any material on record to explain and substantiate the document. (AY. 2003-04, 2005-06 to 2008-09)

Chhaya P. Gangar (Ms.) v. DCIT (2016) 47 ITR 328 (Mum.)(Trib.)

S. 153C : Assessment – Income of any other person – Search – Client code modifications 1930

The assessee was carrying out the business of trading in shares and investments. The assessee was engaged in commodity transactions through its broker, Kunwarji. Pursuant to a search and seizure action carried out in the premises of the Kunwarji group, the computer data belonging to the assessee was seized. The Assessing Officer held that Kunwarji had carried out client code modifications in active connivance with the assessee which had resulted in diversion of profits of the assessee to other persons. The Assessing Officer thereafter worked out the difference of profits as indicated by the assessee in the books of account and as worked out by reversing the effect of the client code modification, and treated the difference worked out by him as suppressed profit of the assessee. The Commissioner (Appeals) deleted the additions holding that the client code modifications were negligible in number compared to the total quantum of trades carried out by the assessee and the addition was in the nature of notional income made by assumptions and without basis. On appeal, ITAT held that the Commissioner (Appeals) while deleting the addition had relied on the decision in the case of Asst. *CIT v. Kunvarji Finance Pvt. Ltd. [2015] 40 ITR (Trib.) 64 (Ahd.)* and the order of the Commissioner (Appeals) in that case was upheld by the co-ordinate Bench of the Tribunal. The Revenue had not brought any distinguishing feature between the case of the assessee and that of Kunvarji Finance Pvt. Ltd. Therefore, no interference was called for in the order of the Commissioner (Appeals). (AY. 2005-06, 2007-08)

ACIT v. Amar Mukesh Shah (2016) 46 ITR 234 (Ahd.)(Trib.)

1931 **S. 153C : Assessment – Income of any other person – Search – Once the assessee has submitted necessary documents to prove the *bona fides* of transactions entered into by him, the onus lies on the AO to prove that the claim of the Assessee is factually incorrect. Mere baseless statements will not discharge the onus cast upon the AO.**
The assessee was engaged in the investments in capital market. Consequent to a search conducted, the AO issued a notice u/s. 153C and made an addition u/s. 68 on the basis that the Assessee did not have sufficient income or the bank accounts indicated credits and debits in rapid succession leaving little balance for investment. The CIT(A) deleted the addition. On further appeal, the ITAT held that the assessee had submitted necessary evidence to establish *bona fides* of transaction, but the AO had not discharged the onus which was on him to prove that the claim of the Assessee was factually incorrect. Though it was part of their duty to ensure that no tax which was legitimately due from the assessee remained unrecovered, at the same time they would not act in a manner as might indicate that scales were weighed against the assessee. (AY. 2006-07)
ACIT v. Goodview Trading P. Ltd. & Goodview Trading P. Ltd. v. ACIT (2016) 47 ITR 555 (Delhi)(Trib.)

1932 **S. 153C : Assessment – Income of any other person – Search – Notice issued under section 153C without recording any satisfaction that the seized document belong to the assessee – Notice not valid.**
Once it is not the case of Department that documents in question were not belonging to person who was searched, provisions of S. 153C could not be invoked. (AY. 2010-11)
Fiberfill Engineers v. ACIT (2016) 177 TTJ 556 / 138 DTR 57 (Delhi)(Trib.)

1933 **S. 153C : Assessment – Income of any other person – Search – Satisfaction was not recorded hence the order was held to be bad in law. [S. 132(4A, 133A]**
No satisfaction was recorded before issue of notice hence the order was held to be bad in law. (AY. 2007-08, 2008-09, 2009-10, 2010-11)
Super Malls Pvt. Ltd. v. Dy. CIT (2016) 176 TTJ 563 / 132 DTR 48 (Delhi)(Trib.)

S. 154 : Rectification of mistake.

S. 154 : Rectification of mistake – Notice cannot be issued for rectification in respect of an issue which is allowed by the appellate authorities and the same is accepted by the Department. [S. 80HHC] 1934

The High Court quashed the rectification notice issued by the Assessing Officer under section 154 of the Act seeking to disallow the deduction under section 80HHC which was allowed by the Commissioner of Income Tax (Appeals) for the reason that the order of the Assessing Officer is merged with that of Commissioner of Income Tax (Appeals) and also for the reason that the issue involved was a debatable one. (AY. 1992-93)

IPCA Laboratories Ltd. v. Rajaram, DCIT (2016) 140 DTR 89 (Bom.)(HC)

S. 154 : Rectification of mistake – Assessing Officer being statutorily bound to comply with provisions of sub-section (5) of section 154 cannot refuse to give effect to order passed by Commissioner (Appeals). [S. 40(a)(ia), 245] 1935

Allowing the appeal the Court held that pursuant to the order dated 5-9-2013, the Assessing Officer has neither given effect to such order as contemplated under sub-section (5) of section 154 nor has he made any adjustment after prior intimation to the assessee under section 245. The reason for non-compliance with the mandate of the provisions of sub-section (5) of section 154 is nothing but an adamant attitude of the Assessing Officer. It may be that the Assessing Officer is aggrieved by the order passed by the Commissioner (Appeals) and may have preferred an appeal before the Tribunal. Nonetheless, as on date, such order is in operation, as the same has not been stayed by the Tribunal or any other court of competent jurisdiction. Under the circumstances, the Assessing Officer is statutorily bound to give effect to the said order. (AY. 2005-06)

R.G. Gurjar v. ITO (2016) 387 ITR 696 / 240 Taxman 273 (Guj.)(HC)

S. 154 : Rectification of mistake – Long term capital gains – Agricultural land – Not a case of rectification – Assessee should have filed revised return or revision application. [S. 45, 139, 264] 1936

Assessee claiming to have mistakenly declared long-term capital gains on transfer of agricultural land. Assessee has filed Rectification Application. Dismissing the petition the Court held that, facts of the case does not fall as mistake for rectification. Submission of corroborating evidence with Rectification Application requiring investigations and verifications hence the assessee should have filed revised return or sought revision before Commissioner. (AY. 2008-09)

Satbir Nijjer v. CIT(A) (2016) 383 ITR 71 / 139 DTR 138 / 288 CTR 96 (P&H)(HC)

S. 154 : Rectification of mistake – Lease income assessed as income from financing transaction – No appeal against such assessment or disallowance of depreciation – Earlier application for rectification given up – Application to delete income from lease was held to be not valid. [S.154(IA), 254(2)] 1937

The lease income was assessed as income from a financial transaction and upheld by the High Court. A plea for rectification for deletion of income from lease was raised before the High Court but not pursued. Subsequently, an application was made for rectification u/s. 154(1A) and also u/s. 254(2). The applications were rejected by the

Tribunal. Held, that at the initial point of time, it was well within the assessee's knowledge that the income, though not treated as an income from lease, was treated as income from finance transaction in respect of the same party. Therefore, the new plea taken by the assessee that consequent to the disallowance of depreciation, the income should also be deleted, had no basis. The case did not fall within the scope of section 154(1A) warranting rectification as envisaged in the provision.(AY. 1993-94 to 1996-97)
Indus Finance Corporation Ltd. v. CIT (2015) 63 taxmann.com 244 / (2016) 380 ITR 504 / 136 DTR 118 (Mad.)(HC)
Editorial: SLP of assessee is dismissed Indus Finance Corporation Ltd v. CIT (2017) 246 Taxman 222 (SC)

1938 **S. 154 : Rectification of mistake – Commissioner (Appeals) and Tribunal failing to adjudicate issue of jurisdiction u/s. 154 – Matter remanded to Commissioner (Appeals) to decide issue afresh. [S.54, 54F, 54EC]**
The assessee sold certain shares and computed capital gains and claimed deduction u/s. 54. The Assessing Officer, without noticing that the capital asset which had been transferred was not a long-term capital asset, allowed the claim of deduction u/s. 54. On finding that the assessee had made and been allowed a wrong claim u/s. 54, the Assessing Officer issued a notice u/s. 154. The assessee accepted the mistake crept in the order of assessment and filed a revised computation claiming the benefit u/s. 54F and section 54EC. The Assessing Officer allowed the proportionate investment and taxed the remaining sale consideration. The Commissioner (Appeals), on considering the appeal filed against the regular assessment, against the disallowance of interest claimed on the loans borrowed from the banks and other institutions, granted relief to the assessee. As regards the appeal against the order u/s. 154, he failed to consider the issue on the merits but allowed the appeal with an observation that in view of the finding given in the main appellate order it became consequential in nature and, accordingly, the appeal as regards section 154 succeeded. As regards the order u/s. 154, the Tribunal rejected the appeal filed by the Revenue and allowed the cross-appeal filed by the assessee on the jurisdiction of the Assessing Officer u/s. 154 holding that no challenge was made by the Revenue as regards the order of the Commissioner (Appeals) on the issue of section 154. On appeal: Held, allowing the appeal, that with regard to the appeal filed u/s. 154 no reasons were assigned by the Commissioner (Appeals). On this issue, appeals were filed by the Revenue before the Tribunal including the grounds of appeal on the issue of section 154. Cross-objections were filed by the assessee on this issue. Thus, it was manifest that the Commissioner (Appeals) and the Tribunal failed to adjudicate the matter in a right perspective. The finding given on the proceedings u/s 154 was perverse and not sustainable. The matter was remanded to the Commissioner (Appeals) to adjudicate on the issue of section 154 in accordance with law after hearing the parties.(AY. 2002-03)
CIT v. Pradeep Kar (2016) 380 ITR 121 (Karn.)(HC)

1939 **S. 154 : Rectification of mistake – Merely on the basis of admission the assessee cannot be held to be liable to deduct tax at source, without examining the provisions, order was set aside. [S.194C, 201(1), 201(IA)]**
Allowing the appeal of the assessee, the Tribunal held that assessee had not incurred any amount towards building constructions for year under consideration and AO,

without examining applicability of provisions of s. 194C, merely on basis of admission of assessee that there was lapse in TDS Compliance in respect of building construction, held assessee as assessee in default u/s. 201(1) and 201(1A), said mistake being a mistake apparent from record, needed to be rectified. (AY 2010-11)
Sri Chaitanya Educational Society v. ITO (2016) 159 ITD 763 (Visakh.)Trib.)

S. 154 : Rectification of mistake – Once the appellate authority has decided an issue, the AO can no longer rectify or reopen the same issue under proceedings u/s. 154. [S. 115JB] 1940
The Assessee is a company paying tax u/s. 115JB. The provision of bad debts claimed by it was added back by the AO in his order u/s. 143(3), which was subsequently deleted by the CIT(A). The Finance (No. 2) Act, 2009 introduced a retrospective amendment of increasing the book profit by any provision on account on diminution in value of any asset. The AO sought to make the addition of the provision for bad debts *vide* rectifying his order u/s. 154. On appeal, the ITAT quashed the order of the AO and held that once the matter has been decided in appeal proceedings, then the order u/s. 154 can be passed only by the authority passing such appellate order and the AO can no longer reopen or rectify the issue u/s. 154. (AY. 2004-05 to 2006-07)
NHPC Ltd. v. ACIT (2016) 47 ITR 561 (Delhi)(Trib.)

S. 154 : Rectification of mistake – Tax cannot be levied on assessee at a higher amount or at a higher rate merely because assessee, under a mistaken belief or due to an error, offered income for taxation at that amount or that rate. [S.4] 1941
Assessee filed an application seeking rectification of assessment order on ground that in computing income, incorrect figures of net profit and depreciation had been picked up from profit and loss account. Assessing Officer rejected said application on ground that assessee itself had computed income on basis of incorrect figures. CIT(A), allowed the claim of assessee. On appeal dismissing the appeal of revenue the Tribunal held that tax cannot be levied on assessee at a higher amount or at a higher rate merely because assessee, under a mistaken belief or due to an error, offered income for taxation at that amount or that rate. Order of CIT(A) was upheld. (*Dattatraya Gopal Bhotte v. CIT (1984) 150 ITR 460 (Bom.)(HC)* (AY. 2008-09)
ACIT v. Rupam Impex (2016) 157 ITD 360 (Rajkot)(Trib.)

S. 154 : Rectification of mistake – Pension fund would continue to be governed by provisions of section 44 irrespective of fact it is exempted or not; therefore, even after insertion of section 10(23AAB), while determining actuarial valuation surplus from insurance business under section 44, loss incurred from pension fund has to be excluded – Non-consideration of subsequent decision of Apex Court or jurisdictional High Court could give rise to a mistake apparent record where an order is inconsistent therewith. [S. 10(23AAB), 44] 1942
Assessee moved the application under section 154 and claimed that there was a mistake in reducing the loss of its pension business as it was also a part of its business and thus liable to be taken into account in computing income from the same under section 44 read with First Schedule thereto. AO rejected the application. CIT(A) affirmed the order

of AO. On appeal Tribunal held that pension fund would continue to be governed by provisions of section 44 irrespective of fact it is exempted or not; and, therefore, even after insertion of section 10(23AAB), loss incurred from pension fund has to be excluded while determining actuarial valuation surplus from insurance business. The Tribunal also held that non-consideration of subsequent decision of Apex Court or jurisdictional High Court could give rise to a mistake apparent record where an order is inconsistent therewith. (AY. 2009-10)
Sunlife Insurance Company Ltd. v. Jt. CIT (2016) 157 ITD 16 (Mum.)(Trib.)

1943 **S. 154 : Rectification of mistake – Set off of unabsorbed losses – Rectification order was held to be bad in law. [S. 32]**
Dismissing the appeal of revenue the Tribunal held that as issue of set off of unabsorbed depreciation pertaining to assessment year 1996-97 and earlier years was subject matter of huge debate, it could not be subject matter of rectification proceedings.(AY. 2007-08)
Dy. CIT v. India Jute & Industries Ltd. (2016) 156 ITD 912 (Kol.)(Trib.)

1944 **S. 154 : Rectification of mistake – Additional depreciation – View once allowed by the AO could not be rectified by him if the issues is debatable. [S. 32(1)(iia)]**
The assessee installed and put to use power generating captive units which was used for manufacturing of cement. Additional depreciation u/s. 32(1)(iia) claimed by the assessee was allowed by the AO in the original assessment. The AO sought to disallow the claim for depreciation *vide* rectification order u/s. 154 on the basis that electricity was not an "article" or "thing" that could be manufactured or produced. The ITAT held that the issues was debatable and the view taken by the AO could not be revised u/s. 154. (AY. 2007-08, 2008-09)
DCIT v. J.K. Cement (2016) 45 ITR 50 (Luck)(Trib.)

1945 **S. 154 : Rectification of mistake – Depreciation – Asset put to use – Debatable issue – Rectification order by the AO was held to be not justified. [S. 32]**
Allowing the appeal of assessee the Tribunal held that, in respect of rejecting assessee's claim for excessive depreciation, issue as to when assets were actually put to use during relevant year was a debatable issue and, thus, rectification order passed by Assessing Officer in respect of said issue was not sustainable. (AY. 2007-08)
S.R. Industries Ltd. v. ACIT (2016) 156 ITD 384 (Chd.)(Trib.)

1946 **S. 154 : Rectification of mistake – Carry forward and set off of loss – CIT(A) justified in directing the AO to allow carry forward and set off loss in rectification under Sec 154 where it could not be claimed due to technical default. [S. 72, 143(1)]**
Assessee had filed its return of income within due date, which was processed under Sec 143(1), but later on detection of mistake in its return, filed a Rectification Application under Sec 154 before the AO stating that losses of earlier year which had to be brought forward from earlier years to be set off against income for the impugned assessment year. Assessee claimed that although proper mention regarding brought forward losses was made in the return in the schedule for carry forward of losses but the amount had been inadvertently omitted to be mentioned in the Brought forward of losses

schedule. Since the software used for automatic processing of returns did not take care of necessary adjustment under Sec. 143(1)(a)(ii) it was a mistake apparent from record. AO however rejected the application of the assessee stating that the assessee had not mentioned the brought forward losses to be carried forward in the returns of previous two years and also that it was a settled position of law that is an assessee does not claim brought forward loss in return of income filed by due date, the loss will not be allowed to be carried forward to the future. CIT(A) observed that it was an undisputed fact that the assessee company had genuinely accumulated losses and had technically fulfilled the condition of filing the return before due date. CIT(A) directed the AO to modify the order u/s. 154 and allow appropriate relief to the assessee. Tribunal upheld the order of the CIT(A) stating that relied and rectification claimed by the assessee was *bona fide* and legal claim of the assessee could not be denied because of some technical fault. (AY. 2008-09)

ACIT v. Mangalam Timber Products Ltd. (2016) 176 TTJ 21 (UO)(Ctk.)(Trib.)

S. 154 : Rectification of mistake – Interest on refunds – Delay in claiming exemption under section 10(23G) – By itself cannot lead to delay attributable to assessee – Non-disallowance of interest under Section 244A for such delayed period – Not mistake apparent from record [S. 10(23G) 244A] 1947

The assessee was a non- resident. It received notice under Section 154 pertaining to non-disallowance of interest under Section 244A on the ground that the delay was attributable to the assessee. The ITAT held that the delay in making of the claim under Section 10(23G) could not lead to the conclusion that the delay was attributed to the assessee. Further non-disallowance of interest under Section 244A for such delayed period was not mistake apparent from record. (AY. 2002-03)

DBS Bank Ltd. v. DDIT (2016) 157 ITD 476 / 176 TTJ 293 (Mum.)(Trib.)

S. 154 : Rectification of mistake – Intimation – Once matter is taken up for scrutiny rectification order passed under section 143(1)(a) has no validity in the eyes of law. [S. 143(1)(a)] 1948

The Tribunal held that once the matter is taken up under scrutiny assessment by issuing a notice under section 143(2) then the earlier rectification order passed under section 154 on intimation under section 143(1)(a) has no validity in the eyes of law. (AY. 1996-97 to 1998-99)

ICI India Ltd. v. Dy. CIT (2016) 175 TTJ 217 (Kol.)(Trib.)

S. 158BB. Computation of undisclosed income of the block period.

S. 158BB : Block assessment – Statements recorded prior to search would not amount to disclosure of income – Unearthed money during search and subsequent enquiries would be undisclosed income. [S. 131, 132(4), 158(b)] 1949

Allowing the appeal of revenue, the Court held that that where the assessee had never filed their regular returns of income, amount found deposited in their bank accounts which were unearthed during the course of search, would be treated as undisclosed income. Merely a statement was recorded u/s. 131 prior to search giving details of such

bank accounts, would not amount to disclosure of income. On Special leave petition, the Supreme Court affirmed the findings of the High Court. (BP 1-4-1986 to 26-4-1996)
Shibu Soren v. CIT (2016) 239 Taxman 512 (SC)
Editorial: Refer CIT v. Shailendra Mahto (2016) 372 ITR 257 (Delhi)(HC)

S. 158BC. Procedure for block assessment.

1950 **S. 158BC : Block assessment – Addition can be only on basis of materials found in search, additions based on subsequent enquiry was held to be not permissible. [S.132]**
The AO made certain additions in the block assessment order. The Tribunal deleted the additions on the ground that the additions could have been made only in a regular assessment and not in the block assessment proceedings since they did not arise from the material unearthed during the course of search. On appeal: Held, dismissing the appeal, that there was no legal infirmity in the order of the Tribunal deleting the additions. The Department was not able to dispute that the additions made by the AO were not on account of any material unearthed during the search but as a result of enquiry made subsequently.
CIT v. Pooja Forge Ltd. (2016) 389 ITR 382 (Delhi)(HC)

1951 **S. 158BC : Block assessment – Inadvertent error in the notice which does not causing prejudice to the assessee do not render notice or block proceedings void. [S. 132,142]**
Dismissing the appeal of assessee the Court held that even though the notice did not specify the block period, that would not render the notice void. It was not the assessee's case that there was any search and seizure operation other than the one conducted on June 6, 1997. That being the case, the block period also was obvious. It was as stipulated in section 158B(a) which as it stood at the relevant time provided that unless otherwise required "block period" means the period comprising previous years relevant to the 10 assessment years preceding the previous year in which the search was conducted under section 132. It was a mere technicality and the assessee was not prejudiced in any manner whatsoever.
Surjeet Bahadur Khurania v. CIT (2016) 389 ITR 211 / 75 taxmann.com 229 / (2017) 292 CTR 491 (P&H)(HC)

1952 **S. 158BC : Block assessment – Jewellery found during search – Explanation filed much later and figures given in explanation not matching jewellery found in assessee's possession, addition to income was held to be justified.**
Held, dismissing the appeal, that the explanation that was sought to be raised belatedly at the time of hearing by the assessee ought to have been given at the time of filing of the block returns. At the relevant time, when block returns in question were being filed on a manual basis it was certainly open to the assessee to have added any explanation by way of a separate statement or note attached, which had not been done. Even otherwise, if such a plea were taken to be correct, then immediately after filing of the block return such an explanation could have been submitted before the Department whereas in this case the stand was taken much later by getting the affidavits from the brothers-in-law. As a matter of fact, none of the figures given even in the belated

explanation matched with the gold jewellery actually found in the assessee's possession. The assessee had been unable to show how the findings of the lower appellate authorities were perverse. The addition was justified.
Amita Kochar v. ACIT (2016) 389 ITR 345 (Patna)(HC)

S. 158BC : Block assessment – Undisclosed income – Assessee eligible for benefit of section 158BE. [S.158BE] 1953
Dismissing the appeal of revenue, the Court held that; the Tribunal was right in relying on section 158BE introduced by section 65 of the Finance Act, 2002, which was a declamatory enactment. The assessee was eligible for the benefit of section 158BE of the Act. The sum of ₹ 5,52,876 could not be treated as the undisclosed income of the assessee.
CIT v. K. Ravikumar (2016) 388 ITR 233 (Ker.)(HC)

S. 158BC : Block assessment – Undisclosed income – Voluntary disclosure of income under Scheme accepted as correct and genuine, income cannot be assessed again. [S. 132, Voluntary Disclosure of Income Scheme, 1997] 1954
Dismissing the appeal of the Revenue, the Court held that in view of the fact that the declaration under the Voluntary Disclosure of Income Scheme by the assessee's wife was accepted by the Department as correct and genuine, the income could not have been added once again in the hands of the assessee. The voluntary disclosure of income scheme by the company was also accepted by the Department.
CIT v. Rajeev Gupta (2016) 389 ITR 456 (All.)(HC)

S. 158BC : Block assessment – Surrender of income – Addition was held to be justified. 1955
Allowing the appeal of revenue the Court held that the Tribunal was wrong in concluding that the opinion of the Commissioner (Appeals) was based only on presumption, which could be evident from the relevant questions and answers made by the assessee in the assessment order. Therefore, the order of the Appellate Tribunal was to be set aside to this extent and addition of ₹ 3,85,000 was to be restored.
CIT v. K. Ravikumar (2016) 388 ITR 233 (Ker) (HC)

S. 158BC : Block assessment – Agricultural income – Failure to produce supportive evidence, addition was held to be justified. 1956
Assessee declaring income from sale of property, credit and agriculture. Findings of the Tribunal that sale was not genuine. Creditors had no capacity to lend money. Agricultural land leased out and bearing no income. Agricultural trust land bearing only small income after meeting expenses. Tribunal has deleted the addition. On appeal allowing the appeal of revenue the Court held that a burden upon assessee to prove income accumulated out of agricultural income from trust lands by producing supportive documents. On facts failure by assessee to prove source of income, income to be treated as undisclosed income.
CIT v. Sundaramoorthy (HUF) (2016) 388 ITR 154 (Karn.)(HC)
CIT v. K.Sundaramoorthy (2016) 388 ITR 154 (Karn.)(HC)

1957 **S. 158BC : Block assessment – Notice is mandatory – Notice must give assessee not less than fifteen days to submit return – Asking assessee to furnish return within fifteen days is held to be not valid. [S. 132]**

Dismissing the appeal of revenue the Court held that while block assessment was to be made, the Assessing Officer had knowledge about the statutory provision and while issuing notice he should have mentioned in it about his source of power and should have referred to the time which is required to be given for the purpose of filing of return under section 158BC of the Act. The words mentioned in the notice were "within fifteen days" whereas the provision mandates the time of "not less than fifteen days". The notice was not valid.

CIT v. Amit K. Jain alias Anil K. Jain. (2016) 388 ITR 113 / (2017) 148 DTR 110 / 293 CTR 185 (Guj.)(HC)

1958 **S. 158BC : Block assessment – Search and seizure – Names of assessees not found in warrant, hence the notice issued was held to be illegal.[S. 132]**

Dismissing the appeals of the revenue the Court held that the search should be carried out under section 132(1) in the name of a person before invoking the provision of section 158BC. All the family members were separate assessable legal entities under the Act and in a case where search warrant was issued in the name of G and family, it could not be stretched to cover all the family members, namely spouse and children. It was to be in the name of a specific person to initiate proceedings. When a search action under section 132(1) was to be person specific and when admittedly the names of the assessees did not figure in the warrant, the Assessing Officer had no jurisdiction to issue notice under section 158BC of the Act and thus the issuance of notice was illegal.

CIT v. Surbhi Goel (Mrs.) (2016) 387 ITR 575 / 243 Taxman 539 / 290 CTR 14 (Raj.)(HC)
CIT v. Umesh Goel (Smt.) (2016) 387 ITR 575 / 243 Taxman 539 / 290 CTR 14 (Raj.)(HC)

1959 **S. 158BC : Block assessment – Loans accepted – Addition cannot be on account of repayment – Purchase of property – Addition on basis of bills relating to construction prior to date of purchase was held to be not justified. [S.131]**

Allowing the appeal the Court held that it was a case of refund of loan given to persons who were known to the assessee and they had income and capacity to pay, which repayment was also not only affirmed by them in the affidavit but further asserted during the course of examination by the Income-tax Inspector at the stage of remand report as also during section 131 proceedings. Having accepted one part of the transaction regarding the loan having been given by the assessee, it was not open to the Revenue to have so lightly disbelieved the other part of the transaction. The additions was held to be not justified. As regards the additions pertained to the assessment years 1994-95 and 1995-96 during which time the property in question had not been purchased by the assessee and there was no occasion to make investment in construction including electrical works, purchase of sanitary ware and hardware fittings, etc. The addition was not justified.

Dr. Pravan Prakash v. CIT (2016) 387 ITR 458 (Patna)(HC)

S. 158BC : Block assessment – Non-disclosure of giving of loan and interest received on the said loan not been disclosed to authorities – Interest accrued on loan given – Assessee cannot establish the method of accounting followed by it, order of the Tribunal was affirmed. [S. 4, 5, 132] 1960

Dismissing the appeal of the assessee, the Court held that loan agreement was found during the search operation and prior to search, revenue was unaware of the loan agreement and interest accrued thereon and hence interest amount earned on loan was chargeable to tax in the block assessment period as undisclosed income. Further, High Court held that the assessee have not established before the authorities that they were following cash system of accounting. At no stage, it was brought to the notice that loan was given to Mr & Mrs. K and interest to be received has not been disclosed before any of the authorities. Further, in fact the best evidence which could be produced by the assessee was the evidence of Mr. & Mrs. K to point out that they have not paid any interest during the period under consideration for the loan. However, the assessee did not choose to produce them as witnesses and or any evidence from them indicating that no interest has been paid by them.

Pragna R. Shah v. Dy. CIT (2016) 282 CTR 291 (Bom.)(HC)
Priti Paras Shah v. Dy. CIT (2016) 282 CTR 291 (Bom.)(HC)

S. 158BC : Block assessment – Though material found during course of search assessment was held to be valid. [S. 132] 1961

The entire deposits in the bank accounts of these parties were treated as assessee's income on protective basis. On appeal, the High Court distinguished the case of NR Paper & Boards Ltd. (234 ITR 733) (Guj), where issue was whether after making of block assessment, regular assessment is barred or prohibited by law and held that the said case was not applicable to the facts of the present case. The court held that the said decision shall therefore not be applicable on the facts and circumstances of the present case and ruled in favour of revenue on this issue by upholding the assessment made under section 158BC of the Act despite the fact that in the proceedings under section 132 of the Act, no material was found in relation to the concerned parties.

N. K. Industries Ltd. v. Dy.CIT (2016) 142 DTR 162 / 72 taxmann.com 289 / (2017) 292 CTR 354 (Guj.)(HC)

S. 158BC : Block assessment – Notice could not be issued when no incriminating materials are found during the course of the search. [S. 132, 158BC] 1962

The High Court held that the notice under section 158BC could not have been issued when the search was conducted under mistaken identity and no incriminating material was found during the course of the search as evident from the appraisal report.

Dr. Gautam Sen v. CCIT (2016) 289 CTR 478 /142 DTR 220/ 74 taxmann.com 128. (Bom.) (HC)

S. 158BC : Block assessment – Undisclosed income – Books of account not reflecting investment – Failure by assessee to prove non-materialisation of transaction and return of money from vendor – Addition made on undisclosed income proper. 1963

Held, dismissing the appeal, that the assessee did not dispute that the amount which appeared to be invested for the purpose of buying land was not debited to the books of

account of the assessee. Even assuming that the money was paid by its sister concern, the assessee should have credited the account of B and debited the account of the seller of the land. This was not done. If the transaction did not fructify, the money paid to the seller of the land was to be recovered and if it was not recovered from the vendor the amount continued to be spent on behalf of the assessee, for which the assessee received benefit. The assessee failed to produce evidence on the fact whether the sum was recovered from the vendor. Therefore, the Tribunal was right in affirming the addition. *Laxmi Business Promotions P. Ltd. v. CIT (2016) 386 ITR 558 (Cal.)(HC)*

1964 **S. 158BC : Block assessment – Search – Survey – assessee himself admitted that undisclosed income reflected in block return related to transactions recorded in documents found in course of survey, addition made on basis of return so filed deserved to be confirmed – Estoppel – Assessee can waive benefit conferred by statute. [S. 132, 133A, 158BB]**

Allowing the appeal of revenue, the Court held that where pursuant to search proceedings, a survey was also carried out at another premises held by assessee in capacity of a director, in view of fact that in block assessment proceedings assessee himself admitted that undisclosed income reflected in block return related to transactions recorded in documents found in course of survey, addition made on basis of return so filed deserved to be confirmed. Assessee can waive benefit conferred by statute. (AY. 2006-07)

CIT v. Harsh Kochar, Bahrat Ice Factory (2016) 287 CTR 63 / 69 taxmann.com 322 / 136 DTR 393 / (2017) 390 ITR 385 (Patna)(HC)

1965 **S. 158BC : Block assessment – No incriminating documents were found in the course of search – The Officers cannot act on their whim and fancy – Chief CIT directed to pay costs to the assessee. [S. 132]**

Allowing the petition the Court held that the action of the revenue in issuing s. 158BC notice despite the appraisal report clearly stating that no incriminating material was found is highly deplorable as it amounts to harassment of the taxpayer. The Officers cannot act on their whim and fancy. The Dept should adopt a standard operating procedure (SOP) to provide adequate safeguards before issuing notices under Ch. XVIB. The revenue i.e. the jurisdictional Chief Commissioner of Income Tax (Respondent No.1) is directed to pay the costs of ₹ 20,000/to the Petitioner within four weeks from today. (WP No. 1344 of 2000, dt. 14.09.2016)

Dr. Gautam Sen v. CCIT v. (Bom)(HC), www.itatonline.org

1966 **S.158BC : Block assessment – Limitation – Period reckoned from date of conclusion of search – Restraint order not extended and no action taken pursuant to search after three months – Search to be taken to have been concluded on expiry of restraint order – Visit of officers to assessee's premises two years later to record conclusion of search not material – Period of limitation to pass assessment order not to be reckoned from such date – Assessment barred by limitation.**

Pursuant to a search and seizure in the premises of the assessee, a restraint order was issued on October 15, 1998 for a period of sixty days, which was later extended

for another thirty days up to January 15, 1999. Thereafter, it was not extended. On November 21, 2000, the Department called on the assessee at his premises for the purpose of recording that the search was at an end. The Tribunal held that the period of limitation of two years for passing the assessment order was not to be reckoned from November 21, 2000. On appeal held, dismissing the appeal, that the Tribunal's order was unimpeachable. The restraint order was not extended by the Department after January 15, 1999, after a period of three months, which meant that the search was also abandoned and had ended. The search did not stand revived when the officers of the Department called at the house of the assessee merely for the purpose of recording that the search was at an end almost after two years. The order of assessment was passed beyond the limitation period of two years after the conclusion of the search.
CIT v. Ritika Ltd. (2016) 384 ITR 434 (Cal.)(HC)

S. 158BC : Block assessment – Assessee's failure to cross-examine the witness during the search proceeding would not preclude AO to make a block assessment. [S. 132(4), 132(4A), 158BH] 1967

During the course of search conducted at the office premises of the assessee and a hotel room various incriminating documents and cash were found and seized. After taking into consideration, the explanations offered by the assessee company, the sworn statements of the occupant at the hotel room and vice president of the assessee company, undisclosed income was computed by the AO.
On appeal, the CIT(A) allowing the appeal held that the order of the assessment passed pursuant to the search was not in accordance with law and therefore directed to treat the undisclosed income as NIL. However, the ITAT interfered with the finding of the CIT(A) and allowed Revenue's appeal. Before the HC, the assessee contented that during the search proceedings, the appellant was not provided with sufficient opportunity for cross-examination of the witnesses whose sworn statements were recorded by the AO and therefore the acceptance of evidence and presumptions made as contemplated u/s. 132(4) and 4(A) respectively, could not be sustained under law. The HC dismissing the appeal, held that the assessee was free and open to make a demand/request for cross-examination of the witness at the time when the proceedings were pending before the AO. However, in the instant case, no such request was made by the assessee. Further, in view of the introduction of s. 158BH, sub-section (4) and (4A) of s. 132 are applicable to the matter of conducting the assessment by the AO and therefore there is no illegality or infirmity on the part of the AO to have taken into account the sworn statement of witnesses taken on oath during the search proceedings. (BP1 April, 1996 to 9 Oct., 2002)
Bhagheeratha Engineering Ltd. v. ACIT (2015) 379 ITR 244 / 127 DTR 245 / (2016) 282 CTR 209 (Ker.)(HC)

S. 158BC : Block assessment – Survey – No search action – Block assessment is bad in law. [S. 132, 133A. 158BD] 1968

Allowing the appeal the Court held that this was a case of survey under section 133A of the Act, as was evident from the document, and the question of making a block assessment, invoking the provisions of sections 158BC did not arise, as there was no search in terms of section 132. (BP. 1986-87 to 1995-96)
Rajkumari Chandak (Smt.) v. ACIT (2016) 382 ITR 312 (Mad.)(HC)

1969 **S. 158BBC : Anonymous donations – Amount received in charity boxes installed at different places was held to be not taxable. [S. 2(24)(iia), 12AA]**
Dismissing the appeal of the revenue, the Tribunal held that; Amount received in charity boxes installed at different places was held to be not taxable. (AY. 2010-11, 2011-12)
Dy. CIT v. All India Pingalwara Cahritable Society (2016) 158 ITD 410 / 178 TTJ 602 / 47 ITR 1 (Amritsar)(Trib.)

S. 158BD. Undisclosed income of any other person.

1970 **S. 158BD : Block assessment – Undisclosed income of any other person – Preparation of satisfaction note depends on facts of each case, which must be prepared as soon as practically possible and without undue delay after the proceedings are completed u/s. 158BC of the searched person. [S. 158BC]**
The AO carried out a search operation u/s. 132 and held that the sales recorded in the documents seized were not recorded by the assessee in the books of account and therefore made an addition to the total income. The CIT(A) accepted the assessee's contention that the amount surrendered during the survey carried out u/s. 133A included the unaccounted sales transactions.
Before the Tribunal, the assessee contended that the AO lacks the jurisdiction to make the impugned assessment as the department had not recorded the satisfaction note that the undisclosed income pertains to a person other than the person searched before or at the time of assessment of the person searched u/s. 158BC, which is a requirement for initiating proceedings u/s 158BD. The Tribunal held that the satisfaction note recorded was beyond the period prescribed by law and therefore allowed the appeal of the assessee.
On revenue's appeal, the HC held that as per the Supreme Court decision in *CIT v. Calcutta Knitwears (2014) 267 CTR 105 (SC)*, the satisfaction note could be prepared at any of the following stages: (a) either at the time of initiating proceedings u/s. 158BC against the searched person (b) during the stage of assessment proceedings u/s. 158BC (c) immediately after the completion of assessment proceedings u/s. 158BC of the searched person. Accordingly, the HC held that as there is no outer limit specified for the words 'immediately after', it will depend upon the facts of the case and it cannot be read as the very next moment or the very next day. Since in the given case, the AO had issued notices to about 70 persons and had taken action against them, which involved enormous paperwork, a period of three and a half months taken to record satisfaction can be held to be reasonable.
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. Rajan Knit Fab. (P.) Ltd. (2016) 131 DTR 308 / 284 CTR 293 (P&H)(HC)
CIT v. Mridula Prop. Dhruv Fabrics (2015) 234 Taxman 245 / (2016) 131 DTR 308 / 284 CTR 293 (P&H)(HC)

S.158BE. Time limit for completion of block assessment.

S. 158BE : Block assessment – Search and seizure – Limitation – Time during which interim order of High Court in force to be excluded – Time to be reckoned from date of last panchnama – Review petition was dismissed. [S. 132, 142(2A)] 1971

On a petition for review of the decision of the Supreme Court *VLS Finance Ltd. v. CIT ([2016] 384 ITR 1)* to the effect (a) that the period between August 24, 2000, i.e. the date on which the interim order was passed by the High Court staying the direction for special audit under section 142(2A), and December 15, 2016, i.e., when the High Court passed the order setting aside the direction for special audit, should be excluded in counting the period of limitation for concluding the block assessment, and (b) that the limitation should be counted from the last date of search when the search operation completed, i.e. August 5, 1998, and that therefore, the assessment was within time. The Supreme Court dismissed the review petition.

VLS Finance Ltd v. CIT (2016) 386 ITR 407 / 142 DTR 318 / 289 CTR 656 / (2017) 81 taxmann.com 358 (SC)

Editorial: VLS Finance Ltd v. CIT (2016) 384 ITR 404 / 239 Taxman 404 / 286 CTR 146 (SC) is affirmed.

S. 158BE : Block assessment – Time limit – Last panchanama drawn on 5-8-1998 – A search under section 132 of the Act, will conclude in the day the last panchanama is drawn. The limit for making of an order under section 158BC read with section 158BE will start from last panchanama. [S. 132, 158BC] 1972

Supreme Court held that the appellants never challenged subsequent visits and searches of their premises by the respondents on the ground that in the absence of a fresh authorisation those searches were illegal, null and void. The revenue authorities visited and searched the premises of the appellants for the first time on 22nd June, 1998. In the panchanama drawn on that date, it was remarked 'temporarily concluded', meaning thereby, according to the revenue authorities, search had not been concluded. For this reason, the respondent authorities visited many times on subsequent occasions and every time panchanama was drawn with the same remarks, i.e. 'temporarily concluded'. It is only on 5th August, 1998 when the premises were searched last, the panchanama drawn on that date recorded the remarks that the search was 'finally concluded'. Thus, according to the respondents, the search had finally been completed only on 5th August, 1998 and panchanama was duly drawn on the said date as well. The appellants, in the writ petition filed, had nowhere challenged the validity of searches on the subsequent dates raising a plea that the same was illegal in the absence of any fresh and valid authorisation. On the contrary, the appellants proceeded on the basis that search was conduced from 22nd June, 1998 and finally concluded on 5th August, 1998. On the aforesaid facts and in the absence of any challenge laid by the appellants to the subsequent searches, we cannot countenance the arguments of the appellants that limitation period is not to be counted from the last date of search when the search operation completed, i.e. 5th August, 1998. Therefore, this issue is also decided in favour of the respondents. (AY. 1994-95 to 1998-99)

VLS Finance Ltd. v. CIT (2016) 384 ITR 1 / 286 CTR 146 / 134 DTR 305 / 239 Taxman 404 (SC)

Editorial: Decision in VLS Finance Ltd. v. CIT (2007) 289 ITR 286 (Delhi)(HC) is affirmed.

1973 **S. 158BE : Block assessment – Time limit – A panchanama for purposes of opening a locker and vacating S. 132(3) prohibitory orders does not amount to conclusion of the search for purposes of extending limitation for passing the block assessment order .[S. 132. 158BC]**

Allowing the appeal of assessee the Tribunal held that; a panchanama for purposes of opening a locker and vacating S. 132(3) prohibitory orders does not amount to conclusion of the search for purposes of extending limitation for passing the block assessment order.(ITA No. 05/Mum/2004, dt. 15.09.2016)

Rajendra Agarwal v. DCIT (Mum.)(Trib.), www.itatonline.org

S. 158BFA. Levy of interest and penalty in certain cases.

1974 **S. 158BFA : Block assessment – Interest – Levy of interest cannot be adjusted from seized cash lying in personal deposit account. [S. 132, 158BC]**

Dismissing the appeal of assessee the Court held that the cash seized during the course of search remained without earning interest when the Commissioner deposited it in the personal deposit account. Therefore, the levy of interest could not be adjusted from the seized amount lying in the personal deposit account in the absence of provision to grant such claim. Therefore, there was no need to interfere with the order of the Tribunal.

Ashok Kumar Sethi v. Dy. CIT (2016) 387 ITR 375 / (2017) 244 Taxman 174 (Mad.)(HC)

CHAPTER XV
LIABILITY IN SPECIAL CASES

S. 159. Legal representatives.

S. 159 : Legal representatives – Proceedings initiated on a dead person is nullity and are different from proceedings initiated on an alive person which continues after death of person. Service and Participation in such proceedings by legal heir does not save it from nullity. [S. 263, 292BB] 1975

The Assessment was completed during the life time of Assessee however after his death notice under section 263 was issued in his name. Such notice returned with remarks "assessee deceased". Subsequently the same notice was served upon the legal heir of assessee who participated in the proceedings and the Assessment was set aside by CIT. The order under section 263 was challenged in Tribunal and it was quashed on the ground that order passed against a deceased person is null and void. On appeal by revenue, the High Court held that where proceedings are initiated against an alive person and continues after the death who dies by putting his legal heirs on notices would be saved but proceedings initiated after death would be nullity. Moreover, section 292BB would not be applicable in the case since the legal heir has appeared in the case and not assessee which is a pre-condition. Also held that as per section 159 the death of a person does not absolve the legal heirs of liability crystallised during lifetime of Assessee but not on liability arisen after the death. (AY. 2009-10)

CIT v. M. Hemanathan (2016) 384 ITR 177 / 239 Taxman 533 / 133 DTR 226 / 285 CTR 182 (Mad.)(HC)

S. 159 : Legal representatives – Executors – Legal representatives – Income earned, till death to be assessed in the hands of legal representatives and after death till distribution in the hands of the executors. [S. 168] 1976

Tribunal held that income earned by the by deceased up to date of his death is chargeable in the hands of legal representatives and thereupon income arising from the estate of the deceased after death up to date of complete distribution is chargeable to tax in the hands of the executors on year to year basis. (AY. 1992-93)

B. D. Gupta & Sons v. ITO (2015) 70 SOT 16 (Delhi)(Trib.)

S. 163. Who may be regarded as agent.

S. 163 : Representative assessees – Agent – Non-resident – When AO brings to tax an income in hands of assessee, representative assessee loses his right to tax same income in hands of principal 1977

Assessee was a public sector undertaking engaged in business of civil aviation. It had entered into a wet lease agreement, with a company namely Carbijet Inc. based in West Indies. In terms of agreement, Carbijet Inc. gave 3 aircrafts to assessee on wet lease. Subsequently, said agreement was terminated and matter was subjected to litigation before International Arbitral Tribunal London. IATL passed an award as per which assessee had to pay compensation to Carbijet Inc. the AO held that said compensation

was revenue receipt in nature and it was taxable in year in which right to receive said income crystallized. Accordingly, said amount was brought to tax in hands of assessee, as a representative assessee of Carbijet Inc. AO taxed said amount in hands of Carbijet Inc. also on very next day CIT(A) opined that same income could not be assessed in hands of non-resident and simultaneously through its agent i.e. representative assessee. He concluded that income in question was not required to be assessed in hands of assessee. The Honourable ITAT in terms of section 163 observed that when AO taxes income in hands of assessee directly, he loses his right to tax same income in hands of agent, and vice versa. Therefore, when AO exercised his option to bring income to tax in hands of assessee in capacity of representative assessee, he was legally functus officio so far as assessment of same income in hands of Carbijet Inc. was concerned. In favour of revenue. (AY. 2000-01)
Dy. DIT (IT) v. Air India Ltd. (2016) 158 ITD 555 / 178 TTJ 121 / 135 DTR 153 (Mum.) (Trib.)

S. 164. Charge of tax where share of beneficiaries unknown.

1978 **S. 164 : Representative assessees – Charge of tax – Beneficiaries unknown – Provision is applicable only when income is found to be not eligible for exemption u/s. 11 and 12. [S. 11, 12]**
S. 164(2) stipulates status in which income is assessable and provision is applicable only when income is found to be not eligible for exemption u/s. 11 and 12. The status of the assessee trust will be Artificial Juridical person (APJ) and not an AOP. (AY. 2004-05 to 2007-08)
ACIT v. Shushrutha Educational Trust. (2016) 161 ITD 565 (Bang.)(Trib.)

S. 166. Direct assessment or recovery not barred.

1979 **S. 166 : Representative assessees – Direct assessment or recovery not barred – Trusts – Once AO had exercised option to assess trust, same income could not be assessed in hands of beneficiary of trust. [S. 143(1), 143(2)]**
Tribunal held that once AO had exercised option to assess trust, same income could not be assessed in hands of beneficiary of trust. However since intimation u/s. 143(1) was issued to trust after commencement of proceedings u/s. 143(2) on beneficiary, it could definitely be said that option stood exercised by AO to assess beneficiary and not trust. Thus AO had power to assess assessee on amounts received by him from trust as a beneficiary therein. (AY. 2008-09)
Sharon Nayak (Mrs.) v. Dy. CIT (2016) 159 ITD 143 (Bang.)(Trib.)

S. 172. Shipping business of non-residents.

S. 172 : Shipping business – Non-resident – Shipping companies assessed u/s. 172 are not subject to deduction at source obligations u/s. 195 – Demurrage charges paid by Indian Company to foreign company was held to be not liable to deduct tax at source. [S. 40(a)(ia), 44B, 195] 1980

As a Division Bench of the Bombay High Court was unable to agree with the view taken in *Commissioner of Income-tax v. Orient (Goa) Private Limited 325 ITR 554*, the Full Bench had to consider the question "Whether, while dealing with the allowability of expenditure under section 40(a)(i) of the Income Tax Act, 1961, the status of a person making the expenditure has to be a non-resident before the provision to section 172 of the Act can be invoked?" HELD by the Full Bench overruling *CIT v. Orient (Goa) Private Limited 325 ITR 554*:

(i) A bare perusal of s. 44BB indicates as to how this provision covers the case of an assessee who is a non-resident and engaged in the business of operation of ships. That stipulates a sum equal to 7% of the aggregate ½ of the amount specified in sub-section (2) of section 44B as deemed to be profits and gains of such business chargeable to tax under the head "Profits and Gains of Business or Profession". It is the explanation which refers to the demurrage and for the purpose of sub-section (2) of section 44B. It clarifies that the amount paid or payable or received or deemed to be received, as the case may be, by way of demurrage charges or handling charges or any other amount of similar nature shall for the purposes of sub-section (1) deemed to be the profits and gains of the business, namely, shipping business chargeable to tax under that head. The amounts which are paid or payable whether in or out of India to the assessee or to any person on his behalf on account of carriage of passengers, livestock, mail or goods shipped at a port in India and the amount received was deemed to be received in India by or on behalf of the assessee on account of the carriage of passengers, livestock, mail or goods shipped at any port outside India shall be deemed to be the profits and gains. On that the tax is payable by virtue of subsection (1) of section 172. That has to be levied and recovered in terms of the sub-sections of section 172 of the Income Tax Act. Once section 172 falls in Chapter XV titled as Liability in Special Cases – Profits of Non-residents, then section 172 is referable to section 44B. Both provisions open with a *non-obstante* clause and whereas section 44B enacts special provisions for computing profits and gains of shipping business in case of non-residents section 172 dealing with shipping business of non-residents is enacted for the purpose of levy and recovery of tax in the case of any ship belonging to or chartered by a non-resident operated from India. These sections and particularly section 172 devise a scheme for levy and recovery of tax. The sub-sections of section 44B denote as to how the amounts paid to or payable would include demurrage charges or handling charges or any other amount of similar nature. The sub-sections of section 172 read together and harmoniously would reveal as to how the tax should be levied, computed, assessed and recovered. Therefore, there is no warrant in applying the provisions in chapter XVII for collection and recovery of the tax and its deduction at source *vide* section 195.

(ii) To our mind, the Division Bench judgment in *Commissioner of Income-tax v. Orient (Goa) Pvt. Ltd*. seen in this light does not, with greatest respect, take into account the scheme and setting as understood above. There need not be apprehension because there is no escape from the levy and recovery of tax. The tax has to be levied and collected. The ship cannot leave the port or if allowed to leave any port in India, it must either pay or make arrangement to pay the tax. Hence, the apprehension of avoidance or evasion both are taken care of by the legislature. That is how advisedly the legislature cast the obligation to deduct tax at source on the person responsible to make payment to a non-resident in shipping business.

(iii) The resident assessee contended before the Division Bench in Orient (Goa) (supra) as well as the Division Bench which made the referring order that section 172 of the Income-tax Act has a bearing and an important one on the obligation to deduct tax at source. Therefore, it is the recipient's position and the perspective in which the recipient's income would be taxed will have to be borne in mind. The non-resident shipping company in respect of its' income would be in a position to rely upon section 44B and consequently section 172. However, we do not see how there is an obligation to deduct tax at source on the resident assessee/Indian company before us. While computing the income of the non-resident Indian/ foreign company, assistance can be derived by such non-residents from section 44B if they are in shipping business. It would also be in a position to rely upon section 172 but the responsibility of the person making payment to a non-resident in sub-section (1) of section 195 cannot be avoided in the manner set out in other cases. The scheme as above operates only to cases covered by section 172 of the IT Act and none else. (AY. 1999-2000)

CIT v. V. S. Dempo & Co Pvt. Ltd. (2016) 381 ITR 303 / 131 DTR 217 / 284 CTR 1 / 238 Taxman 91 (FB) (Bom.)(HC)

Sesa Goa & Co Ltd. v. CIT (2016) 381 ITR 303 / 131 DTR 217 / 284 CTR 1 / 66 taxmann.com 93 (FB) (Bom.)(HC)

1981 **S. 172 : Shipping business – Non-residents – Slot hire is also entitled to treaty protection under Article 8 from source taxation of income arising from transportation of goods by operation of ships in international traffic, irrespective of whether or not such ships were owned or chartered by assessee – DTAA-India-Indonesia. [Art. 8]**

The Assessing Officer held that benefit of DTA agreement is not available, to the slot charter or to those who had just loaded a few containers on board, since the vessel was neither owned or chartered by them. On appeal allowing the appeal of the assessee, the Tribunal held that; slot hire facility is an integral part of contract for carriage of goods by sea and, thus, such an activity is also entitled to treaty protection under article 8 from 'source taxation' of income arising from transportation of goods by operation of ships in international traffic, irrespective of whether or not such ships were owned or chartered by assesse. (AY. 2012-13)

K. Cargo Global Agencies, Indonesia v. ITO (2016) 159 ITD 1042 (Ahd.)(Trib.)

S. 172 : Shipping business – Non-residents – Freight income from operation of ships in international traffic, was taxable only in Singapore – AO is directed not to tax such income in India. 1982

Assessee did business and was tax resident of Singapore. Revenue Authority of Singapore confirmed that, in the case of assessee, "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 had also filed a confirmation from its public accountant that the freight earned on X's sailing from Sikka port has been included in the global income offered to tax by the company in Singapore. Tribunal held that 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 was nothing on the record to suggest that the freight receipts of ASPL-S were taxed only on receipt basis in Singapore. There was reasonable evidence to show that such an income was taxable, on accrual basis, in the hands of the assessee. Only reason for declining treaty benefits was the application of Article 24 and there was no other dispute on the claim of treaty protection of shipping income under Article 8(1) (Profits derived by an enterprise of a Contracting State from the operation of ships or aircraft in international traffic shall be taxable only in that State). Entire freight income of the assessee, which was only from operation of ships in international traffic, was held to be taxable only in Singapore. Court directed the AO not to tax assessee's income in India. (AY. 2011-12)

Alabra Shipping Pte. Ltd. v. ITO (2016) 175 TTJ 359 / 129 DTR 43 (Rajkot)(Trib.)

S. 179. Liability of directors of private company in liquidation.

S. 179 : Private company – Liability of directore – Notice upon director calling for proof that company is public limited company – For lifting the corporate veil the revenue ought to have *prima facie* sufficient material – Order was set aside. [S. 158BC] 1983

Allowing the petition the Court held that admittedly the company in question was a public limited company. Ordinarily, therefore in terms of section 179, the director of such a company would not be answerable for unpaid taxes of the company. Although the Court in the case of *Pravinbhai M. Kheni v. Asst. CIT* had recognised limited exceptions under which it may be possible for the Revenue to apply section 179 to the directors of a public limited company by lifting the corporate veil, certain safeguards had been provided to avoid any possible misuse of such powers. The Department had instead of confronting the petitioner with the necessary material and asking him to show cause why the corporate veil should not be lifted and section 179 be applied to him, issued a notice and called upon the petitioner to substantiate the claim that the company was a public limited company. The Department ought not to have questioned such a basic fact. If the Department had wanted to apply the principle of lifting the corporate veil in the context of section 179, it ought to have *prima facie* sufficient material to confront the assessee on the issue calling upon him to show cause why such powers should not be invoked. The Department was at liberty to take fresh proceedings by issuing appropriate notice, if it so desired.

Paras S. Savla v. ACIT (2016) 389 ITR 336 / 244 Taxman 17 (Guj.)(HC)

CHAPTER XVII
COLLECTION AND RECOVERY OF TAX

S. 190. Deduction at source and advance payment.

1984 **S. 190 : Deduction at source – Capitalized expenditure – Once an expenditure had been capitalized, there would be no requirement for deducting TDS**
Payment on hoarding and display expenses, the CIT(A) has directed the AO to remove the expenditure which has been capitalized by the assessee in its books of account. The ITAT held that Once an item of expenditure has been capitalized then there is no requirement for deducting the TDS.
DCIT v. Laqshya Media (P.) Ltd. (2016) 160 ITD 35 / 182 TTJ 318 (Mum.)(Trib.)

S. 191. Direct payment.

1985 **S. 191 : Collection and recovery – Direct payment – Interest payable for failure to deduct tax at source. [S. 192, 201(1)]**
Tribunal held that if deductee has paid tax directly but does not absolve assessee from payment of interest under section 201(1A). Explanation to section 191 saves the assessee from not being assessee in default under section 201(1). Any shortfall in deduction of TDS on payment of salary/pension can be deducted at end of financial year, interest would be payable from first day of April subsequent year. Matter was remanded. (AY. 2010-11, 2011-12)
ACIT v. Andhra University (2016) 158 ITD 389 (Visakha)(Trib.)

B. Deduction at source

S. 192. Salary.

1986 **S. 192 : Deduction at source – Salary – Perquisites – Medical allowances – Reimbursement of medical expenditure actually incurred by employee on himself or his family or upto a ceiling of ₹ 15,000 would not be included in term 'perquisite'. [S. 2(24), 17(2)]**
Dismissing the appeal of the Revenue, the Court held that reimbursement of medical expenditure actually incurred by employee on himself or his family or upto a ceiling of ₹ 15,000 would not be included in term 'perquisite', hence the assessee is not liable todeduct tax at source.
CIT v. Gujarat Alkalies & Chemicals Ltd. (2016) 242 Taxman 125 (Guj.)(HC)

1987 **S. 192 : Deduction at source – Salary – Government need not deduct TDS on payment of salary to Prest/Nuns where their entire salary has to be paid directly to Congregation/ Diocese and which has already been exempted from payment of income tax**
Allowing the petition the Court held that Government need not deduct TDS on payment of salary to Prest/Nuns where their entire salary has to be paid directly to Congregation/ Diocese and which has already been exempted from payment of income tax.
Correspondent Holy Cross Primary School v. CBDT (2016) 388 ITR 162 / 240 Taxman 395/ 141 DTR 257 / 289 CTR 293 (Mad.)(HC)

S. 192 : Deduction at source – Perquisite – Free airline tickets provided to employees of assessee by other airlines – Cannot be considered a perquisite provided by assessee – No tax is deductible at source. [S. 15, 17] 1988

The Assessing Officer treated as perquisite the free inter-airline tickets provided to the employees of the assessee by other airlines. He held the assessee liable for short deduction of tax at source. The Commissioner allowed the assessee's appeal and the Tribunal concurred with the findings of the Commissioner (Appeals). On appeal. Held: dismissing the appeal, that the Tribunal did not commit any error in deleting the addition made to the income of the assessee. The Department was unable to explain how the free air tickets provided to the employees of the assessee by some other airlines could be treated as perquisites provided by the assessee. (AY. 1993-94)

CIT v. Air France (2016) 384 ITR 142 (Delhi)(HC)

S. 192 : Deduction at source – Payments by hospital to doctors – Professional doctors not entitled to benefits allowed to salaried doctors – Not employees of hospital but independent professionals – Payments to doctors not salary but professional charges and tax deductible at source accordingly. [S. 194J, 201(1), 201(IA)] 1989

Held, professional doctors were not entitled to leave travel concession, concession in medical treatment of relatives, provident fund, leave encashment and retirement benefits like gratuity. They were required to follow defined procedure to maintain uniformity in action and administrative discipline but this did not mean that they became employees of the hospital. Further, the Department had not taxed the payments received by any of the doctors from the hospital under the head "Income from salary". The Tribunal held that there did not exist employer-employee relationship between the hospital and the persons providing professional services. The Tribunal, after considering the agreement in its entirety, concluded that it was not a case of employer-employee relationship between the hospital and the doctors. Therefore, the income of the doctors was not salary but professional charges and taxable accordingly. (AY 2009-10)

CIT (TDS) v. Ivy Health Life Sciences P. Ltd. (2016) 380 ITR 242 / 236 Taxman 292 / 286 CTR 313 / 133 DTR 169 (P&H) (HC)

Editorial : Order in Deputy CIT (TDS) v. Ivy Health Life Sciences P. Ltd. (2012) 20 ITR (Trib) 179 (Chandigarh) is affirmed.

S. 192 : Deduction at source – Salaries – Provident fund withdrawals – Withdrawals from Employees Provident Fund account by employees within five years of rendering continuous service with their employer are liable to TDS in terms of rule 10 of Part A of Fourth Schedule to Act. [S. 10(11), Employees Provident Fund and Miscellaneous Provisions Act, 1952] 1990

Tribunal held that Employees Provident Fund and Miscellaneous Provisions Act, 1952, is covered under Fourth Schedule to Act being a recognised provident fund and, therefore, withdrawals from EPF account by employees within five years of rendering continuous service with their employer are liable to TDS in terms of rule 10 of Part A of Fourth Schedule to Act. (AY. 2011-12 to 2013-14)

Employees Provident Fund Organization v. Dy. CIT (2016) 160 ITD 611 / 181 TTJ 494 (Delhi)(Trib.)

1991 **S. 192 : Deduction at source – Salary – Leave travel concession – Foreign travel employee can't claim LTC exemption to extent of travel exp. in India – Liable to deduct tax at source. [S. 10(5)]**

Tribunal held that Leave Travel Concession (LTC) paid by assessee to employees involving foreign travel as well would not qualify for exemption under section 10(5) and, accordingly, assessee was liable to deduct TDS on such payment of Leave Travel Concession (LTC.). (AY. 2012-13)

State Bank of India v. DCIT (2016) 158 ITD 194 (Luck.)(Trib.)

1992 **S. 192 : Deduction at source – Salary – Inhouse consultant doctors in a hospital were under supervision and control of hospital authorities and paid fixed remuneration, services rendered by doctors was in nature of employee and, thus, TDS was to be deducted as salary. [S. 28(i), 194J]**

Assessee hospital was employing inhouse consultant doctors. Even though inhouse consultant doctors declared their income under head 'professional charges', they were paid fixed remuneration and their working conditions were under supervision and control of hospital authorities. Services rendered by in house consultant doctors were in nature of employee and, thus, fixed remuneration paid to them would be subjected to TDS u/s. 192. (AY. 2011-12 to 2013-14)

Hosmat Hospital (P.) Ltd. v. ACIT (2016) 160 ITD 513 (Bang.)(Trib.)

S. 194A. Interest other than "Interest on securities"

1993 **S. 194A : Deduction at source – Interest other than interest on securities – Compensation for acquisition of land – Failure of High Court to give reasons – Matter remanded.**

On appeal against the judgment of High Court, holding that Tribunal was not justified in affirming the order of the appellate authority holding that there was no liability on the appellant to deduct tax at source on the interest payable for belated payment of compensation for land acquired and that section 194A of the Act was not applicable to such payment and restoring the order of Tax Recovery Officer. The Apex Court held that since the High Court had not recorded reasons, in its order, its orders were set aside and remanded to High Court for decision afresh giving detailed reasons after hearing counsel of parties. (AY. 2002-03)

Commissioner, Belgaum Urban Development Authority v. CIT (2016) 382 ITR 8 / 243 Taxman 237 / 136 DTR 96 / 286 CTR 371 (SC)

1994 **S. 194A : Deduction at source – Interest other than interest on securities – Capital gains – Interest – Assessable as capital gains – Tax is not deductible at source on such interest [S. 45, 56, Land Acquisition Act S. 28]**

Allowing the appeal the Court held that the Assessing Officer was not justified in deducting tax at source under section 194A of the 1961 Act in respect of such interest. The assessee was, therefore, entitled to refund of the amount wrongly deducted under section 194A of the 1961 Act. Followed, *CIT v. Ghanshyam (HUF) (2009) 315 ITR 1 (SC) Movaliya Bhikhubhai Balabhai v. ITO (TDS) (2016) 388 ITR 343 / 70 taxmann.com 45 (Guj.)(HC)*

S. 194A : Deduction at source – Interest other than interest on securities – A co-operative bank was not required to deduct tax on interest on time deposits of its members paid or credited before 1-6-2015 1995

Dismissing the appeal of the revenue, the Court held that a co-operative bank was not required to deduct tax on interest on time deposits of its members paid or credited before 1-6-2015.

CIT v. Shri Basaveshwara Sahakari Bank. (2016) 242 Taxman 411 (Karn.)(HC)

S. 194A : Deduction at source – Interest – No liability to deduct tax on interest to members paid or credited before 1-6-2015. 1996

Dismissing the appeal of revenue the Court held that the provisions of section 194A(3)(v) of the Income-tax Act, 1961, have been amended so as to expressly provide that the exemption provided from deduction of tax from payment of interest to members by a co-operative society under section 194A(3)(v) of the Act shall not apply to the payment of interest on time deposits by co-operative banks to their members. As this amendment is effective from the prospective date of June 1, 2015, the co-operative bank shall be required to deduct tax from the payment of interest on time deposits of its members, on or after June 1, 2015. Hence, a co-operative bank was not required to deduct tax from the payment of interest on time deposits of its members paid or credited before June 1, 2015. (AY. 2009-10)

CIT v. Shri Siddeshwar Co-Operative Bank Ltd. (2016) 388 ITR 588 / 240 Taxman 588 (Karn.)(HC)

CIT v. Sindagi Urban Co-operative Bank Ltd. (2016) 388 ITR 588 / 240 Taxman 588 (Karn.)(HC)

S. 194A : Deduction at source – Interest – Co-operative bank – Tax not deductible at source on interest on time deposits of members paid or credited before 1-7-2015. [S. 192A(3)(v)] 1997

Dismissing the appeal of revenue, the Court held that the provisions of section 192A(3)(v) of the Income-tax Act, 1961, have been amended so as to expressly provide that the exemption provided from deduction of tax from payment of interest to members by a co-operative society under section 194A(3)(v) of the Act shall not apply to the payment of interest on time deposits by co-operative banks to their members. As this amendment is effective from the prospective date of June 1, 2015, the co-operative bank shall be required to deduct tax from the payment of interest on time deposits of its members, on or after June 1, 2015. Hence, a co-operative bank was not required to deduct tax from the payment of interest on time deposits of its members paid or credited before June 1, 2015.

CIT v. National Co-op. Bank Ltd. (2016) 387 ITR 702 (Karn.)(HC)

S. 194A : Deduction at source – Interest other than interest on securities – Insurance company deducted tax at source while depositing compensation in favour of claimant, Motor Accident Claims Tribunal had committed no error in insisting on insurance company in making good shortfall. 1998

The Court held that the case of credit of interest on compensation awarded by the Claims Tribunal falls in the exclusion clause contained in sub-section (3) of section

194A and it *prima facie* appears that the ceiling of ₹ 50,000 per annum for such exclusion is now done away with in case of crediting of interest on compensation awarded by the Claims Tribunal while retaining such limit in cases of payment of interest on such compensation. The Court held that looked from any angle, the insurance-company was not justified in deducting tax at source while depositing the compensation in favour of the claimants. It therefore, cannot avoid liability of depositing such amount with the Claims Tribunal. The Court concluded that the insurance company should have properly advised itself before effecting tax at source on the ground that the judgment of the Court in case of *Smt. Hansagauri Prafulchandra Ladhani v. Oriental Insurance Co. Ltd. (2007) 2 GLR 291* was no longer good law in view of the statutory amendments. Not having done that, the only course left open to the insurance-company would be to approach the Income-tax department for refund, as may be advised. Thus, the Court ruled in favour of the claimant.
New India Insurance Co. Ltd. v. Bhoyabhai Haribhai Bharvad (2016) 242 Taxman 415 (Guj.)(HC)

1999 **S. 194A : Deduction at source – Interest – Exclusion from provision – Interest paid to corporation established by State Act – Noida constituted under State Act – Tax not deductible at source on interest paid to Noida.**
As per section 194A(3), income credited or paid to the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1952 or the Unit Trust of India established under the Unit Trust of India Act, 1963 are exempted from payment of tax at source. The State Government has issued a notification under the proviso to clause (1) of Article 243Q of the Constitution providing that having regard to the size of Noida which has been declared to be an Industrial Development Area, Noida would be an "Industrial Township" with effect from the date of publication of the notification. This clearly means that instead of Municipal Corporation providing services, Noida would provide the said services and if that be so, then Noida owes its existence to an Act of the State. Hence, tax is not deductible on interest paid to Noida. (AY. 2006-07, 2007-08)
CIT (TDS) v. Canara Bank (2016) 386 ITR 504 / 240 Taxman 249 / 289 CTR 75 / 141 DTR 73 (All.)(HC)

2000 **S. 194A : Deduction at source – Failure to deduct – Payment of interest to entities exempted from tax – No tax need be deducted at source. [S. 10(23C)(iv), 194H, 201(1) 201(IA)]**
If an organisation was exempted from payment of tax there was no need for deduction of tax at source by the assessee. *Hindustan Coca Cola Beverage P. Ltd. v. CIT (2007) 293 ITR 226 (SC)* followed. (AY. 2012-13)
CIT (TDS) v. Canara Bank (2016) 386 ITR 229 (P&H)(HC)

2001 **S. 194A : Deduction at source – Interest other than interest on securities – Interest received under section 28 of the Land Acquisition Act, 1894 is in the nature of enhanced compensation and not interest as envisaged under section 194A [S. 56(2)(vii), 57(iv), 197, Land Acquisition Act, 1894, S. 28]**
Assessee's agricultural lands were acquired and the assessee received additional compensation under an award under the Land Acquisition Act, 1894. Pursuant to the

Award, the payer submitted a statement showing the amount of interest as payable under section 28 of the 1894 Act and also the amount of TDS to be deducted as per S. 194A. Assessee made an application to the AO u/s. 197(1) for deciding the tax liability of interest and for issuance of nil tax liability certificate. AO rejected the application on the ground that the interest amount on delayed payment of compensation is taxable u/s. 57(iv) r/w S. 56(2)(viii) of the Act. HC held that the interest under section 28 of the 1894 Act was in the nature of enhanced compensation and would not fall within the ambit of the expression 'interest' as envisaged under section 145A(b). HC held that the payer was therefore not justified in deducting tax under section 194A.
Movaliya Bhikhubhai Balabhai v. ITO (2016) 138 DTR 223 / 70 taxmann.com 45 (Guj.) (HC)

S. 194A : Deduction at source – Interest other than interest on securities – Amendment made to section 194A(3)(v) has prospective effect from 1-6-2015. 2002
The High Court held that the issue is squarely covered by Division Bench ruling in case of Bagalkot District Central Co-op Bank (ITA No. 100116/2014 dated 16 December 2015) which had reference of Circular No. 19 of 2015 dated 27 November 2015. The circular held that amendment made to section 194A(3)(v) will have prospective effect form 1 June 2015. Hence a co-operative bank was not required to deduct tax from the payment of interest on time deposits of its members paid or credited before 1 June 2015. Thus the High Court dismissed the revenues appeal stating no substantial question of law arises. (AY. 2009-10, 2010-11)
CIT v. Shri Siddeshwar Co-operative Bank Ltd. (2016) 388 ITR 588 / 240 Taxman 588 (Karn) (HC)

S. 194A : Deduction at source – Interest – Motor Vehicles Act – Compensation awarded by Motor Vehicle Accident claims Tribunal and interest accruing therein are not incomes, hence such amounts cannot be subjected to tax deduction at source. 2003
The compensation awarded by the Motor Accident Claims Tribunal or the interest accruing thereon cannot be subjected to deduction of tax at source and since the compensation and the interest awarded therein do not fall under the term "income" as defined under the Act.
Managing Director, Tamil Nadu State Transport Corpn (Salem) Ltd. v. Chinnadurai (2016) 385 ITR 656 / 240 Taxman 162 / 142 DTR 65 / 290 CTR 297 (Mad.)(HC)

S. 194A : Deduction at source – Interest other than interest on securities – Discounting charges cannot be termed as "interest" – Not liable to deduct tax at source [S. 40(a)(ia)] 2004
Dismissing the appeal of revenue the Court held that the term sheet issued by GTFL showed that interest @ 13% would be charged on the loan advanced to the assessee. This is difference from the factoring charges @ 10% payable to GTFL. The AO had no factual basis to treat the impugned amount as "interest". Thus, no disallowance is warranted u/s. 40(a)(ia) of the Act. (AY. 2009-10)
PCIT v. M Sons Gems N Jewellery (P.) Ltd. (2016) 239 Taxman 530 (Delhi)(HC)

2005 **S. 194A : Deduction at source – Interest other than interest on securities – Contingent payments – No liability to deduct tax, if income did not accrue to the supplier. [S. 201(IA)]**

The assessee Company being an undertaking of the Government of Karnataka purchased power after entering into power purchase agreements. For such purchases when there was a delay in payment, the assessee paid interest to suppliers. During the 3 years under consideration, the assessee had created a provision for the interest amount and treated the same as expenditure to arrive at the profit but while filing the return the Assessee did not treat the interest as expenditure. As these were book entries towards contingent interest payable for the first 2 years, corresponding reversal entries were made in the books indicating that the provision towards contingent interest would never be paid. However in the third year the said amount though was treated as expenditure in the profit and loss account was not excluded while arriving at the taxable income in the return of income.

The AO held that the assessee was liable to deduct tax at source on the amount of provision made towards likely interest payable and treated the assessee as in default and invoked the provisions of section 201 and 201(1A) of the Act. The same was upheld by the CIT(A) and the Tribunal. Aggrieved the assessee filed an appeal before the High Court.

The High Court after examining the applicability of section 194A of the Act to the present case held that the section mandates the tax deductor to deduct income tax on 'any income by way of interest other than income by way of interest on securities'. The phrase 'any income' and 'income tax thereon' if read harmoniously, it would indicate that the interest which finally partakes the character of income, alone is liable for deduction of the income tax on that income by way of interest. If the said interest is not finally considered to be an income of the deductee, as per reversal entries of the provision in the present case, Section 194A(1) of the Act would not be made applicable. In other words, if no income is attributable to the payee, there is no liability to deduct tax at source in the hands of the tax deductor. In view of the admitted fact that interest being not paid to the suppliers being reversed in the books of accounts, High Court was of the opinion that there would be no liability to deduct tax as no income accrued to the suppliers. (AY. 2005-06 to 2007-08)

Karnataka Power Transmission Corporation Ltd. v. CIT (TDS) (2016) 383 ITR 59 / 238 Taxman 287 / 139 DTR 33 / 288 CTR 77 (Karn.)(HC)

2006 **S. 194A : Deduction at source – Interest payable by co-operative society carrying on banking business – No liability to deduct tax at source on interest prior to 1-6-2015 – Amendment, w.e.f. 1-6-2015 is prospective in operation.**

Held, that for financial years 2008-09 to 2014-15 the assessee, a co-operative society carrying on banking business with the approval of the Reserve Bank of India, was not liable to deduct tax under section 194A on the interest paid to its members. The memorandum explaining the amendment stated that it was proposed to amend the provisions of section 194A of the Act to expressly provide from the prospective date of June 1, 2015 that the exemption provided from deduction of tax from payment of interest to members by a co-operative society under section 194A(3)(v) of the Act

shall not apply to the payment of interest on time deposits by co-operative banks to their members. Apart from the fact that the express language of section 194A after amendment does not indicate any retrospectivity, the note explaining the clauses goes one step further in making it clear that it was intended to have prospective effect from June 1, 2015. (AY. 2008-09 to 2014-15)
Coimbatore District Central Co-op. Bank Ltd v. ITO (2016) 382 ITR 266 / 137 DTR 193 / 288 CTR 53 (Mad.)(HC)

S. 194A : Deduction at source – Interest other than interest on securities – Charge of income-tax – Compensation awarded by Motor Accident Claims Tribunal and interest accruing thereon is not subject to deduction of tax at source – CBDT Circular dated 14.10.2011 is not good law. [S. 4, 156] 2007
Dismissing the revision petition the Court held that Compensation awarded by the Motor Accident Claims Tribunal, and interest accruing thereon, is to ameliorate the sufferings of the victims and does not have the character of "income". If there is a conflict between a social welfare legislation and a taxation legislation, the social welfare legislation will prevail since it subserves larger public interest. CBDT Circular dated 14.10.2011 is not good law. If there is a conflict between a social welfare legislation and a taxation legislation, then, this Court is of the view that a social welfare legislation should prevail since it subserves larger public interest. The Motor Vehicle Act is one such legislation which has been passed with a benevolent intention for compensating the accident victims who have suffered bodily disablement or loss of life and the Income Tax Act which is primarily intended for Tax collection by the State cannot put spokes in the effective and efficacious enforcement of the Motor Vehicles Act. In fact, if one might deeply analyse, it could be seen that there is no direct conflict between any provisions of the Income-tax Act and the Motor Vehicles Act and it is only by the interpretation of the provisions the concept of compulsory payment of TDS has crept into the realm of compensation payment in Motor Vehicle Accident cases. Hence the compensation awarded or the interest accruing therein from the compensation that has been awarded by the Motor Accident Claims Tribunal cannot be subjected to TDS and the same cannot be insisted to be paid to the Tax Authorities since the compensation and the interest awarded therein does not fall under the term 'income' as defined under the Income Tax Act, 1961. (CRP(PD) No. 1343 of 2012 and M. P. No. 1 of 2012, dt. 02.06.2016)
Tamil Nadu State Transport Corporation (Salem) Ltd. v. Chinnadurai (Mad.)(HC); www.itatonline.org

S. 194A : Deduction at source – Interest – Insurance company – Death or injury – Compensation – Not a business transaction or a receipt of any charges on account of services rendered by any other party – Insurance company not required to deduct tax at source. 2008
Compensation received under the Motor Vehicles Act is either on account of loss of earning capacity on account of death or injury or on account of pain and suffering and such receipt is not by way of earning or profit. Award of compensation is on the principle of restitution to place the claimant in the same position in which he would have been had the loss of life or injury has not been suffered.

Held, the payment of compensation on account of death and injury is not a business transaction or a receipt of any charges on account of services rendered by any other party. Thus, in such cases, the insurance company is not liable to impose tax deduction at source. The orders calling upon the insurance company to pay the tax deducted at source/deduct tax at source on the interest part, were not sustainable and were set aside.
National Insurance Co. Ltd. v. Ritu Kunawar and Ors. (2016) 380 ITR 467 / 282 CTR 597 / 129 DTR 418 (P&H)(HC)
New India Assurance Co. Ltd. v. Sudesh Chawala and Ors. (2016) 380 ITR 467 / 282 CTR 597 / 129 DTR 418 (P&H)(HC)
New India Assurance Co. Ltd v. Sunita Sharma and Ors. (2016) 380 ITR 467 / 282 CTR 597 / 129 DTR 418 (P&H)(HC)

2009 **S. 194A : Deduction at source – Interest – Failure to deduct tax at source – Penalty – Tax not deductible at source on payments of interest to societies notified in terms of section 194A(3) – Penalty not leviable in such cases. [S. 201(1), 271C]**
In the case of three societies, i. e. Haryana Rural Roads and Infrastructure Development Agency, Punjab ICT Education Society and Haryana State Council for Science and Technology, the assessee was not liable to deduct tax at source on interest paid to the parties in view of the provisions of section 194A(3)(iii)(f) of the Act. In the case of Shri Aurobindo Society, the Commissioner (Appeals) noticed that the exemption certificate under section 80G(5)(vi) of the Act was valid for the AY. 2011-12 and a copy of its return of income where the total income declared was 'nil', was also filed and, therefore, the assessee had a reasonable cause for failure to deduct tax at source under section 201(1) of the Act. Accordingly, the Commissioner (Appeals) cancelled the penalty levied by the Department under section 271C of the Act. The Tribunal was right in confirming the order. No penalty was leviable under section 271C of the Act. (AY. 2011-12)
CIT (TDS) v. State Bank of Patiala (2016) 386 ITR 533 (P&H)(HC)

S. 194C. Payments to contractors.

2010 **S. 194C : Deduction at source – Contractors – Supply of sugar cane by farmers at gate of factory of assessee was a part of sale transaction and, therefore, assessee was not liable to deduct tax at source.**
During year, assessee, a manufacturer of sugar, made payments to transporters and did not deduct tax at source on said payments. Both Assessing Officer and Commissioner (Appeals) held that assessee was liable to deduct tax at source under section 194C on above payments. Tribunal held that assessee was not liable to deduct tax at source on aforesaid payments. High Court held that in view of an earlier decision of Gujarat High Court made in Tax Appeal No. 211 of 2006, dated 1-12-2014, wherein it had been held that supply of sugar cane by farmers at gate of factory of assessee was a part of sale transaction and, therefore, assessee was not liable to deduct tax at source, order of Tribunal deserved to be confirmed. (AY. 2003-04)
CIT v. Khedut Sahakari Khand Udyog Mandi Ltd. (2016) 76 taxmann. com 117 (Guj.)(HC)
Editorial : SLP filed against order was dismissed, ACIT v. Khedut Sahakari Khand Udyog Mandi Ltd. (2016) 243 Taxman 522 (SC)

S. 194C : Deduction at source – Contractors – Failure to deduct – Matter remitted to Assessing Officer to ascertain veracity of factual matrix. [S. 201(1)] 2011

The assessee, a university, entered into a memorandum of agreement with the Greater Ludhiana Area Development Authority for the supervision of its building projects on its behalf. Interest bearing advance paid by assessee to development authority for supervising construction work. The assessee contended that tax paid on interest on advance and deducted at source from payments to contractors and deposited by development authority. Matter remitted to Assessing Officer to ascertain veracity of factual matrix. (AY. 2009-10)

Guru Angad Dev Veterinary Agricultural Science Universtity v. CIT (2016) 387 ITR 670 (P&H)(HC)

S. 194C : Deduction at source – Contractors – Payments for construction, erection & commissioning etc of plants cannot be regarded as technical services. [S. 9(1)(vii), 194J] 2012

Dismissing the appeal of the revenue the Court held that payments for construction, erection & commissioning etc of plants cannot be regarded as payments for technical services. Assessee rightly deducted the tax at at source as contract. The assessee was not liable to deduct tax at source u/s. 194J. (AY. 2012-13)

PCIT v. Bharat Heavy Electricals Ltd. (2017) 145 DTR 96 / 291 CTR 161 (P&H)(HC)

S. 194C : Deduction at source – Contractors – Works contract – Contractor purchasing material from person other than customer – Tax not deductible at source. [S. 194J] 2013

If a person executing the work purchases the materials from a person other than the customer, it would not fall within the definition of "work" under section 194C. (AY. 2008-09)

CIT v. Executive Engineer, O and M Division, (GESCOM) (2016) 386 ITR 438 (Karn.)(HC)

Editorial : SLP was to the Department CIT v. Executive Engineer, O and M Division, (GESCOM) (2016) 384 ITR 123 (St.)

S. 194C : Deduction at source – Contractors – Collection of toll fee – Justified in deducting the tax as contractor. [S. 194H] 2014

Dismissing the appeal of the Revenue, the Tribunal held that; Assessee carried out development and maintenance work of highways, entered into contract with collection agencies for collection of toll fee, since it was merely a contract for supply of labour for execution of work, assessee was justified in deducting tax at source u/s. 194C while making payments to collection agencies. (AY. 2009-10)

Dy. CIT v. Project Director, NHAI (2016) 159 ITD 367 (Visakh.)(Trib.)

S. 194C : Deduction at source – Contractors/sub-contractors – Authorised Service Stations- Payment received by dealers from vehicle owners on providing services against service coupons, would be liable to deduct tax at source. 2015

Dismissing the appeal of the assessee, Payment received by dealers from vehicle owners on providing services against service coupons, would be liable to deduct tax at source. (AY. 2007-08, 2008-09)

Mahindra Navistar Automotives Ltd. v. Dy. CIT (2016) 159 ITD 123 / 181 TTJ 271 / (2017) 148 DTR 355 (Mum.)(Trib.)

2016 **S. 194C : Deduction at source – Contactors – Film-negative printing does not involve any technical or professional service hence TDS would be deducted as contractor. [S. 194J, 201]**

Dismissing the appeal of the revenue, the Tribunal held that process of making prints of negatives did not involve any technical or professional service, same would be covered u/s. 194C and not u/s. 194J. (AY. 2005-06)

Dy. CIT v. Yash Raj Films (P.) Ltd. (2016) 160 ITD 626 (Mum.)(Trib.)

2017 **S. 194C : Deduction at source – Contactors – Use of infrastructure facility of BRPL as loading facility provided by BRPL as it was not possible for assessee to purchase products without availing infrastructure facility, payment was not liable to deduction of tax at source, payment was a part of the price. [S. 194I, 201]**

Assessee-company used infrastructure facility of BRPL as loading facility provided by BRPL as it was not possible for assessee to purchase products without availing infrastructure facility. The AO held that the payment was liable to deduct tax at source u/s 194C. On appeal CIT(A) dismissed the appeal of the assessee. On appeal to Tribunal, the Tribunal held that method for payment of infrastructure facility and entering into a separate agreement for availing loading facility could not be sole basis to treat transaction independent from purchase and, thus, loading charges would not be covered under section 194C. It is part of the purchase price. (AY. 2002-03 to 2004-05)

Indian Oil Corporation Ltd. v. DCIT (2016) 161 ITD 131 / (2017) 183 TTJ 624 / 147 DTR 77 (Kol.)(Trib.)

2018 **S. 194C : Deduction at source – Contractors – While making reimbursement of cost of materials supplied is not liable to deduct tax at source.**

Contract with a party to supply labourers for construction of flats, assessee procurred materials also through said contractor without any profit markup, it could not be a case of composite work contract not required to deduct TDS while making reimbursement of cost of materials supplied. (AY. 2008-09)

Dhanashekar Muniswamy v. ACIT (2016) 161 ITD 366 (Bang.)(Trib.)

2019 **S. 194C : Deduction at source – Contractors – payment for clearing and forwarding agents – whether payment to professionals u/s. 194J [S. 194J]**

The assessee entered into an agreement with clearing and forwarding agents at various ports in India and based on that agreement, the clearing and forwarding agents provided services such as receiving of goods, arranging labour, maintenance of records and submission of various documents to the customs authorities. The Assessing Officer treated the services as professional services covered under section 194J and held that tax at 10 percent was to be deducted at source and treated the assessee as in default under section 201(1) and levied interest under section 201(1A) for short deduction of tax at source. The Tribunal held that the clearing and forwarding agencies were independent contractors, and the payment to them pursuant to the agreement entered into with them was subject to tax deduction at source under section 194C and not section 194J. (AY. 2009-10 to 2012-13)

Gujarat Ambuja Exports Ltd. v. DCIT (2016) 46 ITR 519 (Ahd.)(Trib.)

S. 194C : Deduction at source – Contractors – Matter was remitted back for redetermination. 2020

Commissioner (Appeals) did not adjudicate plea of assessee raised for first time that he was an individual builder-developer and thus was not liable to deduct TDS on labour charges, matter was liable to be remitted back for redetermination. (AY. 2007-08)

Vasant J. Khetani v. JCIT (2016) 158 ITD 339 / 179 TTJ 475 / 138 DTR 265 (Mum.)(Trib.)

S. 194C : Deduction at source – Contractors – Assessee deducted TDS under wrong provision in earlier assessment years which was accepted by revenue without verification, principle of consistency could not be applied to continue application of such wrong provision in later years – TDS is to be deducted under section 194J. [S. 194J] 2021

The assessee was engaged in business of distribution of TV channels from its own DTH network. It obtained rights from TV channels to distribute their programs to the ultimate viewers. It made payments thereto after deducting TDS u/s. 194C. The A.O. held that assessee paid licence fee to TV channels which was in the nature of royalty covered under Explanation 2(v) of section 9(1)(vi) and as such, TDS was to be deducted u/s. 194J. Applicability of correct TDS provision was in question. Assessee argued that it made payments in past also after deducting TDS u/s. 194C, which view had not been disturbed by revenue therefore same view should be followed for assessment year in question as well. Issue was not examined in earlier years and assessee's contention was accepted without verification. Non-examination of issue in earlier years could not give license to assessee to claim in later years that correctly applicable section be put under carpet and, therefore, a wrong provision could not be applied in garb of consistency. (AY. 2009-10)

Dish TV India Ltd. v. ACIT (2016) 157 ITD 1096 / 177 TTJ 752 / 134 DTR 81 (Delhi)(Trib.)

S. 194C : Deduction at source – Contractors – Payment to music group – Cannot be considered as professional services – Deduction of tax at source as contractor was held to be justified. [S. 194J] 2022

The Tribunal held that live performance given by a music troupe at the assessee's hotel cannot be considered as professional services as defined in section 194J. There was no production of any cinematography film during the performance by the group and therefore provisions of section 194J are not applicable, ex-consequent deduction of tax at source under section 194C is in order. (AY. 2006-07, 2007-08)

C. J. International Hotels Ltd. v. Addl. CIT (2016) 158 ITD 287 / 177 TTJ 447 / 137 DTR 289 (Delhi)(Trib.)

S. 194C : Deduction at source – Contractor – Transportation of goods and container – Tax was rightly deducted as contractor. [S. 194I] 2023

Where assessee-company, engaged in business of cargo handling, made payments for transportation of goods to transporter which also supplied containers, since use of containers was only incidental to transporting of cargo, assessee was justified in deducting tax at source under section 194C from payments in question. Provision of section 194I can not be invoked. (AY. 2009-10)

ACIT v. Pushpak Logistics (P.) Ltd. (2016) 157 ITD 471 (Rajkot)(Trib.)

2024 **S. 194C : Deduction at source – Contractors – Maintenance Charges – Tax is deductible as per section 194C and under section 194J. [S. 194J]**
Allowing the appeal of assessee the Tribunal held that where assessee was running diagnostic laboratories and it paid routine maintenance charges to professionals for maintaining medical equipments and deducted tax at source under section 194C, it had not committed any default by deducting tax at source under section 194C. (AY. 2010-11)
DDRC SRL Diagnostic (P.) Ltd. v. ITO (2016) 157 ITD 92 / 135 DTR 107 / 178 TTJ 281 (Mum.)(Trib.)

S. 194H. Commission or brokerage.

2025 **S. 194H : Deduction at source – Commission or brokerage – Trade discount – Incentive given only to promote sales is not commission, hence not liable to deduct tax at source. [S. 201(1)]**
Dismissing the appeal of revenue the Court held that it was evident that beer was sold by the assessee to the Corporation, and the Corporation, in turn, sold the beer purchased by it from the assessee, to retail dealers. The two transactions were independent of each other, and were on a principal-to-principal basis. No services were rendered by the retail dealer to the assessee, and the incentive given by the assessee to the retailers as trade discount was only to promote their sales. The Tribunal rightly held that in the absence of a relationship of principal and agent, and as there was no direct relationship between the assessee and the retailer, the discount offered by the assessee to the retailers could only be treated as sales promotion expenses, and not as commission, as no services were rendered by the retailers to the assessee. (AY. 2008-09 to 2010-11)
CIT (TDS) v. United Breweries Ltd. (2016) 387 ITR 150 / 293 CTR 500 / 80 taxmann.com 123 (T & AP)(HC)

2026 **S. 194H : Deduction at source – Commission or brokerage – Guarantee fee paid to bank is not in nature of commission or brokerage under ambit of s. 194H as there exists no principal-agent relationship hence not liable to deduct tax at source.**
Assessee sought its banks to issue guarantee in its favour for which bank had charged certain amount as 'guarantee fee. Contract of guarantee did not give rise to principal-agent relationship; therefore, consideration received by bank could not be treated as commission. (AY. 2010-11)
DCIT v. Laqshya Media (P.) Ltd. (2016) 160 ITD 35 / 182 TTJ 318 (Mum.)(Trib.)

2027 **S. 194H : Deduction at source – Commission or brokerage – Bank guarantee – No principal-agent relationship between assessee and bank issuing bank guarantee on behalf of assessee, transaction between them is not liable to deduct tax at source.**
Bank issues bank guarantee on behalf of assessee, there is no principal-agent relationship between bank and assessee and, therefore, assessee is not required to deduct tax at source u/s. 194H from payment of bank guarantee commission made to bank. (AY. 2011-12)
Efftronics Systems (P.) Ltd. v. (2016) 161 ITD 688 (Visakh.)(Trib.)

S. 194H : Deduction at source – Commission or brokerage – Director's remuneration – Did not amount to 'commission or brokerage requiring deduction of tax at source under section 194H. 2028

Payment made by assessee-company to its non-executive directors for giving suggestions for better performance of company, did not amount to 'commission or brokerages' requiring deduction of tax at source under section 194H. (AY. 2007-08 to 2010-11)

Dy. CIT v. Kirloskar Oil Engine Ltd. (2016) 158 ITD 309 (Pune)(Trib.)

S. 194H : Deduction at source – Commission or brokerage – Sub-brokerage on security transactions – TDS liability on payment of commission and brokerage, specific provision of s. 194H would be attracted – not provision of s. 194J; however, in view of Expl. 1 to S. 194H tax is not deductible at source in respect of sub-brokerage paid. [S. 194J] 2029

Assessee Company was a stock broker and had entered into an agreement with SHCL, a holding company, for conducting business as sub-broker and had paid sub-brokerage to it. AO opined that sub-brokerage payment would attract provisions of S. 194J since payment was made to holding company, which would fall under head 'fees for technical services' and as tax had not been deducted at source sub-brokerage paid as such was to be disallowed. Since provisions of s. 194H are specific provision dealing with commission and brokerage, same would be attracted to payments made for sub-brokerage and not provisions of S. 194J; however, under Explanation 1 to S. 194H transactions in securities is exempt and no tax was deductible in respect of sub-brokerage paid. (AY. 2011-12)

SHCIL Services Ltd. v. Dy. CIT (2016) 158 ITD 1006 / 181 TTJ 408 (Mum.)(Trib.)

S. 194H : Deduction at source – Commission or brokerage – Discount – Matter remanded. 2030

Tribunal held that where assessee was running diagnostic laboratories and it had given discount to hospitals in respect of testing charges received by it and Assessing Officer held that discount given was in nature of commission liable for deduction under section 194H, since nature of relationship between assessee and hospitals had not been examined by considering basic facts, matter required fresh examination. (AY. 2010-11)

DDRC SRL Diagnostic (P.) Ltd. v. ITO (2016) 157 ITD 92 / 135 DTR 107 / 178 TTJ 281 (Mum.)(Trib.)

S. 194I. Rent.

S. 194I : Deduction at source – Rent – Non-refundable upfront Lease premium paid does not take the character of rent and therefore, section 194-I is not attracted. 2031

The High Court held that one time non refundable upfront charges paid by the assessee was not (i) under the agreement of lease, and (ii) merely for the use of the land. The payment was made for a variety of purposes such as (i) becoming a co-developer, (ii) developing a Product Specific Special Economic Zone, and (iii) for putting up an industry in the land. The lessor as well as the lessee intended to treat the lease virtually

as a deemed sale giving no scope for any confusion. In such circumstances, the upfront payment made by the assessee for the acquisition of leasehold rights over an immovable property for a long duration of time say 99 years could not be taken to constitute rental income at the hands of the recipient obliging the assessee to deduct tax at source under section 194-I.
Foxconn India Developer (P) Ltd. v. ITO (2016) 288 CTR 173 / 239 Taxman 513 (Mad.) (HC)

2032 **S. 194I : Deduction at source – Rent – Onetime non-refundable upfront payment for the acquisition of leasehold rights for a period of 99 years as a co-developer cannot constitute rent for deduction of tax at source. [S. 201]**
Allowing the appeal of assessee the Court held that the upfront charges paid by assessee was not merely for use of land but for a variety purposes such as (i) becoming a co-developer, (ii) developing a project and (iii) putting up an industry on the land, and therefore upfront payment made for the acquisition of leasehold rights over an immovable property could not be treated as rental income at the hands of the lessor, obliging the lessee to deduct tax at source.
Foxconn India Developer (P.) Ltd. v. ITO (2016) 239 Taxman 513 / 288 CTR 173 / 135 DTR 185 (Mad.)(HC)

2033 **S. 194I : Deduction at source – Rent – Amount paid by joint venture company to Government for lease of land is not mere lease, hence not liable to deduct tax at source. [S. 201]**
Allowing the appeal of the assessee, the Court held that;
that though the amount of ₹ 1412 crores was paid actually by the lessee to the lessor, it was not paid merely for the purpose of retaining the lease for a period of 99 years. The amount paid was actually determined in an open competitive bidding that took place even before the joint venture company was born. T, which was the joint venture partner, offered this amount for getting the benefit of entering into a joint venture agreement with TIDCO, the benefit of which would spill over to joint venture company in the form of a 99 years lease. The date on which the amount was quantified, the manner in which the amount was quantified and the method of selection of the joint venture partner were the crucial determining factors to understand that the amount could never constitute rent. To put it differently, a premium or rent irrespective of how it was treated, could be decided only after an agreement for lease was finalised. If an amount had to be determined even before an agreement for lease was finalised, it would never form part of the rental income. On the facts there was no dispute that even at the time when the alienation was made by the Government, the amount determined by the parties was agreed to be paid to the Government. The method of determination of the amount and the method of choosing the lessee alone were left to TIDCO. But TIDCO was obliged to retain only a sum of ₹ 50 per sq. ft. and pass on the balance amount to the Government. Therefore, the amount liable to be passed on to the Government could not be consideration paid to TIDCO, which was the lessor. It was consideration paid to

the Government. Once it was understood to be a consideration paid to the Government, the question of deducting tax at source did not arise.
TRIL Infopark Ltd v. ITO (TDS) (2016) 385 ITR 465 / 288 CTR 188 / 138 DTR 201 / 70 taxmann. com 44 (Mad.)(HC)
Editorial : Order of the Appellate Tribunal in TRIL Infopark Ltd. v. ITO (TDS) (2015) 44 ITR 139 (Chennai)(Trib.) reversed.

S. 194I : Deduction at source – Rent – Constitutional validity – Provision valid – Does not contravene Article 14 or 19 of – Constitution of India – Room charges of hotel including charges for amenities constitutes rent – Circulars – Circular No. 715 of 1995 and 5 of 2002 do not expand scope of section 194-I – Circulars not *ultra vires* Act – Interpretation of taxing statutes – Contextual interpretation. [Constitution of India, Arts. 14, 19, 366 (29A)] 2034

The word "rent" in section 194I of the Income-tax Act, 1961, has to be interpreted widely and not confined to payments received towards a "lease, sub-lease or tenancy" or transactions of such like nature. Given the context of the provision which is intended to cover a wide range of transactions as is evident from the words "any other agreement or arrangement" it is evident that the principles of *ejusdem generis* or noscitur a sociis cannot be invoked to narrow the scope of those words. The words "any payment" occurring in definition of "rent" in the Explanation to section 194I is also indicative of the legislative intent to accord the widest possible meaning to the payment received as a result of any of the underlying transactions envisaged in that provision. After the forty-sixth amendment to the Constitution which inserted article 366(29A) the "dominant purpose" test cannot form the sole basis for determining whether the payment received as consideration for the transfer of the right to use or enjoy a property is "rent". The context in which the word has been used, the particular statute in which it occurs and the legislative intent have to be taken into consideration in examining whether a narrower or a wider meaning has to be given to the word. Even where the room charges collected by a hotel from its customer are not confined to the use of the space but to a host of facilities and amenities such payment would still fall within the ambit of "rent" under section 194-I of the Act.
The applicability of section 194-I does not depend upon whether the income of the hotel from room charges is assessed under "profits and gains of business or profession" or "income from house property". Section 194-I is applicable at the time of payment of rent or at the time of crediting such amount to the payee, if the other conditions laid down under the provision are fulfilled. It is for the assessee to decide whether it seeks to retain the hotel as an investment or as a business asset. The income therefrom could be taxed as business income if it is exploited as a business asset. Rental income can also be taxed under the head "Income from other sources". This, however, does not affect the Constitutional validity of the provision or the liability of the person (other than an individual or Hindu undivided family) making payment to deduct tax at source at the time of making such payment.
No artificial distinction is being sought to be drawn between individual guests of a hotel, on the basis whether they are Indians or foreigners. Where the payment on behalf of the foreigner is made by a tour operator, such payment would fall within the ambit

of section 194-I and that is a reasonable classification based on intelligible differentia as to the entity making payment. Section 194-I obliges the person making the payment, who is neither an individual nor a Hindu undivided family, to deduct tax at source at the prescribed rates, deposit it under Rule 30 of the Income-tax Rules, 1962 and issue certificate of deduction of tax at source to the hotel concerned under Rule 31 of the Rules. In terms of section 199 such deduction is treated as payment of tax on behalf of the hotel and credit is given in the assessment to the hotel for the tax deducted at source on the production of the certificate furnished under section 203. Consequently, the hotel does not suffer any prejudice or inconvenience. Further, the hotel can under section 197 of the Act apply to have the tax deducted at source at a lower rate. There is nothing either arbitrary or unreasonable so as to attract Articles 14 or 19(1)(g) of the Constitution.

No portion of either Circular No. 715 of 1995 dated August 8, 1995 or Circular No. 5 of 2002 dated July 30, 2002 can be said to be prejudicial to hoteliers. There is no vagueness as to what constitutes hotel accommodation taken on "regular basis". In order to remove any ambiguity that may attach to that term, the subsequent Circular dated July 30, 2002 was issued. Far from expanding the scope of section 194-I they serve to lend further clarity to the scope and ambit of the provision and therefore, cannot be held to be *ultra vires* the Act.

Apeejay Surrendera Park Hotels Ltd v. UOI (2016) 383 ITR 697 / 134 DTR 169 / 287 CTR 161 (Delhi)(HC)

Federation of Hotel and Restaurant Association of India v. UOI (2016) 383 ITR 697 / 134 DTR 169 / 287 CTR 161 (Delhi)(HC)

2035 **S. 194I : Deduction at source – Rent – Compensation to slum developers due to its failure to provide alternative accommodation during period of construction, said payment not being in nature of 'rent', did not require deduction of tax at source. [S. 40(a)(ia)**

Allowing the appeal of the assessee, the Tribunal held that compensation paid to slum developers due to its failure to provide alternative accommodation during period of construction, said payment not being in nature of 'rent', did not require deduction of tax at source under section 194-I (AY. 2010-11)

Sahana Dwellers (P.) Ltd. v. ITO (2016) 158 ITD 78 / 180 TTJ 139 (Mum.)(Trib.)

S. 194-IA. Payment on transfer of certain immoveable property other than agricultural land.

2036 **S. 194-IA : Deduction at source – Payment on transfer of immovable property – Immovable property acquired in auction – Entire Payment made before the introduction of section – Sale Certificate issued after the introduction of section – Held, no liability on the assessee to deduct TDS.**

Assessee purchased a property from the bank in an auction. In March, 2012, assessee made payment to the bank. On 1-6-2013, section 194-IA was introduced providing for deduction of TDS on payment for purchase of immovable properties. In September, 2013, the bank executed sale certificate in favour of the assessee which was thereafter

presented for registration to the Sub-registrar. Sub-Registrar, in view of section 194-IA, issued an endorsement intimating the assessee that registration could be completed only on production of proof of deduction of TDS. Held, when the assessee had paid the amount to the transferor, there was no obligation in law on the assessee to deduct the TDS u/s. 194-IA. Held, sale certificate should be registered without insisting upon deduction of TDS u/s. 194-IA.
Shubhankar Estates (P.) Ltd. v. Senior Sub-Registrar (2016) 237 Taxman 731 / 136 DTR 61 (Karn.)(HC)

S. 194J. Fees for professional or technical services.

S. 194J : Deduction at source – Fees for professional or technical services – Payment made by assessee, a mobile service provider company, to another mobile service provider Company for utilization of roaming mobile data and connectivity could not be termed as technical service and, therefore, no TDS was deductible. [S. 201] 2037
Dismissing the appeal of the revenue, the Court held that the contention of the Department is not only misconceived, but is non-existent because the subject matter of the present appeals is not roaming services provided by mobile service provider to its subscriber or customer, but the subject matter is utilization of the roaming facility by payment of roaming charges by one mobile service provider Company to another mobile service provider Company. Hence, the observations made are not of any help to the Department. As such, whether use of roaming service by one mobile service provider Company from another mobile service provider Company, can be termed as 'technical services' or not, is essentially a question of fact. The Tribunal, after considering all the material produced before it, has found that roaming process between participating entities is fully automatic and does not require any human intervention. In view of the above, the High Court dismissed the appeals filed by the Department. (AY. 2005-06 to 2012-13)
CIT v. Vodafone South Ltd. (2016) 142 DTR 19 / 241 Taxman 497 / 290 Taxman 436 (Karn.)(HC)

S. 194J : Deduction at source – Fees for professional or technical services – Purchasing and selling electricity – Transmission of electricity by State Power Transmission Corporation is not technical services hence tax is not deductible on amount paid for such transmission. [S. 40(a)(ia)] 2038
Dismissing the appeal of the revenue the Court held that the provisions of section 194J of the Act were not attracted and the assessee was not liable to deduct the tax at source from the payments of transmission charges made by it to the Corporation and State load dispatching centre and therefore, the additions made by the assessing authority in the returned income of the assessee on this account were rightly set aside by the Income-tax Appellate Tribunal. (AY. 2009-10)
CIT v. Gulbarga Electricity Supply Company Ltd. (2016) 387 ITR 484 / 76 taxmann. com 244/ 142 DTR 97 (Karn.)(HC)

2039 **S. 194J : Deduction at source – Fees for professional or technical services – Bill management services – Not professional services – Section 194J not applicable – Amount paid covered by section 194C. [S. 194C]**

In respect of payments made by the assessee towards bill management services, the services rendered by the agencies engaged by the assessee at several places were not professional services, and, therefore, section 194J was not attracted. The demand towards short deduction of tax deducted at source and interest was improper and the contract was rightly held to be a service contract by the Tribunal. It was a contract covered under section 194C of the Act. (AY. 2008-09)

CIT v. Executive Engineer, O and M Division, (GESCOM) (2016) 386 ITR 438 (Karn.)(HC)

Editorial : SLP is granted to the Department CIT v. Executive Engineer, O and M Division, (GESCOM) (2016) 384 ITR (St.) 123-Ed.

2040 **S. 194J : Deduction at source – Fees for professional or technical services – Purchase of power and transmission to consumer – No rendering of technical services – Not liable to deduction at source. [S. 194I]**

Section 194J was not applicable on transaction of transmission of electricity from the generation point to the consumers through a transmission network was in the nature of technical services attracting section 194J of the Act. (AY. 2006-07 to 2011-12)

CIT v. Gulbarga Electricity Supply Co. Ltd. (2016) 386 ITR 622 / 69 taxmann.com 252 (Karn.)(HC)

2041 **S. 194J : Deduction at source – Fees for professional or technical services – Programme support services – Revenue shared – Not payments for technical services rendered – Not liable to deduct tax at source.**

Dismissing the appeal of revenue, the court held that the assessee imparting computer education to Government employees and students through franchises. Franchisees under the agreement remitting entire fees collected from students to assessee and the assessee sharing with franchisees and programme support centres. Contract not in the nature of service provider or service receiver. Payment shared is not payments for technical services rendered. Tax is not deductible at source on payments by assessee to Franchisees. (AY. 2009-10)

CIT (TDS) v. Rajasthan Knowledge Corporation Ltd. (2016) 385 ITR 427 / 141 DTR 249 (Raj.)(HC)

2042 **S. 194J : Deduction at source – Fees for professional or technical services – Supply of ready study data by a foreign company to its subsidiary cannot be technical services to resident – Not liable to deduct tax at source. [S. 9(1)(vii), 201(IA)]**

The parent company (non-resident) had purchased technical data from a foreign company which was subsequently supplied to its subsidiary in India, i.e. the assessee. The amount was recovered by the parent company from the assessee company in the subsequent year. The AO treated this amount liable for TDS under section 194J of the Act. The CIT(A) confirmed the AO's action.

On appeal before the Tribunal, it was held that the assessee was merely supplied with ready study data and no services were rendered by the parent company to the assessee and thus payment made on such services which are reimbursement of expenses did not attract TDS. Aggrieved the revenue was in appeal before the High Court.

The High Court held that no services were rendered by the parent company to the Assessee so as to be construed as technical services rendered to a resident under section 194J of the Act. As the sum paid is not chargeable to tax as per Explanation 2 to Section 9(1)(vii) of the Act, therefore the Assessee is not liable to deduct TDS on such payments. The Revenue's appeal was dismissed by the High Court. (AY. 2008-09, 2009-10)
CIT v. Heramec Ltd. (2016) 238 Taxman 519 (AP&T)(HC)

S. 194J : Deduction at source – Fees for professional or technical services – Since there was neither transfer of any technology nor any service attributable to a technical service was offered, tax was not required to be deducted at source under sec. 194J while making payment of transmission charges. [S. 201(1)] 2043
The assessee was a State owned company engaged in the business of buying and selling electricity. It purchased electricity from State owned generators like KPCL and NTC. The power was transmitted from the generation point to the consumers through the transmission network of KPTCL. No tax was withheld on the transmission charges and therefore the AO held that the assessee was in default under section 201(1).
In appellate proceedings, the assessee brought to the notice of the Commissioner (Appeals) that the payee namely the KPTCL had paid the taxes due on its income. Thus, the assessee urged that no demand could be raised against it. The Commissioner (Appeals) accepted assessee's explanation. Accordingly, the appeal was allowed in part and the Assessing Officer was directed to afford an opportunity to the assessee to furnish proof of payment of taxes by the payees and thereafter work out interest under section 201(1A) from the date of remittance of TDS till the date of filing of the return by the payee. The order passed by the Commissioner (Appeals) was challenged by both the assessee as well as revenue. The assessee was aggrieved by the order of the Commissioner to the extent that it had been rendered liable to pay interest. Revenue was aggrieved by the order passed by the Commissioner against a finding that no demand could be visualized under section 201 when the assessee would satisfy the authorities below that the taxes were paid by the payee. The Tribunal dismissed both appeals.
The High Court held that the provision of section 194J would come into play only when there is payment of fee for availing technical services. It was apparent from perusal of transmission agreement that there was no mention of any offer with regard to any 'technical services' by the KPTCL. There was neither transfer of any technology nor any service attributable to a technical service offered by the KPTCL and accepted by the assessee. Therefore, application of section 194J to the facts of the case by the revenue is misconceived. (AY. 2007-08 to 2010-11)
CIT v. Hubli Electric Supply Co. Ltd. (2016) 386 ITR 271 / 237 Taxman 7 / 136 DTR 105/ 287 CTR 443 (Karn.)(HC)

S. 194J : Deduction at source – Fees for professional or technical services – Payment to Stock Exchange they are not for technical services rendered but are in nature of payments for facilities provided by Stock Exchange, not liable to deduct tax at source. 2044
Allowing the appeal of the assessee the Tribunal held that; TDS is not deductible on payment of transaction charges by members to Stock Exchange u/s. 194J as they are not

for technical services rendered but are in nature of payments for facilities provided by Stock Exchange. (AY. 2009-10)
Fiduciary Shares & Stock (P.) Ltd. v. ACIT (2016) 159 ITD 554 / 181 TTJ 750 (Mum.)(Trib.)

2045 **S. 194J : Deduction at source – Fees for professional or technical services – No master and servant relation ship – Payments to retainer doctors would be subject to TDS under section 194J and not under section 192. [S. 192, 201(1), (201(IA)]**
Dismissing the appeal of the revenue, the Tribunal held that; Payments to retainer doctors would be subject to TDS under section 194J and not under section 192. There is no master and servant relationship. (AY. 2013-14)
ACIT v. Fortis Healthcare Ltd. (2016) 157 ITD 746 (Chd.)(Trib.)

2046 **S. 194J : Deduction at source – Fee for professional or technical services – Mere use of technology would not make any service managerial/technical or consultancy service hence cannot be considered as managerial or technical services. [S. 194C, 201]**
Assessee was providing banking services in extreme rural areas through its network of agents, through whom the customers could do banking business by use of device called 'Point of Transaction Machine (POT)'. The AO held that TDS was to be made as per S. 194J and not as per S. 194C, and also levied interest u/s. 201. CIT(A) held that service availed by the assessee were in the nature of a contract and that there was no acquisition of technical know how by the assessee. Dismissing the appeal of the Revenue, the Tribunal held that; S. 194J would be applicable only if any managerial, technical or consultancy services are provided to an assessee and mere use of technology would not make any service managerial/technical or consultancy service. Since there was no specific skill required to provide said services, services rendered by service providers were not in nature of managerial, technical or consultancy services and mere use of technology would not make it technical services and thus S. 194J were not applicable. (AY. 2011-12)
ITO v. Fino Fintech Foundation (2016) 159 ITD 743 (Mum.)(Trib.)

2047 **S. 194J : Deduction at source – Fees for professional or technical services – Remuneration paid to a visiting doctor was variable with number of patients attended by him, payment would be subject to TDS u/s. 194J and not as salary. [S. 192]**
Tribunal held that remuneration paid to visiting doctors was variable with number of patients attended by them. The payments made to them would be subjected to TDS under section 194J. (AY. 2011-12 to 2013-14)
Hosmat Hospital (P.) Ltd. v. ACIT (2016) 160 ITD 513 (Bang.)(Trib.)

2048 **S. 194J : Deduction at source – Fee for professional or technical services – Director's remuneration – Clause (ba) inserted in sub-section (1) of section 194J is enforceable with effect from 1-7-2012, it would have no application to assessee's case. [S. 201, 201(IA)]**
The assessee-company was engaged in the business of manufacturing and sale of generating sets bimetal strips and bearings, engine valves, castings etc. During relevant year, assessee made payments to non-executive directors. The AO opined that payments

made to the non-executive Directors fell within the definition of 'commission or brokerage' as defined in Explanation (i) to s. 194H and, thus the assessee should have deducted TDS while making said payments. Since assessee failed to deduct tax at source while making payments in question, the Assessing Officer treated assessee to be assessee in default in terms of section 201(1) and 201(1A).
The provisions relating to deduction of tax at source on payment of fee for professional or technical services are contained in s. 194J. The provisions of s. 194J have been amended by the Finance Act, 2012 with effect from 1-7-2012 *vide* which clause (ba) has been inserted in sub-section (1) of section 194J. The provisions of newly inserted clauses are enforceable with effect from 1-7-2012, therefore, it will have no application in the assessment years under appeal. (AY. 2007-08 to 2010-11)
Dy. CIT v. Kirloskar Oil Engine Ltd. (2016) 158 ITD 309 (Pune)(Trib.)

S. 194J : Deduction at source – Fees for professional or technical services – TV programmes – Payment to TV channels to receive their programs for further telecasting TDS was to be deducted u/s. 194J. [S. 194C] 2049
Assessee made payment to TV channels to receive their programs so that it can distribute same to its viewers through its own DTH network. It deducted TDS u/s. 194C. A.O. held that assessee paid license fee to TV channels which was in nature of royalty covered under Explanation 2(v) of s. 9(1)(vi) and, thus, TDS was to be deducted u/s. 194J. S. 194C would be attracted when payment was made for carrying out work of broadcasting and telecasting and since assessee did not make payments to TV channels for telecasting rather it telecasted TV programs on its own, TDS was not to be deducted u/s. 194C. Payment was made to TV channel for transfer of intellectual property rights in programs to be used by assessee in connection with television which was covered under Explanation 2(v) of s. 9(1)(vi) and thus TDS was to deducted u/s. 194J. (AY. 2009-10)
Dish TV India Ltd. v. ACIT (2016) 157 ITD 1096 / 177 TTJ 752 (Delhi)(Trib.)

S. 194J : Deduction at source – Fees for professional or technical services – Secondment charges – Reimbursement of salary of seconded employees to AE couldn't be treated as 'FTS' to attract TDS. [S. 40(a)(ia)] 2050
Under secondment agreement, employees of other company BG were seconded to assessee to do technical work. Salary to said employees was being paid by BG and was recoverable from assessee on cost to cost basis. BG had deducted TDS on salary paid to seconded employees. AO disallowed such payments u/s. 40(a)(ia) on ground that assessee had not deducted TDS there from u/s. 194J. Since services of employees had been seconded to assessee and assessee was to reimburse their emoluments it was assessee which for all practical purposes was employer and, therefore, salary reimbursed to BG could not be considered as 'fees for technical services' for purpose of S. 194J. (AY. 2009-10)
Dy. CIT v. Mahanagar Gas Ltd. (2016) 158 ITD 1016 (Mum.)(Trib.)

2051 **S. 194J : Deduction at source – Fees for professional or technical services – Support services of assessee involving identification of customers to whom services to be rendered – Payments made by assessee liable to tax deduction. [S. 194C, 201(1), 201(1A)]**

The services of the most of the personnel of the assessee were provided by outsourcing agencies. The work relating to front office management, liaison work, data entry was being manned by the outsourced personnel. The assessee made payments for three kinds of service. They were support services such as field activations, vendor payment queries, entering receipts into SAP and field verification, customer support services such as tele-calling for bill payments, tele-calling for new activations and housekeeping services. The assessee was deducting tax at the rate of 2% u/s. 194C of the Act on the payments made for their services. The AO held that the provision of services of technical or other personnel for rendering managerial, technical or consultancy services would be treated as technical services and would attract TDS at the rate of 10% and therefore the assessee was in default. The CIT(A) held that the payments made towards housekeeping shall be subject to TDS u/s. 194C and with respect to other support services the assessee would be covered for tax deduction at source u/s. 194J. On appeal, the tribunal concurred with the view of CIT(A). (AY. 2013-14 & 2014-15)

Vodafone Cellular Ltd. v. Dy. CIT (2016) 45 ITR 333 / 177 TTJ 105 / 134 DTR 52 (Chennai)(Trib.)

S. 194LA. Payment of compensation on acquisition of certain immovable property.

2052 **S. 194LA : Deduction at source – Compensation on acquisition of certain immovable property – Non-resident – Though the assessee had not made application it can contend in the assessment proceedings that they are not liable to deduct tax at source. For the purpose of section 194LA, the agricultural land is supposed to be understood in general sense and not as per section 2(14). [S. 2(14), 195, 197]**

The High Court held that there is no liability to deduct tax at source if the land is an agricultural land and the same has to be understood in general sense and reliance cannot be placed upon section 2(14) of the Act for the same. It was also held that no application could have been made by the assessee too as he was under the belief that the income is not chargeable to tax at all. (AY. 2005-06)

Land Acquisition Collector v. Addl. CIT (2016) 242 Taxman 389 (P&H)(HC)

2053 **S. 194LA : Deduction at source – Compensation on acquisition of certain immovable property – Building in agricultural land – Compensation on their acquisition would be liable to deduct tax at source. Compensation for trees was held to be part of agricultural land and not liable to deduct tax a source. [Land Acquisition Act, 1894]**

Allowing the appeal partly in favour of revenue, the Court held that buildings in agricultural land, which did not form part of agricultural land or at any rate had not been shown in nature of small farm houses or go-downs for agricultural operations, compensation on their acquisition would be liable to deduct tax at source.

Compensation for trees was held to be part of agricultural land and not liable to deduct tax a source. Partly in favour of revenue (AY. 2008-09)
CIT v. Special Land Acquisition Officer. (2016) 242 Taxman 398 (Guj.)(HC)
Editorial : SLP is granted to the revenue, CIT v. Special Land Acquisition Officer (2017) 245 Taxman 271 (SC).

S. 195. Other sums.

S. 195 : Deduction at source – Non-resident – Fees for technical services- Protocol to Agreement – Not liable to deduct tax at source – DTAA-India-United Kingdom [S. 90, Art. 13(4)] 2054
Allowing the petition the Court held that the definition of "fees for technical services" occurring in article 13(4) of the Double Taxation Avoidance Agreement between India and the United Kingdom clearly excludes managerial services. What was being provided by the non-resident to the assessee in terms of the management services agreement were managerial services. It was plain that once the expression "managerial services" was outside the ambit of "fee for technical services", the question of the assessee having to deduct tax at source from payments for the managerial services, would not arise. The payment made by the assessee to the non-resident for the managerial services provided by the latter could not be taxed as fees for technical services and the payments were not liable to withholding of tax under section 195.
Steria (India) Ltd. v. CIT (2016) 386 ITR 390 / 241 Taxman 268 / 288 CTR 694 / 140 DTR 64 (Delhi)(HC)
Editorial : Ruling in Steria (India) Ltd, In re (2014) 364 ITR 381 (AAR) reversed.

S. 195 : Deduction at source – Non-resident – If no income accrues or arises to non-resident in India – No liability to deduct tax. [S. 9(1)(vii), 40(a)(i)] 2055
The assessee was appointed as the arranger by the State Bank of India (SBI) for mobilizing its Indian Millennium Deposits (IMDS). In turn the assessee was entitled to appoint sub-arrangers within and outside India. The assessee in turn received arranger fees and commission and it in turn paid sub-arranger the sub-arranger's commission. The assessee had failed to deduct tax at source on the sub-arrangers commission paid and hence the AO invoked the provisions of section 40(a)(i) of the Act and thereby disallowed the expenditure. On appeal the CIT(A) held that the amount paid to the non-resident sub-arranger was in the nature of commission/brokerage and not in the nature of fees for technical services in terms of section 9(1)(vii) of the Act.
The Revenue filed an appeal before the Tribunal wherein the Tribunal analysed the nature of services provided by the assessee. In this regard, the Tribunal examined whether the services provided by the assessee were managerial, technical or consultancy in nature. The Tribunal held that the services provided by the Assessee were neither of the three and hence upheld the order of the CIT(A). Aggrieved Revenue filed an appeal before the High Court.
The High Court held that the need to deduct tax would arise if the non-resident would earn any income chargeable to tax in India. Further the High Court also held that the services provided by the assessee did not fall under the category of Explanation 2 to

section 9(1)(vii) of the Act and hence the assessee was not required to deduct tax at source under section 195 of the Act.
DIT(IT) v. Credit Lyonnais (2016) 238 Taxman 157 (Bom.)(HC)

2056 **S. 195 : Deduction at source – Non-resident – Royalty – Payments for import of software – Not royalty – Tax not deductible at source on such payments. [S. 9(1)(vi), 40(a)(i)]**
Payments made for import of software do not constitute royalty within the meaning of section 9(1)(vi). They cannot be disallowed under section 40(a)(i) because the assessee failed to deduct tax at source on such payments. (AY. 2001-02 to 2004-05)
Dy. CIT v. Wipro Ltd. (2016) 382 ITR 179 / 236 Taxman 209 / 282 CTR 346 (Karn.)(HC)
Editorial : SLP was granted, CIT v. Wipro Ltd. (2016) 240 Taxman 299 (SC)

2057 **S. 195 : Deduction at source – Non-resident – Royalties – Mere passing of project specific architectural drawings & designs with measurements did not amount to 'making available' technical knowledge, know-how or process hence not liable to deduct tax at source – DTAA-India-USA. [S. 9(1)(i), Art. 12]**
Allowing the appeal the Tribunal held that mere passing of project specific architectural drawings & designs with measurements did not amount to 'making available' technical knowledge, know-how or process hence not liable to deduct tax at source. Moreover, where total stay of employees/executives of US company in India was 5 days only, it could be safely concluded that said company had no Permanent Establishment in India. (AY. 2008-09, 2009-10)
Gera Developments (P.) Ltd. v. Dy. CIT (2016) 160 ITD 439 / 181 TTJ 510 / 52 ITR 1 (Pune) (Trib.)

2058 **S. 195 : Deduction at source – Non-resident – Sale proceeds of land payable to non-resident – Not liable to deduct tax at source – DTAA-India-USA [S. 201, Art. 26]**
Assessee had entered into a collaboration agreement with the 3 co-owners one of which was non-resident. AO had noticed that the assessee made payments to power of attorney holder of the non-resident without deduction of tax thereon. Consequently, proceedings under section 201 were initiated against the assessee. Commissioner (Appeals) upheld the contention of assessee that in view of non-discrimination clause in article 26 of the DTAA between India and USA, the assessee was not obliged to deduct tax at source under section 195 in, as there is no provision in the Income-tax Act, requiring a resident to deduct tax at source from sale proceeds of land payable to any other resident. On appeal by department held that the reasoning given by Commissioner (Appeals) with reference to Article 26 of the DTAA between India and USA is fully justified because there is no provision in the Act requiring a resident to deduct tax at source from sale proceeds of land payable to any other resident and, therefore, in view of Article 26(4), the assessee could not be burdened with the requirement of TDS in case of payment to non-resident as Article 26 provides that the provisions of section 195 are not applicable on the reasoning that provisions of section 195 are applicable only when some remittance is required to be made from India to an outside country. (AY. 2006-07)
ITO v. Santur Developers (P.) Ltd. (2015) 70 SOT 475 (Delhi)(Trib.)

S. 195 : Deduction at source – Non-resident – Fee for technical services – Since services were intrinsically connected to sale of goods, same could not be treated as FIS or FTS and they would constitute part of business income – Not liable to deduct tax at source – DTAA-India-China. [S. 9(1)(i), Art. 5, 12]. 2059

Assessee, Indian company entered into Specific Purchase Contract with Chinese Company for supply of cranes and Service Contracts for rendering installation and commissioning services in relation to such cranes according to which Chinese company transported cranes to designated site, provided installation and commissioning services as also after sales services and spare parts, since services were intrinsically connected to sale of goods, same could not be treated as FIS or FTS and they would constitute part of business income. Not liable to deduct tax at source. (AY. 2008-09)

Gujarat Pipavav Port Ltd. v. ITO (IT) (2016) 158 ITD 687 / 180 TTJ 354 / 140 DTR 1(Mum) (Trib.)

S. 195 : Deduction at source – Non-resident – Royalty – Copy right – (i) Purchase of a licence to use shelf/shrink-wrapped software is purchase of a "product" and not a "copyright" and not liable to deduct tax at source. [S. 9(1)(v), 9(1)(vi)] 2060

Dismissing the appeal of the revenue, the Tribunal held that (i) Purchase of a licence to use shelf/shrink-wrapped software is purchase of a "product" and not a "copyright", (ii) The retrospective insertion of Explanation 4 to s. 9(1)(vi) to include "software" in the definition of "royalty" does not apply to DTAAs, (iii) In view of the conflict of views amongst the High Courts, the view in favour of the assessee should be followed, (iv) An obligation to deduct TDS u/s. 195 cannot be imposed by the retrospective insertion of Explanation 4 to s. 9(1)(vi), (v) As payments for software were not "royalty" at the time of payment, the assessee cannot be held to be in default for not deducting TDS. (AY. 2006-07, 2007-08)

DDIT v. Reliance Industries Ltd. (2016) 159 ITD 208 / 180 TTJ 22 (Mum.)(Trib.)

S. 195 : Deduction at source – Non-resident – Settlement amount payable by Applicant to QSF – Pursuant to the final judgment of the US Court – Not regarded as sum chargeable to tax in hands of QSF. 2061

The applicant is an Indian company whose shares are listed on Bombay Stock Exchange (BSE) and National Stock Exchange (NSE). It's American Depository Shares (ADS) were listed in the New York Stock Exchange (NYSE).

A number of suits were filed against the Indian company as well as its auditors in various jurisdictions in the US, for claiming damages. The suits were consolidated and a consolidated 'Class Action Complaint' was filed for alleged violation of the Securities Exchange Act of US.

The US court passed a preliminary order approving the settlement and later the US court passed a final judgment in this regard. Under the terms of the settlement, Indian Company had first to deposit the agreed amounts in a segregated account in India. Thereafter, the amount deposited by would be transferred to an initial escrow account in New York. After the approval of the settlement, the amount had to be transferred from the initial escrow account to the final escrow account to be treated as Qualified Settlement Fund (QSF). Thereafter, it had to be distributed to the qualified claimants in

the class action, after deducting the expenses including legal fees incurred and meeting the tax liability, if any.

Before actual transfer of the funds, the applicant approached the AAR for a ruling on whether the settlement amount payable under the stipulation to the QSF was liable to TDS under section 195 of the Act.

Ruling in favour of the Revenue, AAR held that the settlement amount constituted 'income from other sources' in the hands of QSF, under Article 23(3) of the Indo-US DTAA. Thus, the 3 applicants were required to withhold tax under section 195 of the Act, before the fund was distributed. Having held that the income arose in India and observing that the Lead Counsel was a resident of the USA, the AAR held that the receipts under class action suit were squarely covered by Article 23(3) of the Indo-US DTAA.

Against the aforesaid AAR, a writ was filed before Delhi HC. HC had set-aside the above AAR ruling and remanded matter back to AAR to firstly examine whether the aforementioned receipts were in nature of revenue or capital and then determine chargeability under the Act.

Further AAR rejected Revenue's stand that amount was taxable under the head 'income from other sources'. AAR noted that Section 56(1) contemplates only such source which does not specifically fall under any one of other four heads of income. AAR held that the income in the nature of settlement amount in lieu of surrender of 'right to sue' was not covered in this section.

Thus AAR disagreed with earlier AAR ruling in applicant's case and held that amount was not taxable under section 56 of the Act. However, as TDS under section 195 of the Act was already deducted pursuant to co-ordinate bench order, AAR clarified that the remedy for this was available in Income-tax Act for the payee to claim refund and for that appropriate action will have to be taken.

Lead Counsel of Qualified Settlement Fund (QSF). In RE (2016) 381 ITR 1 / 237 Taxman 667 / 283 CTR 361 / 130 DTR 369 (AAR)

2062 **S. 195 : Deduction source – Penalty paid to Government of USA pursuant to order of court in USA for violations of securities law in that country – No tax liability – No tax required to be deducted at source.**

That unless the payment made attracts tax under the law in India, there would be no liability to deduct tax u/s. 195 of the Act. A penalty ordered by the U. S. court can never attract any tax nor would such a payment made by the applicant attract any tax liability. The payment being penalty as ordered by the court of competent jurisdiction could never attract any such tax liability. Hence, the applicant would not be required to deduct any such amount u/s. 195.

Satyam Computer Services Ltd., In re (2016) 380 ITR 189 / 236 Taxman 199 / 282 CTR 41 (AAR)

S. 196. Interest or dividend or other sums payable to Government, Reserve Bank or certain corporations.

S. 196 : Deduction at source – Provision not applicable – Payable to Government – Non-deduction of tax at source. [S. 196(i)] 2063

The assessee had obtained a loan from Punjab Agro Industrial Corporation (PAIC). The assessee had made a provision for interest payment to the extent of ₹ 48,00,000/- in its books, however no payment was made. No tax was deducted at source in respect of the provision made in the books. The AO passed the order under section 201(1)/201(1A) holding the assessee as assessee-in-default and consequently raised a demand of TDS and also interest. It was the submission of the assessee that the no tax was required to be deducted as the payment is made to the Government as the corpus of PAIC was formed by the Government from which payment was made. The assessee had relied upon a certificate from PAIC to that extent which also said that the income from the corpus belongs to the Government. The contentions were rejected both by the CIT(A) and ITAT. On appeal, it was held by the High Court that the certificate relied upon by the assessee is a self-serving certificate not substantiated by any other corroborative evidence. Therefore, it was held that it cannot be said that the payment was made to the Government and therefore, section 196(i) was held not to be applicable. (AY. 2008-09)

Council for Citrus and Agri Juicing in Punjab v. CIT (TDS) (2016) 236 Taxman 489 (P&H)(HC)

S. 196C. Income from foreign currency bonds or shares of Indian company.

S. 196C : Deduction at source – Income from foreign currency bonds or shares of Indian company – Interest paid on FCCBs issued by it to bond holders outside India – Not liable to deduct tax at source – DTAA-India-UK. [S. 9(1)(v)(b), 115AC, 201(1), 201(IA), Art. 5(2), 12] 2064

Assessee, an Indian company, issued FCCBs to non-residents and utilized proceeds of said FCCBs for acquisition of foreign subsidiaries outside India. Assessee remitted interest on said FCCBs to foreign bond holders but did not deduct TDS on same. AO held that the income of bond-holders was liable to TDS under section 196C accordingly passed an order invoking provisions of section 201(1)(IA). On appeal CIT(A) held that interest paid by assessee on its FCCBs is covered by exception to section 9(1)(v)(b) and consequently, it fell outside ambit of deemed income arising and accruing in India and as a result out of section 5. On appeal the Tribunal held that dismissing the appeal of revenue the Tribunal held that where assessee-company paid interest on FCCBs issued by it to bond-holders outside India, said income squarely fell under exclusion clause of sub-section (1)(v)(b) of section 9, and, consequently, it could not fall within ambit of section 5(2). (AY. 2005-06, 2007-08, 2010-11)

Suzlon Energy Ltd. v. ACIT (2016) 156 ITD 7 (Ahd.)(Trib.)

S. 197. Certificate for deduction at lower rate.

2065 **S. 197 : Deduction at source – Application for certificate of deduction at lower rate – Payer cannot be treated as assessee in default for non deduction of tax at source as lng as certificate issued is in force. [S. 195, 201]**
Dismissing the appeal of the revenue, the Court held that there is no obligation on part of payer to pay tax as long as certificate issued is in force and not cancelled, hence the payer cannot be treated as assessee in default. (AY. 2003-04, 2004-05)
CIT v. Bovis Lend Lease (India) (P.) Ltd. (2012) 208 Taxman 168 (Karn.)(HC)
Editorial : SLP of revenue is dismissed; CIT v. Bovis Lend Lease (I) Ltd. (2016) 241 Taxman 312 (SC)

2066 **S. 197 : Deduction at source – Application for certificate of deduction at lower rate – Amendment with effect from 1-4-2011 – AO entitled to issue certificate if tax liability of person justifies deduction of tax at lower rate or no deduction – Direction to assessee to move competent authority.**
Allowing the petition, the Court held that the exemption for the deductor not to deduct tax in terms of Rule 28AA of the Rules was to be considered by the competent authority. Substantial change was made in Rule 28AA of the Rules and the AO was entitled to issue a certificate if the tax liability of the person justified deduction of tax at lower rate or no deduction of tax. The earlier restriction imposed under Rule 28AA of the Rules was taken away by the present amendment. Therefore, it was for the assessee who was involved in such transactions to approach the AO concerned and seek necessary concession in terms of Rule 28AA of the Rules.
Central Advertising Agency v. UOI (2016) 389 ITR 320 (Ker.)(HC)

S. 199. Credit for tax deducted.

2067 **S. 199 : Deduction at source – Joint venture – Credit for tax deducted – Assessee got civil contract work from State Government – Awarded same to sub-contractor without margin – No contract between State Government and sub-contractor – Income from contract assessable in assessee's hands – Credit for TDS to assessee and not to sub-contractor. [S. 194C, R. 37BA]**
The assessee was a joint-venture executing civil contract works which was received from State Government. Subsequently, those contracts were sub-contracted on a back to back basis without any margin. TDS deducted by State Govt. thereon was claimed by assessee in return of income. AO opined that since the contract was further subcontracted, no real work was carried on by the assessee; no income had accrued to it and, thus, credit for TDS was not allowable in hands of assessee. On Writ, the High Court held that legal contract was between assessee and State Government and the income was also assessable in hands of assessee, credit of tax should also be given to assessee and not to sub-contractor (AY. 2010-11 to 2012-13)
IVRCL-KBL(JV) v. ACIT (2016) 386 ITR 564 / 239 Taxman 152 / 133 DTR 234 / 289 CTR 111 (T& AP)(HC)

S. 199 : Deduction at source – Credit for tax deducted – Assessee following cash system of accounting, would be entitled to credit of entire amount of TDS being offered as income in year of deduction [S. 145, 198, R. 37BA] 2068

Allowing the appeal of the assessee, the Tribunal held that the assessee following cash system of accounting, raised invoice on his client for services. Said client deposited TDS to credit of account of assessee and issued a certificate of TDS to assessee. TDS deducted by deductor on behalf of assessee and offered as income was to be allowed as credit in year of deduction of tax deducted at source. (AY. 2011-12)

Chander Shekhar Aggarwal v. ACIT (2016) 157 ITD 626 (Delhi)(Trib.)

S. 200A. Processing of statements of tax deducted at source.

S. 200A : Deduction at source – Processing of statements of tax deducted at source – Shortfall – Non-resident eligible for DTAA benefit – No scope for deduction of tax at source at 20 per cent even though PAN of non-resident recipients were not furnished by assessee u/s. 206AA. 2069

The assessee made payments to non-residents and deducted tax at source in accordance with the provisions of DTAA. The AO made adjustment under section 200A on account of short deduction of TDS in respect of payments to non-residents on the ground that the assessee had not furnished PAN of non-resident recipients. On appeal to Tribunal, it was held that the provisions relating to deduction at source have to be read along with DTAA for computing the tax liability on the sum and therefore when the recipient was eligible for the benefit of DTAA, there was no scope for deduction of tax at source at 20% as provided under the provisions of Section 200A. It was beyond the scope of provisions of Section 200A. (AY. 2011-12)

Wipro Limited v. ITO (IT) (2016) 47 ITR 404 (Bang.)(Trib.)

S. 201. Consequences of failure to deduct or pay.

S. 201 : Deduction at source – Levy of interest – No limitation prescribed for passing order – Order should be passed within four years. [S. 194I, 201(1), (201(IA)] 2070

Though no period of limitation is prescribed for exercising power under section 201(1) and (1A), still if such power is not exercised within a reasonable period, it would become time-barred. The period of four years is reasonable. The court cannot legislate but the AO also cannot be given unfettered powers, which he can exercise even beyond the reasonable period of four years.

CIT(TDS) v. Anagram Wellington Assets Management Co. Ltd. (2016) 389 ITR 654 / 73 taxmann.com 164 (Guj.)(HC)

2071 **S. 201 : Deduction at source – Failure to deduct tax at source – Levy of interest – No limitation provided prior to 1-4-2010 – Four years period from end of relevant financial year would be a reasonable period for initiating action – Levy of interest in respect of assessment year 2002-03 in the year 2008 was held to be barred by limitation – Liability to pay interest under section 201(IA) would end on date when such tax has been deposited by recipient, either by way of advance tax or along with return of income. [S. 194I, 201(IA)]**

Dismissing the appeal of revenue the Court held that admittedly, at the relevant time relating to the assessment year 2002-03, there was no limitation provided for initiating proceedings under section 201. In the case of K, the assessment for the relevant assessment year 2002-03 was completed under section 143(3) of the Act on February 28, 2005, where the receipt of the amount from the assessee had been disclosed and the requisite tax had presumably been paid by the recipient. The question of deduction of tax at source or payment thereof was not raised by the Revenue at that time. In the case of the assessee also, the assessment proceedings for the assessment year 2002-03 had again been completed, in which the payments made to K had been disclosed. The question of not having deducted tax at source and deposited it with the Department, was also not raised at that stage. The Tribunal had held that four years period would be a reasonable period of time for initiating action. The Tribunal was correct in holding that the order passed under section 201(1) and (1A) of the Act on January 28, 2008 for the assessment year 2002-03, would be barred by limitation. Court also held that the provision for payment of interest would arise from the date when it ought to have been deducted, i.e., from the date of payment by the payer to the recipient. The liability to pay interest would end on the date when such tax has been deposited by the recipient, either by way of advance tax or along with the return of income. (AY. 2002-03)

CIT (TDS) v. Bharat Hotels Ltd. (2015) 64 Taxmann.com 325 / (2016) 384 ITR 77 / 288 CTR 682 / 140 DTR 95 (Karn.)(HC)

Editorial : Order of the Income-tax Appellate Tribunal in the case of Tax Recovery Officer v. Bharat Hotels Ltd. (2009) 318 ITR 244 (AT)(Bang.) is affirmed.

2072 **S. 201 : Deduction at source – Failure to deduct or pay – Deductees had filed their returns and had paid tax in terms of assessment – Held, in view of proviso to section 201(1) if deductees have paid taxes on the amount on which deductors have failed to deduct tax at source, demand raised consequent to 201(1) proceedings cannot be enforced [S. 221, 226]**

The assessee was a department of the State Government. It had made certain payments to two Corporations, namely, BRPNNL and BSRDCL, on which it failed to deduct tax at source. In 201(1) proceedings, the AO treated the assessee as assessee-in-default and raised demand. Assessee filed an appeal before the CIT(A) and simultaneously filed an application for stay of demand before the ACIT(TDS) and CIT(A). ACIT(TDS) rejected the request for stay and attached the accounts of the assessee maintained with the District Treasury Officer, for recovery of the whole amount in dispute. Assessee filed a writ petition challenging the rejection of stay and attachment of its account. High Court, after considering the Circular No. 275/201/95-IT(B) dated 29.01.1997, judgment of the Hon'ble Supreme Court in case of *Hindustan Coca Cola Beverage (P.) Ltd. v. CIT*

(2007) 293 ITR 226 (SC) and the proviso to section 201(1), held that a person, who fails to deduct, whole or part of the tax at source, shall not be deemed to be an assessee in default if in respect of such tax, the deductee has furnished his return of income u/s 139 of the Act and, while furnishing the return, has taken into account such sum for computing income in such return and has paid the tax due on the income declared by him in such return. In view of the above conclusion, the High Court directed the CIT(A) to take up the appeal at the earliest and if it was found that the taxes have been paid by deductees, then to set aside the demand and to vacate the attachment of account. (AY. 2012-13 to 2014-15)

Nai Rajdhani Path Pramandal v. CIT (TDS) (2016) 384 ITR 328 / 238 Taxman 281 (Patna) (HC)

S. 201 : Deduction at source – Failure to deduct or pay – Time limit for passing order – Amendment by Finance (No. 2) Act, 2014 – increase in limitation period to 7 years for passing order u/s. 201 – Held, not retrospective – Held, amendment will not apply to those years, in whose case time limit for passing order u/s. 201 as on 1/10/2014 has expired as per the existing law – Held notices issued u/s. 201(1)/(1A) were to be quashed. [S. 201(IA)] 2073

The assessee was served with notices u/s. 201(1)/(1A) in December, 2014 in connection with TDS proceedings concerning AY 2008-09 and 2009-10. The assessee contended that section 201(3) inserted *vide* Finance (No. 2) Act, 2009 with effect from 1/4/2010 provided period of limitation of two years from the end of financial year in which TDS statement is filed since assessee regularly filed TDS statements, period for passing order u/s. 201(3) for relevant assessment years expired on 31-3-2011/2012. Hence, assessee submitted that the notices issued in December, 2014 were time-barred. AO held that the revised time limit of 7 years prescribed by the Finance (No. 2) Act, 2014 shall apply. High Court held that Finance Act, 2012 amended the provision of section 201(3) on 28/05/2012 and was specifically made applicable retrospectively w.e.f. 11/4/2012, whereby limitation period was substituted from four years to six years for passing orders where TDS Statement had not been filed. However, section 201(3) as amended by Finance Act No. 2 of 2014, as mentioned in the memorandum of the Finance Bill No. 2 of 2014 was stated to have effect from 1/10/2014. Thus, it was held that wherever the Parliament/Legislature wanted to make provisions applicable retrospectively, it had been so provided. High Court held that proceedings for FYs 2007-08 and 2008-09 had become time barred and for the aforesaid financial years, limitation u/s. 201(3)(i) had already expired on 31/03/2011 and 31/03/2012, respectively, much prior to the amendment in section 201 as amended by Finance Act, 2014 and therefore right had accrued in favour of the assessee. It was therefore held that notices issued u/s. 201(1)/(1A) were to be quashed. (AY. 2007-08, 2008-09)

Tata Teleservices v. UOI (2016) 385 ITR 497 / 238 Taxman 331 / 284 CTR 337 (Guj.)(HC)

2074 **S. 201 : Deduction at source – Failure to deduct or pay – Limitation – CBDT Circular 5/2010 for expanding time limit of pending cases cannot be interpreted to allow declaration of assessee in default beyond 4 years prior to 31.03.2011. Circular No. 5 of 2010 [S. 201(1), 201(1A), 201(3)]**

Proceedings under section 201 were initiated against assessee for non-deduction of tax for four years prior to 31.03.2011 by declaring assessee as assessee in default. Department relied on CBDT Circular 5 of 2010 interpreting that it clarifies that the proviso to section 201(3) was meant to expand the time limit for completing the proceedings and passing orders in relation to 'pending cases' has to be harmoniously construed with section 201(3) to glean an intention to permit the department to initiate cases four years earlier than 31-3-2011. On appeal High Court held that the circular is at best an external aid and harmonious interpretation is not required thereof. Also Circular gives an instance of contrary understanding of the legal position by the department itself. The proviso to section 201(3) was meant to expand the time limit for completing the proceedings and not to enable it to initiate proceedings to declare an assessee to be an assessee in default for a period earlier than four years prior to 31st March, 2011. (AY. 2003-04 to 2005-06)

Vodafone Essar Mobile Service Ltd. v. UOI (2016) 385 ITR 436 / 238 Taxman 625 / 285 CTR 48 / 133 DTR 57 (Delhi)(HC)

Tata Teleservices Ltd. v. ACIT (2016)385 ITR 436 / 238 Taxman 625 / 285 CTR 48 / 133 DTR 57 (Delhi)(HC)

2075 **S. 201 : Deduction at source – Failure to deduct or pay – Limitation – The amendment to s. 201(3) by FA 2014 to extend the time limit for passing s. 201 orders is prospective and does not apply to cases which are already time-barred. A show-cause notice involving a pure point of law can be challenged in a Writ Petition. [S. 201(3), Constitution of India, Art. 226]**

The High Court had to consider whether section 201(3) of the Income-tax Act as amended on 1/10/2014 by Finance Act of 2014 would be applicable retrospectively or prospectively and whether the said provision would be applicable with respect to the proceedings under the Income Tax Act for A.Y. 2008-09 and 2009-2010, the proceedings which had already become time barred in view of the provisions of section 201(3) of the Act prior to amendment in section 201(3) of the Act by Finance Act 2014. HELD by the High Court:

(i) Though the petitioners have challenged the impugned notices/summonses issued under section 201 of the Income-tax Act and the revenue has raised objection against the maintainability and/or entertainability of the present petitions against the Show Cause Notice, it is required to be noted that in the present case, the issue involved is pure question of law, more particularly as to whether, section 201(3) as amended by Finance Act (No. 2) 2014 would be applicable retrospectively or not? Under the circumstances, when pure question of law is involved, petitions cannot be dismissed solely on the ground that the present petitions are against the Show Cause Notices *(Harbanslal Sahnia and another Versus Indian Oil Corpn. (2003) 2 SCC 107 (para 7)* and *Filterco and another v. Commissioner of Sales Tax, Madhya Pradsesh and another, reported in (1986) 24 ELT 180 SC* followed);

(ii) Section 201(3) of the Act as amended by Finance Act, 2012 amended on 28/5/2012 was specifically made applicable retrospectively w.e.f. 1/14/2012, whereby limitation period was substituted from four years to six years for passing orders where TDS Statement had not been filed. However, section 201(3) of the Act as amended by Finance Act No.2 of 2014, as mentioned in the memorandum of the Finance Bill No.2 of 2014 is stated to have effect from 1st October, 2014. Thus, wherever the Parliament/Legislature wanted to make provisions applicable retrospectively, it has been so provided. While making amendment in section 201(3) of the Act by Finance Act No.2 of 2014, does not so specifically provide that the said amendment shall be made applicable retrospectively. On the other-hand, it is specifically stated that the said amendment will take effect from 1/10/2014. As observed hereinabove, in the present cases, limitations provided for passing order under section 201(1) of the Act for AY. 2007-08 and 2008-09 had already been expired on 31/3/2011 and 31/3/2012, respectively, i.e. prior to section 201(3) came to be amended by Finance Act No.2 of 2014.

(iii) An accrued right to plead a time barred which is acquired after the lapse of the statutory period is in every sense a right even though it arises under an Act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation unless such a construction is unavoidable.

(iv) Considering the law laid down by the Hon'ble Supreme Court in the aforesaid decisions, to the facts of the case on hand and more particularly considering the fact that while amending section 201 by Finance Act, 2014, it has been specifically mentioned that the same shall be applicable w.e.f. 1/10/2014 and even considering the fact that proceedings for F.Y. 2007-08 and 2008-09 had become time barred and/or for the aforesaid financial years, limitation under section 201(3)(i) of the Act had already expired on 31/3/2011 and 31/3/2012, respectively, much prior to the amendment in section 201 as amended by Finance Act, 2014 and therefore, as such a right has been accrued in favour of the assessee and considering the fact that wherever legislature wanted to give retrospective effect so specifically provided while amending section 201(3) (ii) of the Act as was amended by Finance Act, 2012 with retrospective effect from 1/4/2010, it is to be held that section 201(3), as amended by Finance Act No.2 of 2014 shall not be applicable retrospectively and therefore, no order under section 201(i) of the Act can be passed for which limitation had already expired prior to amended section 201(3) as amended by Finance Act No. 2 of 2014. Under the circumstances, the impugned notices/ summonses cannot be sustained and the same deserve to be quashed and set aside and writ of prohibition, as prayed for, deserves to be granted. (AY. 2007-08, 2008-09)

Tata Teleservice v. UOI (2016) 385 ITR 497 / 132 DTR 1 / 284 CTR 337 / 238 Taxman 331 (Guj.)(HC)

Troikaa Pharmaceuticals Ltd. v. UOI (2016) 385 ITR 497 / 132 DTR 1 / 284 CTR 337 / 238 Taxman 331 (Guj.)(HC)

2076 **S. 201 : Deduction at source – Failure to deduct or pay – e-TDS return due to which tax demand had became nil, which was not considered by the lower authorities, matter was remanded. [S. 201(1), 201(IA)]**
Tribunal held that, the lower authorities have not considered; e-TDS return due to which tax demand had became nil, which was not considered by the lower authorities, matter was remanded. (AY. 2008-09)
ACIT v. BA Continuum India P. Ltd. (2015) 40 ITR 149 / 70 SOT 332 (Hyd.)(Trib.)

2077 **S. 201 : Deduction at source – Failure to deduct or pay – Proceedings were pending as on date when proviso to section 201(3) was inserted by Finance Act No. 2 of 2009 with effect from 1-4-2010, hence the order was not barred by limitation. [S. 201(IA)]**
Assessing Officer initiated proceedings under section 201/201(1A) on 9-2-2007 and passed order on 10-3-2011 holding assessee to be assessee-in-default. Tribunal held that since proceedings were pending as on date when proviso to section 201(3) was inserted by Finance Act No. 2 of 2009 with effect from 1-4-2010, said proviso was clearly applicable to assessee's case which mandates that order for financial year commencing on or before first day of April 2007, may be passed at any time on or before 31-3-2011, therefore assessment order passed on 10-3-2011 could not be regarded as barred by limitation. (AY. 2005-06)
ITO v. Uttar Pradesh Financial Corporation (2016) 143 DTR 213 / 181 TTJ 927 (Luck.) (Trib.)

2078 **S. 201 : Deduction at source – Failure to deduct or pay – Wrong deduction – Assessee deducted TDS under wrong provision resulting in lower deduction of tax but deductee paid tax on such payments by including it in its income, assessee was not to be treated as assessee-in-default although he would be liable for interest on such payments.**
The AO raised demand with interest for amounts on which assessee deducted TDS in wrong provision resulting in lower deduction of tax. CIT(A) directed A.O. to reduce demand and interest for amounts which were included by deductees in their incomes and on which due taxes were paid. Assessee should not be held liable for amounts which were taken into account for computing income and on which tax had been paid by deductee. However, assessee would be liable to pay interest under sub-section (1A) from date on which such tax was deductible to date of furnishing of return of income by deductee. (AY. 2009-2010)
Dish TV India Ltd. v. ACIT (2016) 157 ITD 1096 / 177 TTJ 752 (Delhi)(Trib.)

2079 **S. 201 : Deduction at source – Failure to deduct or pay – *Bona fide* belief that TDS not deductible – Held liable to pay interest of non-deduction of tax at source. [S. 201(1A)]**
Assessee hotel realized tips from its customers and paid the same to the employees without deducting TDS. Since, the order passed by the AO(TDS) for all the years under section 201(1) was waived by the CIT(A) but the assessee is liable for interest under section 201(1A) in respect of non-deduction of tax at source from tips given to its staff. (AY. 2006-07, 2007-08)
C. J. International Hotels Ltd. v. Addl. CIT (2016) 158 ITD 287 / 177 TTJ 447 / 137 DTR 289 (Delhi)(Trib.)

S. 201 : Deduction at source – Failure to deduct or pay – Short deduction of tax – Recipients disclosing amount received from assessee in returns filed by them for relevant AY – Assessee not treated as assessee in default – AO directed to verify whether taxes paid by recipients – Assessee liable to pay interest till date of payment of taxes by recipients. 2080
The AO found that the assessee had not deducted tax at appropriate rate. The CIT(A) held that onus was on the assessee to satisfy the AO that tax had been duly paid by the recipients. The confirmation issued by the recipient companies did not specify whether they had paid taxes on the amounts received from the assessee. He therefore, upheld the action of the AO in treating the assessee in default and raising the demand u/s. 201(1).
On appeal, the Tribunal held that it was clearly evident that recipient companies had admitted the fact that the amounts received from the assessee which were subject to tax deduction at source had been shown by them in the returns filed for the AY. Therefore, the assessee could not be treated as an assessee in default. The AO was directed to verify whether tax had been paid by the recipients in respect of the amount received by them from the assessee and if upon such verification it was found that they had paid tax on the amount received by them from the assessee, the assessee could not be treated as an assessee in default. However, the assessee is liable to pay interest u/s. 201(1A) till the date of payment of taxes by the recipients on the income received by them from the assessee. (AY. 2009-10)
Wockhardt Hospitals Ltd. v. ACIT(TDS) (2016) 46 ITR 259 (Mum.)(Trib.)

S. 206AA. Requirement to furnish Permanent Account Number.

S. 206AA : Requirement to furnish Permanent Account Number – Wrong submission of PAN – Raising the demand on deductor on failure to apply 20 per cent TDS rate as payee furnished wrong PAN was held to be justified. [S. 194C] 2081
Assessee made payments to different persons after deducting tax at source u/s. 194C. One of recipient submitted wrong PAN to assessee, and due to such mistake, AO raised a demand by applying 20% TDS rate in place of rate prescribed u/s. 194C. Tribunal held that the assessee had failed to discharge its obligation to verify correct PAN and it was only at time of processing of TDS return that department noticed submission of incorrect PAN and thereafter raised impugned demand, this *non obstante* provisions contained in s. 206AA(1) which override s. 194C. (AY. 2011-12)
Office of XEN, PHED v. ITO (2016) 161 ITD 373 / (2017) 183 TTJ 283 (Jaipur)(Trib.)

S. 206AA : Requirement to furnish Permanent Account Number – it is not automatic that a flat rate of 20 per cent shall be applied wherever PAN is not furnished – Matter remanded. [S. 192] 2082
Assessee-company deducted tax at source under section 192 in respect of salary of employees who failed to furnish their correct PAN. Assessing Officer applied a flat rate of 20 per cent as per section 206AA in respect of those cases and held assessee liable for short deduction of TDS. On appeal Tribunal held that it is not automatic that a flat rate of 20 per cent shall be applied wherever PAN is not furnished. In view of aforesaid legal position, impugned order was to be set aside and, matter was to be remanded back for disposal afresh. (AY. 2011-12, 2013-14)
Rashtriya Ispat Nigam Ltd. v. Add. CIT (2016) 157 ITD 366 / 176 TTJ 747 / 132 DTR 1 (Visakha)(Trib.)

2083 **S. 206AA : Requirement to furnish Permanent Account Number – S. 90(2) overrides S. 206AA and so the assessee is required to deduct TDS as per the DTAA and not as per s. 206AA. The issue is debatable and so cannot be rectified by the AO u/s. 200A [S. 90(2)].**

(i) 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. Section 206AA of the Act does not override the provisions of section 90(2) of the Act and in the payments made to non-residents, the assessee correctly applied the rate of tax prescribed under the DTAAs and not as per section 206AA of the Act because the provisions of the DTAAs was more beneficial.

(ii) The explanation below sub-section-1 of Section 200A of the IT Act, which clarifies that in respect of deduction of tax at source where such rate is not in accordance with provisions of this Act can be considered as an incorrect claim apparent from the statement. However, in the case in hand, it is not a simple case of deduction of tax at source by applying the rate only as per the provisions of Act, when the benefit of DTAA is available to the recipient of the amount in question. Therefore, the question of applying the rate of 20% as provided u/s. 206AA of the IT Act is an issue which requires a long drawn reasoning and finding. Hence, we are of the considered opinion, that applying the rate of 20% without considering the provisions of DTAA and consequent adjustment while framing the intimation u/s. 200A is beyond the scope of the said provision. Thus, the AO has travelled beyond the jurisdiction of making the adjustment as per the provisions of Section 200A of the IT Act, 1961. (ITA No. 1544 to 1547/Bang/2013, dt. 12.02.2016) (AY. 2011-12)

Wipro Ltd. v. ITO (Bang.)(Trib.); www.itatonline.org

S. 206C. Profits and gains from the business of trading in alcoholic liquor, forest produce, scrap, etc.

2084 **S. 206C : Collection at source – Trading – Alcoholic liquor – Forest produce – Scrap – Mere delay in furnishing Form 27C would not make assessee liable for non-collection of TCS under section 206C(1A).**

Dismissing the appeal of revenue the Court held that section 206C(1A) itself does not provide for any time limit within which declaration in Form 27C is to be made. High Court further held that the main thrust of sub-section (1A) of section 206C thus is to make a declaration as prescribed, upon which, the liability to collect tax at source under sub-section (1) would not apply. When there was no dispute about such a declaration being filed in a prescribed format and there was no dispute about the genuineness of such declaration, mere minor delay in filing the said declaration would not defeat the Assesse's claim. Thus the High Court dismissed the Department's appeal and ruled in favour of the Assessee.

CIT(TDS) v. Siyaram Metal Udyog (P) Ltd. (2016) 240 Taxman 578 / 289 CTR 649 (Guj.) (HC)

Editorial: SLP is granted to the revenue; CIT (TDS) v. Siyaram Metal Udyog (P) Ltd. (2017) 246 Taxman 376 (SC), CIT v. Siyaram Metal Udyog (P) Ltd. (2017) 245 Taxman 267 (SC)

S. 206C : Collection at source – Scrap – The words 'waste and scrap' in clause (b) to explanation to section 206C of the Act is a singular item – Assessee was not required to collect tax a source on mere scrap as the same was not covered by clause (b) of the Explanation to section 206C. 2085

The assessee had made sales of scrap, however no tax was collected at source on sale of scrap by the assessee. Therefore the Assessing Officer held that as a consequence of non-compliance of provisions of section 206C of the Act, the assessee was liable to pay tax and interest under section 206C(7) of the Act.

The Tribunal noted that the assessee is engaged in ship breaking activity and the items in question are finished products obtained from the activity and constitute sizeable chunk of production done by ship-breakers. Tribunal ruled in favour of the Assessee treating the sale of scrap out of the scope of section 206C and hence it was not required to collect tax at source. It was held that "waste and scrap" must be from manufacture or mechanical working of material which is definitely not usable as such because of breakage, cutting up, ware and to other reasons. The word "is" as used in the definition of Scrap, in explanation to section 206C, is meant for singular term i.e. "waste and scrap" and hence sale of scrap, which is not part of manufacturing activities would not be regarded as 'waste and scrap' and thereby not liable for tax collection at source. Aggrieved the Revenue filed an appeal before the High Court.

The High Court noted that the products may be commercially known as 'scrap' they are definitely not 'waste and scrap', as such items are usable as such and therefore do not fall within the definition of scrap as envisaged in the Explanation to section 206C(1) of the Act. From plain reading of the explanation it is evident that any material which is usable as such would not fall within the ambit of the expression "scrap" as envisaged under the clause. High Court upheld the order of the Tribunal and dismissed the appeal filed by the Revenue. (AY. 2005-06)

CIT v. Priya Blue Industries Pvt. Ltd. (2016) 381 ITR 210 / 237 Taxman 1 / 135 DTR 163/ 286 CTR 210 (Guj.)(HC)

S. 206C : Collection of tax at source – Breaking ship – Dealer in scrap generated from breaking of ship is liable to deduct tax at source. 2086

Tribunal held that assessee dealing in scrap generated from breaking of ship and had purchased scrap, assessee would be liable to deduct tax at source on sale of scrap. It was not necessary that such mechanical working (breaking of ship) should be carried out by assessee himself. Since said material/goods came from breaking of ship and these goods were sold to manufacturer/rerolling mills as scrap and goods (scrap) sold by assessee could not be used as such without any modification by buyer, assessee was liable to deduct tax at source. (AY. 2008-09, 2009-10)

Chandmal Sancheti v. ITO (2016) 160 ITD 313 / 181 TTJ 906 (Jaipur)(Trib.)

S. 206C : Collection of tax at source – No time limit is provided, for furnishing form, hence delay in filing declaration shall not be ground to deny benefit of declaration to assessee. [R. 37, Form 27] 2087

Tribunal held that appeal is continuation of assessment proceedings, thus, where assessee had filed declaration at appellate stage in prescribed format by disclosing all

information under Form 27 r.w. rule 37 of rules, for non-collection of TCS, benefit of declaration was to be given to assessee. Provision of sub-section (1A) of s. 206C does not prescribe consequences of delayed filing of declaration and, therefore, assessee could not have been penalized for delay in filing declaration. (AY. 2008-09, 2009-10)
Chandmal Sancheti v. ITO (2016) 160 ITD 313 / 181 TTJ 906 (Jaipur)(Trib.)

2088 **S. 206C : Collection of tax at source – Interest – Where advance tax was deposited by buyer, prior to due date of TCS, no interest would be chargeable.**
Tribunal held that revenue was only entitled to recovery of interest on unpaid tax amount/deposit/short tax deposited by buyer. Matter remanded back to verify date when TCS was due by assessee/seller, date on which advance tax was paid/deposited by buyer and in case advance tax was deposited prior to due date of TCS, no interest would be chargeable; however if interest was paid after due date then interest shall be charged for intermediary period. (AY. 2008-09, 2009-10)
Chandmal Sancheti v. ITO (2016) 160 ITD 313 / 181 TTJ 906 (Jaipur)(Trib.)

2089 **S. 206C : Collection of tax at source – Scrap – Products obtained in course of ship breaking activity were usable, they do not fall under the definition of scrap for the purposes of tax collection at source.**
The assessee contended that he had sold items which were reusable products in a ship breaking activity and though the same were scarp by nomenclature, but in fact the same was not scrap. Thus, he could not be held liable to tax under section 206C. Allowing the appeal of the assessee, the Tribunal held that certain items generated out of ship breaking activity might be known commercially as 'scrap' but they are not waste and scrap. These items are reusable as such, and therefore, would not fall within the definition of 'scrap' as envisaged in the Explanation to section 206C(1). (AY. 2011-12 to 2013-14)
Dhasawala Traders v. ITO (2016) 161 ITD 142 (Ahd.)(Trib.)

2090 **S. 206C : Collection at source – Scrap – Seller is not required to collect tax at source on sale of cotton waste, Maize husk and De-oiled cake as they are by-products of the manufacturing process and could not be termed as "scrap".**
Dismissing the appeal of the revenue, the Tribunal held that the de-oiled cake was a by-product and could not be categorised as scrap or waste and it had its own market value. Generally, scrap was either thrown out or sold at a cheaper rate because it could not be used as raw material for manufacture. In the case of a by-product, it had its own market value and could be used as such. Therefore, de-oiled cake was not scrap within the meaning of the Explanation to section 206C of the Act and sale thereof was not liable to collection of tax at source.
DCIT v. Gujarat Ambuja Exports Ltd. (2016) 46 ITR 519 (Ahd.)(Trib)

2091 **S. 206C : Collection at source – Trading – Definition of Scrap – By products not scrap or waste**
The assessee was a manufacturer and exporter of agrobased products. The assessee extracted solvent from soya seeds, mustard seeds, castor seeds and cotton seeds during

which process it obtained deoiled cake which was mainly used as cattle feed. While processing maize the assessee obtained maize husk. The Assessing Officer treated the items such as cotton waste, maize husk and deoiled cake as scrap within the meaning of section 206C of the Act and since no collection of tax at source was made in terms of the provisions of section 206C of the Act on sale of cotton waste, maize husk and deoiled cake, he treated the assessee as in default. The Commissioner (Appeals) held that the byproducts could not be considered scrap or waste. The Tribunal held that (i) that the deoiled cake was a byproduct and could not be categorised as scrap or waste and it had its own market value. Generally, scrap was either thrown out or sold at a cheaper rate because it could not be used as raw material for manufacture. In the case of a byproduct, it had its own market value and could be used as such. Therefore, deoiled cake was not scrap within the meaning of the Explanation to section 206C of the Act and sale thereof was not liable to collection of tax at source.
(ii) That raw cotton was only a part of raw material which was of lower quality from which the thin yarn could not be manufactured and such thick quality cotton which would be separated at the initial warehousing stage and sold off to other yarn manufacturers including that for export. Hence, such raw cotton would not arise from manufacturing or mechanical working as it was a segregation of raw material.
(iii) That the manufacturing process suggested that the maize seeds were processed and various products like maize starch, fibre and maize oil were produced. The percentage of husk as a byproduct was close to 10 per cent and it was mainly used in poultry farm, animal food and pharma industries. Since maize husk fibre itself was subjected to various manufacturing stages and had enormous economic value, it could not be considered as a waste or scrap within the manufacturing process. The maize husk was a byproduct and could not be considered as scrap or waste as provided in the Explanation to section 206C of the Act. (AY. 2009-10 to 2012-13)
Gujarat Ambuja Exports Ltd. v. DCIT (2016) 46 ITR 519 (Ahd.)(Trib.)

S. 206C : Collection at source – Liability incurred by purchaser – AO. verified and ensured that buyer of scrap from assessee-scrap importer had duly discharged tax liability in respect of income earned in respect of goods in question, there could not be any justification of recovering tax collectible at source by assessee. 2092

TCS demands raised u/s. 206C are in nature of vicarious liabilities which survive only as long as principal liability of taxpayer remains in existence; when principal tax liability itself is extinguished, very raison d'etre of demand raised u/s. 206C ceases to hold good in law. Where it was ensured that buyer of scrap from assessee-scrap importer had duly discharged tax liability in respect of income earned in respect of goods in question, there could not be any justification of recovering tax collectible at source by assessee which was, in any event, adjustable against tax liability of buyer of scrap. (AY. 2010-11, 2011-12)
ITO v. Dudani Metal Agencies (2016) 157 ITD 1088 (Rajkot)(Trib.)

2093 **S. 206C : Collection at source – Toll plaza – Granting a project to develop a National Highway to concessionaire on BOT (Build, Operate, Transfer) basis, received only a payment of Re. 1 annually from concessionaire, on this very nominal and insignificant amount provisions could not be applied.**

Assessee (NHAI) granted a project to develop a National Highway to concessionaire (OPPL) on BOT (Build, Operate, Transfer) basis. Cost of project was to be met by OPPL through own finance and was to be recovered through collection of toll during period of lease. As per agreement, fees payable by OPPL to NHAI was Re. 1 per year during term of agreement. AO held that assessee was liable to collect TCS u/s. 206C on toll fees collected by OPPL. When concessionaire had retained toll fees collected and it was under obligation to make only payment of Re.1 annually to NHAI, then on this very minimal as well as insignificant amount provisions of s. 206C(1C) could not be applied.(AY. 2009-10 to 2011-12)

ITO v. Project Director, National Highways Authority of India (2016) 158 ITD 994 / 181 TTJ 113/ 140 DTR 286 (Nag.)(Trib.)

S. 220. When tax payable and when assessee deemed in default.

2094 **S. 220 : Collection and recovery of tax – Special Court (Trial of Offences Relating to Transaction in Securities), matter was to be remanded back to Special Court to consider revenue's objection that it had priority over said amount.**

The Special Court (Trial of Offences relating to Transaction in Securities) directed disbursement of certain sum from the attached account without hearing the case of Revenue. Against such direction, revenue preferred a review application which was dismissed by the Special Court without giving any reason or going through issue raised by Revenue. The Revenue contended that it had priority over such amounts which were directed to be disbursed. On second appeal, the SC opined that Special Court ought to have dealt with review application of Revenue on merits and decide the issue by giving detailed reason. Accordingly, the two orders of Special Court were set aside and the matter remitted back to pass fresh orders after hearing both the sides.

ACIT v. Pallav Sheth (2016) 241 Taxman 13 (SC)

2095 **S. 220 : Collection and recovery – Assessee deemed in default – Appeal pending – No automatic stay – Application for stay must be filed – Court directed the CBDT to issue direction. [S. 220(6), 246, 246A]**

Court held that the assessee admittedly had filed an appeal with an application for interim stay but the fact remained that the assessee had not approached the Assessing Officer under section 220(6) for the exercise of his discretion to defer the recovery proceedings. The scheme of the Act provides a specific remedy under section 220(6) and that remedy having not been invoked by the assessee, did not entitle him to the protection as had been prayed for on the ground of mere pendency of the appeal or till the disposal of interim stay application.

By the court : It is however open to the Central Board of Direct Taxes to issue guidance to the assessing authority to deal with matters during pendency of appeals filed under sections 246 and 246A so that the recovery of revenue of direct taxes may not suffer a setback and the assessee is equally relieved of unnecessary torture. (AY. 2012-13)

Uttar Pradesh Bhumi Sudhar Nigam Ltd. v. PCIT (2016) 387 ITR 268 (All.)(HC)

S. 220 : Collection and recovery – Waiver application – Commissioner should consider the application in judicious manner, matter was set-aside with the direction that waiver of interest was to be reconsidered. [S. 220(2A)] 2096

On appeal, the High Court referred to the decision of Supreme Court in case of *B. M. Malani v. CIT (306 ITR 196) (SC)* where it was clearly indicated that when an application is considered under section 220(2A), it has to be considered in a judicious manner. Relying on the said decision, the Court held that when the statutory authority has been given the discretion to consider whether any of the conditions specified under section 220(2A) has been complied with, it is for the said authority to take into consideration all necessary materials which had been placed before it. Accordingly, the court held that the matter requires reconsideration by the Commissioner and set-aside the matter. In the result, the court set-aside the matter and restored it to the file of Commissioner to reconsider the same.

V. M. Mathai v. CIT (2016) 242 Taxman 385 (Ker.)(HC)

S. 220 : Collection and recovery – Assessee deemed in default – Right to adjust refund was limited to the extent of 15% of demand as directed in stay petition as the appeal is pending before the Commissioner of income tax (Appeals). 2097

Allowing the petition the Court held that the assessee shall be entitled to a stay of the demand subject to its depositing the instalments as required by the stay order and that the future refunds can be adjusted only to the extent of the balance amount directed to be paid as a condition for the stay.

Jindal Steel & Power Ltd. v. PCIT (2016) 290 CTR 342 / 143 DTR 185 / (2017) 391 ITR 42 / 244 Taxman 3 (P&H)(HC)

S. 220 : Collection and recovery – Stay – When CIT(A) has taken the view in favour of assessee in earlier year stay of demand to be granted. 2098

The High Court held that stay of demand is to be granted by the Assessing Officer when, on merits, the Commissioner of Income-tax (Appeals) has taken a view in favour of the assessee in assessee's own case for the earlier assessment year. (AY. 2008-09, 2010-11, 2013-14)

Kalapet Primary Agricultural Co-op. Credit Society Ltd. v. ITO (2016) 241 Taxman 367 ((Mad.)(HC)

S. 220 : Collection and recovery – Assessee deemed in default – Waiver of interest – Waiver cannot be granted unless all the conditions are satisfied. [S. 220(2A)] 2099

The High Court refused to entertain the writ filed against the order of the Commissioner of Income-tax refusing to grant waiver of interest on the ground that the conditions prescribed therein are not satisfied and that there was nothing to place before authorities concerned to show that it was a case of genuine hardship of Assessee. (AY. 1990-91)

Haji Ramzan & Sons v. CIT (2016) 242 Taxman 380 (All.)(HC)

2100 **S. 220 : Collection and recovery – Assessee deemed in default – Stay – Assessing Officer must consider all relevant factors and pass speaking order in stay proceedings – High pitched assessment – No order by Assessing Officer in response to application for stay – Rejection of further application by Principal Commissioner – Coercive measures initiated during pendency of application for stay – Orders and coercive measures was held to be not valid.**

While the Assessing Officer had not passed any order on the applications made by the assessee under section 220(6) including not informing the assessee that the application was not being entertained, the Principal Commissioner had nowhere considered the relevant factors having a bearing on the demand raised, nor had he made any reference to the grounds stated by the assessee for keeping the demand in abeyance. Apart from the fact that the application made under section 220(6) of the Act was required to be decided by the Assessing Officer, even if the order passed by the Principal Commissioner was treated to be the one under section 220(6) of the Act, it could not be to meet the requirements laid down in Instruction No. 1914, dated February 2, 1993. During the pendency of the stay application, which had been filed almost immediately after the period stipulated in the notice under section 156 of the Act had expired, there was no warrant for the Department to resort to drastic measures of making coercive recovery without first taking a decision on the application under section 220(6) of the Act. The action of the Department in attaching the bank accounts and flats of the assessee, therefore, could not be sustained. (AY. 2011-12, 2012-13, 2013-14)

M.D. Infra Developers v. DCIT (2016) 385 ITR 82 / 240 Taxman 237 / 287 CTR 431 / 138 DTR 298 (Guj.)(HC)

2101 **S. 220 : Collection and recovery – Assessee deemed in default – Stay Petition – Strictures passed against unfair conduct of AO – AO acknowledges the application for stay of penalty but refuses to acknowledge the stay application filed – Chief CIT is directed to ensure such behavior is not repeated. High Court disposed the petition directing the Revenue to nominate another AO to hear the stay application. [S. 220(6), 246]**

AO in its Affidavit states that all stay applications are only to be filed with the ASK Centre. AO refuses the assessee to give acknowledgement to stay application however, accepts the application of stay for penalty. Subsequently, on service of writ petition on 23rd February, 2016 an immediate acknowledgement is given to the stay application dt. 17th February, 2016 received by him on 18th February, 2016. High Court passed strictures on such high-handed and unfair conduct of the AO and directed the CCIT to ensure that such behaviour of civil servants is not acceptable. Addl. CIT was directed to deal with the assessee's stay application in accordance with law. (AY. 2012-13)

Piramal Fund Management (P.) Ltd. v. Dy. CIT (2016) 383 ITR 581 / 133 DTR 250 / 286 CTR 175 (Bom.)(HC)

2102 **S. 220 : Collection and recovery – Assessee deemed in default – Reasoned order – Application for waiver of interest-Rejection of application without giving reasons and without considering contentions of assessee was held to be not valid.**

The settled legal proposition is that an order itself shall contain reasons justifying the decision taken and they cannot be supplemented by way of an affidavit. Held

accordingly, that inasmuch as the order was bereft of any reasons and further it had not dealt with the contentions raised by the petitioner in his application for waiver of interest filed under section 220(2A) of the Act, the order could not be sustained. Matter set aside to Commissioner to pass a reasoned order.
M. Bala Narasimha Reddy v. PCIT (2016) 382 ITR 307 (T&AP)(HC)

S. 220 : Collection and recovery – Assessee deemed in default – Order of Assessing Officer is unreasonably high pitched causing hardships to assessee – Assessee entitled not to be treated as being in default in respect of amount in appeal. [S. 246A] 2103
The individual filed the return which also included agricultural income, on which exemption was taken, the same was rejected by the Assessing Officer and was treated as regular income from undisclosed source. The assessee filed an appeal under section 246A of the Act which is still pending for adjudication. Since the CIT(A) did not have the powers to grant stay against the recovery of disputed demand, the assessee filed a writ petition in the High Court.
The Revenue contended that the assessee failed to prove that the agricultural activities were carried by him. Mere proof of ownership was not adequate and the burden of proving it genuine was on the assessee. Taking into the above considerations the Revenue had asked to pay 50% of the disputed demand. The Revenue also contended that the filing of appeal before the CIT(A) did not grant blanket stay to the assessee, it also relied on the CBDT Instruction No. 1914 dated 2nd December 1993 which superseded the CBDT Instruction No. 95 dated 21 August 1969 and said that the Assessing Officer had used the discretion as per the new CBDT instruction.
The assessee argued that the current assessment by the Assessing Officer was high pitched and this case fell within the ambit of sections 220(3) and 220(6) of the Act which states that the assessee could before the expiry of the due date make an application to extend the time of payment to instalments and the Assessing Officer in his discretion treat the assessee as not being in default. Assessee also referred to various case laws which held that if the Assessing Officer order was unreasonable high pitched or caused genuine hardships to the assessee then the assessee could be treated as assessee not being in default.
Thus the High Court held that the high pitched assessments made by Assessing Officer were not unknown and would cause serious prejudice to the assessee and miscarriage of justice. It was also held that the powers under sections 220(3) and 220(6) of the Act were to be exercised in accordance with the CBDT Instruction No. 95 which was binding on all the Assessing Officers. Hence the order passed by the Assessing Officer was against the principles to the various judgments and the impugned order was set aside and the Assessing Officer was directed to pass a suitable order after proving opportunity to the assessee. (AY. 2012-13)
N. Jegatheesan v. Dy. CIT (2016) 388 ITR 410 / 237 Taxman 490 / 138 DTR 17 / 287 CTR 292 (Mad.)(HC)
Editorial : The recent office memorandum issued by the CBDT dated 29th February, 2016 modified the Instruction No. 1914 dated 2nd December, 1993

2104 **S. 220 : Collection and recovery – Assessee deemed in default – Order of Commissioner (Appeals) allowing registration to assessee firm was reversed by Tribunal, benefit of waiver of interest in respect of section 220(2) would be allowed up to period provided in this order of Tribunal and it could not be restricted up to date of order of jurisdictional High Court in another case on similar issue.**

Though the assessee firm was assessed as a 'registered firm' in earlier years, for the assessment years 1991-92 and 1992-93, the assessee firm was assessed as unregistered. On appeal, the CIT(A) allowed the appeal of assessee and directed the AO to allow registration to the assessee for both the years. On further appeal, the Tribunal reversed the order of the CIT(A) and restored the order of the Assessing Officer. On demand raised under section 143(3), the assessee was made liable to pay interest under section 220(2). The assessee filed petition under section 220(2A) for waiver of interest demanded. The CIT(A) held that though the appeal filed by the Department was decided by the Tribunal in its favour on 20-5-1998, the issue was already decided by this court in *Narayanan & Co. v. CIT (1997) 223 ITR 209* / *(1996) 88 Taxman 299* by judgment dated 14-3-1996. Accordingly, the CIT(A) held that the pendency of the Departments appeal in the Tribunal against the assessee was only procedural matter and, therefore, the assessee was entitled to waiver of interest only up to March, 1996 when Narayanan & Co.'s case (supra) was decided.

On writ, the Single Judge set aside the view taken by the CIT(A). On appeal from the writ order, Section 220(2A) contains three conditions, satisfaction of which are required for the CIT(A) to reduce or waive the amount of interest, viz., (i) payment of such amount would cause genuine hardship to the assessee (ii) default in the payment of the amount on which interest is payable was due to circumstances beyond the control of the assessee and (iii) that the assessee has co-operated in any enquiry relating to the assessment or any proceedings for the recovery of any amount due from him. Reading of the order shows that the CIT(A) himself has accepted the position that in the case of the respondent, all the aforesaid conditions are satisfied. However, the CIT(A) limited the benefit of waiver only up to March, 1996 and the reason thereof is that this Court has, in Narayanan & Co.'s case (supra) decided the issue against the assessee therein by judgment dated 14-3-1996 and that the case of the respondent is covered by that judgment. Thus, though the CIT(A) has accepted that the three conditions provided for in section 220(2A) are satisfied, he has chosen to limit the benefit of waiver to a particular period. While examining the validity of that order, what is relevant to be examined is whether the reason assigned by the CIT(A) for restricting waiver is valid or not. On such examination, it is seen that in March, 1996, though this Court decided the case of Narayanan & Co. (supra), the favourable appellate order obtained by the assessee herein in an appeal filed by them, entitling them for assessment treating the firm as a registered one, was remaining valid. That order was invalidated by the Tribunal only on 20-5-1998, in the appeal filed by the revenue. In other words, it was only on 20-5-1998, the assessee became disentitled to assessment on the status of a registered firm. The fact that this court has decided the issue in the case of Narayanan & Co. (supra) is of no consequence at all till 20-5-1998 when the appeal was decided by the Tribunal. This, therefore, shows that the reason which weighed with the CIT(A) to restrict the benefit of waiver till March, 1996 is absolutely untenable. (AY. 1991-92, 1992-93)

CIT v. Muthappan Enterprises (2016) 237 Taxman 551 / *138 DTR 310 (Ker.)(HC)*

S. 220 : Collection and recovery – Assessee deemed in default – In a case where income of a local authority was assessed at nil in the past and the income was sought to be taxed during the year solely on the basis of the proviso to section 2(15), demand should be kept in abeyance at least till the disposal of the First Appeal. [S. (15)] 2105

Assessee, an urban development authority, filed its return of income declaring its income as 'Nil'. The Assessing Officer assessed the assessee's income at ₹ 4,25,77,240 and raised a demand of ₹ 1,92,73,490. The assessee made an application under section 220(6) to the DCIT(E) for keeping the demand in abeyance till the final disposal of the appeal before the CIT(A). The assessee was asked to pay the demand in 6 equal installments. In a further application made to ACIT(E) and thereafter to CIT(E), the installments payable were increased to 12 but the demand was not kept in abeyance. The DCIT(E) attached the assessee's bank accounts. The assessee agreed to make payment under protest by way of instalments. The attachment of the bank accounts was thereafter lifted. High Court observed that as the income of the petitioner was assessed at nil in the past and that the income was sought to be taxed only by resorting to the proviso to section 2(15), the lower authorities should have shown some restraint till the issue was decided at least at the level of the first appellate authority. High Court granted complete stay of balance demand as the assessee had already paid 25% of the demand. (AY. 2012-13)

Jamnagar Area Development Authority v. Principal CIT (OSD) (E) (2016) 236 Taxman 484 (Guj.)(HC)

S. 220 : Collection and recovery – Assessee deemed in default – Stay on order disposing of a stay application has to objectively consider the *prima facie* case on merits, financial hardship and balance of convenience and give reasons for the rejection. [S. 220(6)] 2106

Allowing the petition the Court held that an order disposing of a stay application has to objectively consider the *prima facie* case on merits, financial hardship and balance of convenience and give reasons for the rejection.

Maharashtra Industrial Development Corporation (MIDC) v. CIT (2016) 136 DTR 233 / 290 CTR 337 (Bom.)(HC)

S. 220 : Collection and recovery – Assessee deemed in default – Department was directed to redeposit moneys collected illegally by attachment of assessee's bank account during pendency of stay application. An order passed on a stay application must give reasons for the refusal to stay the demand. 2107

On writ the Court directed the department to redeposit moneys collected illegally by attachment of assessee's bank account during pendency of stay application. An order passed on a stay application must give reasons for the refusal to stay the demand. (AY. 2009-10)

Khandelwal Laboratories Pvt. Ltd. v. DCIT (2016) 383 ITR 485 / 238 Taxman 620 / 285 CTR 178/ 133 DTR 253 (Bom.)(HC)

2108 **S. 220 : Collection and recovery – Assessee deemed in default – Stay – Strictures passed against high-handed and unfair approach of AO (IRS Officer) in refusing to give an acknowledgement of stay application. Chief CIT directed to ensure such behaviour is not repeated. Dept. directed to nominate another AO to hear stay application. [S. 220(6)]**

Allowing the petition the Court held that; (i) We find this conduct on the part of the Assessing Officer to accept a stay application and not immediately give acknowledgement of its receipt is unacceptable. The least that is expected of a civil servant is to be fair and civil. In the absence of the above, his conduct is not one becoming of an Officer belonging to the prestigious Indian Revenue Service. The least that is expected of an Officer is that when a person files an application/letter, which is accepted by him, an acknowledgement should be forthwith given to the party filing the application or letter. In case he refuses to accept the letter he should endorse on the letter/application the reason why it is not being accepted with a line or two for the refusal to accept. In case he does accept it and give an acknowledgment he can deal with the applications/letters as is appropriate in accordance with law. We believe that what has happened in this case is an aberration. However, the Chief Commissioner of Income Tax would ensure that his Officers do not behave in such an high handed and unfair manner, not expected of civil servants.

(ii) Be that as it may, the stay application is still pending decision. Normally, we would have let the Assessing Officer decide the same. However, looking at the manner in which the petitioner has been dealt with by the Assessing Officer in regard to its stay application dated 17th February, 2016, it would be in the interest of justice that the application for stay filed by the petitioner be heard by another Officer different from the Assessing Officer i.e. respondent No.1 herein. The Officer to deal with the petitioner's stay application dated 17th July, 2016 is to be selected/nominated by the Revenue.(WP. No. 526 of 2016, dt. 17.03.2016) (AY. 2012-13)

Pirmal Fund Management Pvt. Ltd. v. DCIT (Bom.)(HC); www.itatonline.org

S. 221 : Penalty payable when tax in default.

2109 **S. 221 : Collection and recovery – Penalty – Tax in default – Deliberate and wilful default in payment of tax – No sufficient and good cause established for not levying penalty – Penalty was held to be payable.**

Dismissing the appeal the Court held that the concurrent findings recorded by the authorities had not been shown to be illegal or perverse in any manner warranting interference by the Court, consequently no substantial question of law and as no sufficient and good cause established for not levying penalty was established levy of penalty was held to be justified. (AY. 2008-09)

Satbir Nijjer v. CIT(A) (2016) 383 ITR 71 / 288 CTR 96 / 139 DTR 138 (P&H)(HC)

2110 **S. 221 : Collection and recovery – Penalty – Tax in default – Deposited TDS with interest *suo motu*, levy of penalty was held to be not justified. [S. 201]**

Allowing the appeal the Tribunal held that assessee had deposited TDS to Government Treasury with a delay of 30 days along with interest thereon *suo motu* even before any proceedings were initiated by Assessing Officer, there existed good and sufficient

reasons to mitigate default in question and, therefore, levy of penalty was not justified. (AY. 2012-13)
Kamlesh M. Kanungo HUF v. DCIT (2016) 160 ITD 331 / 182 TTJ 896 (Mum.)(Trib.)

S. 222. Certificate to Tax Recovery Officer

S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Merely because Department's appeal was admitted in the High Court, assessee cannot be held as assessee-in-default [S. 225] 2111
The assessee filed writ petitions seeking direction of the Court to quash order of attachment of immovable property passed by the Tax Recovery Officer and directed the Tax Recovery Officer to pass appropriate orders for lifting the order of attachment of the immovable property. The High Court held that merely because an appeal against the order of the Tribunal, deleting the demand raised on the assessee, was admitted by the High Court, it would not by itself make the assessee as an assessee-in-default. High Court set aside the impugned order of attachment of immovable property of the assessee. Thus, the Writ Petition of the assessee was allowed. (AY. 2009-10 to 2011-12)
Coromandel Oils (P) Ltd. v. TRO & Ors. (2016) 143 DTR 97 (2017) 244 Taxman 165 / 291 CTR 600 (Mad.)(HC)

S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – As per rules 60, 61 of the said Schedule, petitioner cannot challenge the sale unless an application to set aside the sale has been preferred and amount sought to be recovered is deposited with the Recovery Officer – Held, petitioner did not satisfy the said condition and made an application for deferment of sale – Held, not permissible. [Rules 15, 60, 61 of the Second Schedule of the Income-tax Act, 1961] 2112
The Petitioner Company had defaulted in repayment of its dues to the bank. Suit was filed in this respect. During the pendency of proceedings before the DRT, a settlement was arrived at, on the basis of which the DRT disposed of the suit. However, the petitioner did not honour the settlement so arrived at. Therefore, the Bank initiated the recovery proceedings and obtained a Recovery Certificate from DRT. Such amount was not paid by the petitioner. Accordingly, Recovery Officer auctioned off the mortgaged property and the sale proceeds were deposited. Petitioner moved an application for deferment of the said sale on the ground that one time settlement had been arrived at between the petitioner and the bank. Recovery Officer rejected the said application as it was filed after the confirmation of sale. Petitioner contended that Recovery Officer did not follow provision of Rule 15(2) of Second Schedule to the IT Act, that when the sale is adjourned for more than one month, then a fresh application of sale has to be issued. High Court held that petitioner never challenged the sale of the mortgaged property and the only challenge was against the rejection of application of deferment of sale. It was also held that under Rules 60/ 61, a person interested in the property auctioned can make an application for cancellation of the sale within 30 days of the sale subject to amount sought to be recovered is deposited with the Recovery Officer, and since in the present case, neither any such application was made, nor any amount was deposited, the petitioner cannot invoke Rule 15(2).
Usha Offset Printers (P.) Ltd. v. Bank of Maharashtra (2016) 238 Taxman 363 (Bom.)(HC)

2113 **S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Auction proceedings were conducted in accordance with the established procedure hence petition was dismissed – Incorrect valuation was kept open to be decided by the Tax Recovery Officer.**

Dismissing the petition the Court held that the Tribunal held that auction proceedings were conducted in accordance with the established procedure. The Tribunal further opined that the objection regarding correct valuation of the properties could still be considered by the Recovery Officer, which had been kept open. The Tribunal, thus, concluded that the appeal preferred by the assessee was premature and dismissed the same being devoid of merits. As regards valuation the issue was left open before the Tax Recovery Officer.

Centauto Automotives (P.) Ltd. v. Union Bank of India (2016) 236 Taxman 68 (MP)(HC)

2114 **S. 222 : Collection and recovery – Certificate to Tax Recovery Officer – Quantum appeal was decided in favour of assessee, attachment order was liable to be set aside. [S. 225]**

Since pursuant to Tribunal's order in appellate proceedings, tax demand was reduced to nil and, revenue did not file an appeal for staying of said order of Tribunal, impugned order of attachment of properties was to be set aside. (AY. 2009-10)

Shangkalpam Industries (P.) Ltd. v. ITO (2016) 161 ITD 193 (Chennai)(Trib.)

S. 226 : Other modes of recovery.

2115 **S. 226 : Collection and recovery – Modes of recovery – No bidder came forward to purchase said properties. Rule 17 would not impose any restriction on bank from participating in auction where there was no interested bidders. Auction sale in favour of bank would not be vitiated. [Second Schedule, R. 17, 59]**

The DRT directed the Recovery Officer to conduct a public auction. However, no bidders came forward to purchase the properties. Hence the bank itself had offered to purchase the properties at ₹ 43.10 lakhs and ₹ 33.10 lakh. The bank's offer was accepted and the said amount was deposited with Recovery Officer by the bank. The respondent moved to DRT against the aforesaid sale of mortgaged properties. DRT dismissed the application. On appeal, DRAT upheld the order passed by DRT. On appeal, High Court passed an order to set aside the orders of the DRT and DRAT and remanded the matter to the DRT. On appellant's appeal to the Supreme Court: Rule 17 would not impose any restriction on bank from participating in auction where there was no interested bidders. Auction sale in favour of bank would not be vitiated. Accordingly, both the grounds relied upon by the High Court to come to the impugned conclusion not having been found to be acceptable, these appeals have to be allowed. And accordingly, set aside the order of the High Court and allow these appeals.

ICICI Bank Ltd. v. Aburubam & Company (2016) 243 Taxman 72 (SC)

S. 226 : Collection and recovery – Modes of recovery – Where revenue sought recovery of dues against assessee – Sick industry who put on sale its property, as scheme of rehabilitation had expired, action of revenue was justified [Sick Industrial Companies (Special Provisions) Act, 1985 ('SICA') S. 18(9), 18(12), 22] 2116

On appeal before the Supreme Court, the Supreme Court held that the High Court proceeded on a palpably wrong presumption that the sanctioned scheme was still under operation and, therefore, bar under section 22 of the SICA applied. For this reason, it directed that the only remedy left for the revenue was to approach the Board for lifting of the bar under section 22 of the SICA. From the facts and events noted above, this surmise and assumptions are clearly erroneous and contrary to record. It is to be seen that the scheme had already expired and that the net worth of the company had turned positive and it was no more a sick company. Thus, the revenue had right to recover arrears of income tax after 2007. The issue on what would be quantum of dues that revenue has to recover from the assessee is not decided in the present appeal and the parties are permitted to approach the Board seeking clarification as to what was meant by the words 'to consider' i.e., whether the Board meant that it was mandatory on the part of the revenue to waive the interest and penalty or it was only recommendatory and, therefore, it was up to the revenue to agree or not to agree to the said request. The Income Tax Department shall be entitled to take steps for attachment of the properties of the assessee, including Mumbai unit as per the provisions of the Income-tax Act and shall be entitled to sell the same. If there are any secured creditors in respect of these properties, such attachment and sale shall be subject to the rights of those creditors. Out of the proceeds, the principal amount of tax due to the Income-tax Department and even the admitted excise dues shall be paid to the revenue. Insofar as payment of interest and penalty is concerned, that would be dependent upon the decision which the Board would give.

DGIT v. GTC Industries Ltd. (2016) 240 Taxman 209 / 286 CTR 355 / 135 DTR 337 (SC)

S. 226: Collection and recovery – Modes of recovery – Cash credit account or term loan account cannot be attached for recovery of unpaid tax. 2117

The High Court held that the cash credit account or term loan account cannot be attached for recovery of unpaid tax as it is a case where the assessee has borrowed money and therefore, it cannot be said that the amount is due from the bank to the assessee in respect of such accounts. (AY. 2011-12)

Kaneria Granito Ltd. v. ACIT (2016) 241 Taxman 315 (Guj.)(HC)

S. 234A. Interest for defaults in furnishing return of income.

S. 234A : Interest – Default in furnishing return of income – Assessee has not established that non payment of tax was on account of unavoidable circumstances hence rejection of waiver petition was held to be justified. [S.54F, 234B, 234C] 2118

Chief Commissioner of Income-tax by impugned order rejected application for waiver of interest levied under sections 234A, 234B and 234C. Dismissing the petition the Court held that assessee has not established that non-payment of tax was on account of unavoidable circumstances hence rejection of waiver petition was held to be justified. (AY. 1996-97)

Humayun Suleman Merchant v. CCIT (2016) 290 CTR 511 / 144 DTR 169 (2017) 244 Taxman 230 (Bom.)(HC)

2119 **S. 234A : Interest – Insolvency – Company in liquidation – Levy of interest under sections 234A, 234B and 234C – Waiver of interest – Insolvency court has jurisdiction to consider application. [S. 178, 234B, 234C]**

The insolvency court has full power to decide (i) all questions of priorities and (ii) all other questions whatsoever. The questions that could be decided by the insolvency court could be of law or of fact. The question whether or not interest in certain circumstances can be waived is not a matter covered by section 178, to enable the Department to take advantage of the overriding effect conferred under sub-section (6). The official assignee need not go before the Central Board of Direct Taxes praying for waiver of interest under sections 234A, 234B and 234C of the Act. The insolvency court itself could consider the question of waiver of interest in terms of the power conferred under section 7 of the Provincial Insolvency Act, 1920 and in the light of the provisions of the Income-tax Act, together with the quantum of funds available and the distribution already made.

Held, that the insolvent herself took out an application before the insolvency court for a direction to the official assignee to set apart capital gains tax. By an order passed by the court, the official assignee was directed to set apart 20% of the sale proceeds. Hence, section 178(4) of the Act had been complied with by the official assignee. The question of waiver of interest under sections 234A, 234B, 234C could be considered by the Insolvency Court.

Official Assignee, High Court, Madras v. T.R. Bhuvaneswari (2016) 385 ITR 105 / 240 Taxman 266 (Mad.)(HC)

2120 **S. 234A : Interest – Default in furnishing return of income – Self-assessment tax paid before due date of filing of return – No interest is chargeable.**

For the assessment year 2009-10, the assessee filed the return of income on November 30, 2009, whereas the due date for filing the return was September 30, 2009. The self -assessment tax was paid on various dates amounting to ₹ 40 lakhs prior to the due date for filing the return and an amount of ₹ 10 lakhs was paid on November 3, 2009, subsequent to the due date for filing the return and the balance outstanding demand was ₹ 9.6 lakhs. The Assessing Officer levied interest on the entire amount of tax under section 234A of the Income-tax Act, 1961. The Commissioner (Appeals) and the Tribunal confirmed this. On appeal:

Held, that the Circular No. 2 of 2015, dated February 10, 2015, by the Central Board of Direct Taxes provided that no interest under section 234A of the Act was chargeable on the amount of self-assessment tax paid by the assessee before the due date for filing the return. The matter was to be remanded to the Tribunal to examine the issue in the light of the judgment of the Supreme Court as well as the Circular No. 2 of 20151, dated February 10, 2015. Matter remanded. (AY. 2009-10)

Suresh Sharma v. ACIT (2016) 383 ITR 44 / 68 taxmann.com 163 (Karn.)(HC)

S. 234B. Interest for defaults in payment of advance tax.

S. 234B : Interest – Advance tax – Where receipt is by way of salary, TDS deductions u/s. 192 has to be made. No question of payment of advance tax can arise in cases of receipt by way of 'salary'. Consequently, S. 234B & 234C which levy interest for deferment of advance tax have no application. [S. 192, 234C] 2121

Allowing the appeal the Court held that where receipt is by way of salary, TDS deductions u/s. 192 has to be made. Accordingly no question of payment of advance tax can arise in cases of receipt by way of 'salary'. Consequently, S. 234B & 234C which levy interest for deferment of advance tax have no application. The appeals are allowed; the order of the High Court so far as the payment of interest under Section 234B and Section 234C of the Act is set aside. (AY. 1994-95)

Ian Peter Morris v. ACIT (2016) 389 ITR 501 / (2017) 244 Taxman 219 / 145 DTR 13 / 291 CTR 15 (SC)

Editorial : Decision of the Madras High Court in Ian Peter Morris v. ACIT, TC No. 225, 226 dt. 25-12-2012 was partly set aside.

S. 234B : Interest – Advance tax – Non-resident – ITAT remanded the matter to CIT(A) to follow the law laid down in case of DIT (IT) v. NGC Network Asia Ltd. [2009] 313 ITR 187 – Held, no substantial question of law. [S. 195, 260A] 2122

Where the ITAT restored the matter to the file of the CIT(A) and for a decision in accordance with the decision of the Hon'ble Bombay High Court in case of *DIT (IT) v. NGC Network Asia Ltd. [2009] 313 ITR 187*, held no substantial question of law arose.

DIT v. Sumitomo Mitsui Banking Corpn. (2016) 242 Taxman 378 (Bom.)(HC)

Editorial : SLP of revenue was admitted; CIT v. Sumitomo Mitsui Banking Corpn. (2016) 242 Taxman 111 (SC)

S. 234B : Advance tax – Assessed on book profit – Interest is not leviable. [S.115J, 234C] 2123

Dismissing the appeal of revenue the Court held that no interest under sections 234B and 234C of the Act, would be leviable when the income of the assessee was computed invoking the provisions of section 115J. Since the assessee had claimed depreciation in the profit and loss account on the basis of the Income-tax Rules, 1962, and not in accordance with the Companies Act, 1956, the contention raised by the assessee had been rightly accepted by the Commissioner (Appeals) and affirmed by the Tribunal and, therefore, did not call for interference.

CIT v. Cornerstone Brands Ltd. (2016) 387 ITR 455 (Guj.)(HC)

S. 234B : Interest – Advance tax – Where assessment order was silent about charging of interest u/s. 234B & 234C but was computed in ITNS 150 Computation Form, said interest can be charged, as ITNS 150 is an integral part of assessment order. [S. 234C, 263] 2124

The AO completed the assessment u/s. 142(3) / 263, but the assessment order was silent and didn't speak about charging of any interest u/s. 234B & 234C. However, the interest calculations u/s. 234B & 234C were shown *vide* ITNS 150 computation form, to compute the final demand due from the assessee. The assessee challenged the said charge of

interest u/s. 234B & 234C and also contended that the interest should have been charged on the returned income and not on the assessed income.

On First Appeal, the CIT(A) referred to the retrospective amendment in the provisions of S. 234B & 234C and held that interest was required to be levied in the assessment order and as per the statute the said interest would be with reference to the assessed income. On further appeal, the Tribunal reversed the CIT(A)'s Order and held that the interest u/s. 234B & 234C are to be deleted as they couldn't be charged in absence of any assessment order.

On Revenue's appeal, the HC held that as per the Explanation introduced by the Finance Act, 2001 w.e.f. 1-4-1989, there is a clear distinction in the Income-tax Act in the provisions of S. 234B & 234C. With regard to interest u/s. 234B, the calculation is to be made not on the returned income but on the tax as may be finally assessed and determined by the assessment and with regard to S. 234C, what is to be determined is tax due on the returned income for the purpose of calculation of the shortfall in the advance tax paid. The HC further relied on the Apex Court's decision in the case of *CIT v. Bhagat Construction Co. Pvt. Ltd. (2015) 235 Taxman 135* and held that both the provisions u/s 234B & 234C are mandatory and would apply automatically. Further, it also added that the Tribunal should have held the computation sheet and demand notice as integral parts of the assessment order and thus charging of the interest was legal and valid. (AY. 1996-97)

CIT v. Natraj Engineers (P.) Ltd. (2016) 66 taxmann.com 48 / 286 CTR 103 (Patna)(HC)

2125 **S. 234B : Interest – Advance tax – Levy of interest is mandatory and automatic even though the same was not mentioned in the assessment order. [S. 156]**

The assessee filed its return declaring certain taxable income. The Assessing Officer completed assessment under section 143(3) determining taxable income at a higher amount. The CIT(A) passed an order that so far as the charging of the interest under section 234B of the Act was concerned, the same was consequential and, therefore, the AO would recalculate the interest while giving effect to order passed by him. The Tribunal, however, held that as in the order of assessment the Assessing Officer had not charged any interest under section 234B of the Act, no such interest was chargeable.

On appeal by assessee, on the ground of levy of interest under section 234B of the Act, the High Court after considering the totality of the facts and on conjoint reading of the provisions of sections 143, 234B and 156 of the Act held that when levy of interest under section 234B is mandatory and automatic and the same is on the difference between the advance tax paid and assessed tax, AO has no discretion to levy any other interest other than provided under section 234B. Thereafter, levy of interest under section 234 would be consequential and amount of interest is required to be calculated arithmetically. Thus, even in absence of any direction with regard to section 234B by the Assessing Officer while passing assessment order under section 143(3), there can be demand and levy of interest under section 156 of the Act. It would have been a different fact if the Assessing Officer had any discretion with respect to rate of interest and/or to levy any interest considering the facts and circumstances of the case. The High Court ruled in the favour of the Revenue. (AY. 1990-91)

ACIT v. Norma Detergent (P) Ltd. (2016) 386 ITR 56 / 238 Taxman 259 / 286 CTR 505 / 132 DTR 63 (Guj.)(HC)

Nirma Chemicals and works Pvt. Ltd. v. ACIT (2016) 286 CTR 505 / 132 DTR 63 (Guj.)(HC)

S. 234B : Interest – Advance tax – Interest cannot be charged up to the date of revisional, appellate or rectification order. [S. 234B(4)] 2126

The Assessing Officer charged interest under section 234B up to the date of the order giving effect to Tribunal's order. The High Court held that section 234B clearly states that interest can be charged from 1st April of next financial year up to the date of determination of income under section 143(1) and where regular assessment is made up to the date of such regular assessment. It was also held that section 234B(4) only deals with quantum of tax and does not extend the time period for imposition of interest.

Pr. CIT v. Applitech Solutions Limited (2016) 236 Taxman 602 (Guj.)(HC)

S. 234B : Interest – Advance tax – Intimation – Period already considered in issuing intimation under section 143(1), has to be excluded while calculating interest [S. 234B(3)] 2127

Allowing the appeal of the assessee, the Tribunal held that processing under section 143(1) has to be considered as an assessment for purpose of levy of interest under section 234B(3) and, thus, period already considered in issuing intimation under section 143(1), has to be excluded while calculating interest under section 234B(3). (AY. 2005-06)

MBG Commodities (P.) Ltd. v. DCIT (2016) 50 ITR 129 / (2017) 163 ITD 130 (Hyd.)(Trib.)

S. 234B : Advance tax – Interest – Interest would be charged from end of relevant assessment year to date of 'regular assessment'. [S. 143(1), 143(3), 147] 2128

Tribunal held that intimation u/s. 143(1) is not an assessment, and assessment was made for first time u/s. 143(3) r.w.s. 147 which would fit into Explanation 2 to S.234B(1). Assessment made u/s. 143(3) on 27-6-2014 was to be regarded as 'Regular Assessment' for purpose of S. 234B and starting point for charging interest u/s. 234B would be 1-4-2011 i.e., end of relevant assessment year while end point be 27-6-2014. (AY. 2011-12)

Nuts 'n' Spices v. ACIT (2016) 159 ITD 293 (Chennai)(Trib.)

S. 234B : Interest – Advance tax – No interest u/s. 234B in case of additions made consequent to retrospective amendments. 2129

The AO made an addition to the income of the assessee consequent to a retrospective amendment by the Finance (No. 2) Act, 2009. Interest u/s. 234B was levied on the resultant tax liability. The ITAT held that no interest u/s. 234B can be levied on additions made consequent to a retrospective amendment since the Assessee cannot foresee such amendments while determining his tax liability. (AY. 2004-05 to 2006-07)

NHPC Ltd. v. ACIT (2016) 47 ITR 561 (Delhi)(Trib.)

S.234C. Interest for deferment of advance tax.

S. 234C : Interest – Deferment of advance tax – Interest u/s. 234C should be calculated on tax payable on returned income and not on revised computation of income filed at the assessment. 2130

The assessee, a Government company, filed its original return of income declaring a total income of ₹ 495.03 crores and a refund of ₹ 6.12 crores subsequent to the audit

of accounts by the CAG and adoption of the same in the AGM, a revised computation of income along with audited accounts was filed during the course of assessment. In the revised computation of income, the Assessee showed income of ₹ 228.83 crores and claimed a refund of ₹ 95.15 crores. The Assessee mentioned that ₹ 56,87,807/- was payable as interest u/s. 234C. The AO computed the income as per the revised computation of income, but charged interest u/s. 234C of ₹ 62,13,902/- based on the original return of income and not on the revised computation of income. The ITAT held that interest u/s 234C is charged for deferment of advance tax. It is charged with reference to tax due on returned income and not on revised computation of income filed subsequently by the Assessee. (AY. 2001-02, 2003-04 to 2008-09)
West Bengal Infrastructure Development Finance Corporation v. ACIT (2016) 45 ITR 285 (Kol.)(Trib.)
DCIT v. West Bengal Infrastructure Development Finance Corporation (2016) 45 ITR 285 (Kol.)(Trib.)

S. 234E. Fee for default in furnishing statements.

2131 **S. 234E : Fee – Default in furnishing the statements – TDS deducted prior to 1-6-2015, levy of fee was held to be not valid. [S. 200A, 271H]**
Allowing the petition the Court held that ; as the amendment to S. 200A has come into effect on 1.6.2015 and has prospective effect, no computation of fee for the demand or the intimation for the fee u/s. 234E can be made for TDS deducted prior to 1.6.2015. Hence, the demand notices u/s. 200A for payment of fee u/s. 234E is without authority of law. (WP No. 2663-2674/2015, dt. 26.08.2016)
Fatheraj Singhvi v. UOI (Karn)(HC); www.itatonline.org

2132 **S. 234E : Fee – Default in furnishing the statements – Provision imposing fees @ ₹ 200 per day for late filing of TDS return is Constitutionally valid – Constitutional validity not amendable to challenge on the ground of provision being too onerous or statute does not allow sufficient time or consideration of reasonable cause for violation of provision.**
The Petitioner filed a writ petition, challenging the constitutional validity of S. 234E of the Act on the ground that there is no provision for condonation of delay and also, the reason given by the Central Government as well as the IT Department for insertion of S. 200A do not justify the levy of fee u/s. 234E of the Act. Also, prior to amendment by Finance Act, 2015, there were no provision for computation of fee and appeal.
The HC held that the constitutional validity is not amenable to be challenged on the ground that the performance insisted upon by the statutory provision is too onerous or that the statute does not leave sufficient time or does not allow reasonable cause to be considered for violation of the provision. Further, the HC held that the levy of fee of ₹ 200 per day on late filing of the TDS returns, is a compensatory fee and not in the nature of penalty. It was also held that against levy of fee, though prior to Finance Act, 2015 there was no provision for computation of fee and an appeal, but thereafter, amendments have been made u/s. 200A, 246A and 272A and in view thereof, vires of S. 234E cannot be challenged.
Dundload Shikshan Sansthan & Anr. v. UOI (2015) 235 Taxman 446 (2016) 131 DTR 382 / 284 CTR 175 (Raj.)(HC)

S. 234E : Fee – Default in furnishing the statements – Power to charge/collect fees u/s. 234E was vested with revenue only on substitution of clause (c) to s. 200A *vide* Finance Act, 2015 w.e.f. 1-6-2015, hence prior to 1-6-2015 no fee could have been levied u/s. 234E while issuing intimation u/s. 200A. [S.200A] 2133

AO raised a demand by way of intimation u/s. 200A for levy of fees u/s. 234E for delayed filing of TDS statement. Power to charge/collect fees as per provisions of S. 234E was vested with prescribed authority under Act only on substitution of clause (c) to s. 200A by Finance Act, 2015 w.e.f. 1-6-2015. there was no enabling provision in S. 200A for raising demand in respect of levy of fees u/s. 234E and therefore, no levy of fees u/s. 234E effected in course of intimation u/s. 200A at relevant point of time. (AY. 2013-14 to 2015-16)

Gajanan Constructions v. DCIT (2016) 161 ITD 313 (Pune)(Trib.)

S. 234E : Fee – Default in furnishing the statements – Prior to the amendment to s. 200A w.e.f. 01.06.2015, the fee for default in filing TDS statements cannot be recovered from the assessee – Deductor [S. 200A(1)] 2134

Allowing the appeal of assessee the Tribunal held that prior to the amendment to s. 200A w.e.f. 01.06.2015, the fee for default in filing TDS statements cannot be recovered from the assessee-deductor. (ITA No. 258/Coch/2016, dt. 09.09.2016) (AY. 2013-14)

Little Servants of Divine Providence Charitable trust v. ITO (Cochin)(Trib.); www.itatonline.org

S. 234E : Fee – Default in furnishing the statements – Fee for late filing of TDS returns cannot be levied prior to 01.06.2015. [S.200A(3)] 2135

Allowing the appeal the Tribunal held that the amendment to section 200A(1) of the Act is procedural in nature and in view thereof, the Assessing Officer while processing the TDS statements/returns in the present set of appeals for the period prior to 01.06.2015, was not empowered to charge fees under section 234E of the Act. Hence, the intimation issued by the Assessing Officer under section 200A of the Act in all these appeals does not stand and the demand raised by way of charging the fees under section 234E of the Act is not valid and the same is deleted. The intimation issued by the Assessing Officer was beyond the scope of adjustment provided under section 200A of the Act and such adjustment could not stand in the eye of law. (ITA No. 1292 & 1293/PN/2015, dt. 23.09.2016) (AY. 2013-14)

Gajanan Constructions v. DCIT (Pune)(Trib.), www.itatonline.org

CHAPTER XIX
REFUNDS

S. 237. Refunds.

2136 **S. 237 : Refunds – Delay in filing refund application should be condoned, for an assessee who has incurred huge losses and to whom the refund amount due, if not refunded would cause genuine hardship. [S. 119]**
Allowing the petition, the Court held that where an assessee, who is suffering huge losses over a period of time and also not able to engage an accountant for preparing the returns and filing the returns, it has to be assumed that they have a genuine hardship and it can be redressed or avoided only on payment of amount which is legally due to them. S. 119 states that when a Commissioner is given power to adjudicate the issues relating to exemption, deduction, refund or any other relief, he should condone the delay as such non-payment or non-granting of such relief would cause a genuine hardship to such a person. (AY. 2004-05, 2005-06).
Beta Cashews & Allied Products (P.) Ltd. v. CIT (2016) 242 Taxman 373 / 289 CTR 564 (Ker.)(HC)

2137 **S. 237 : Refunds – Delay in application for refund should be condoned where it is demonstrated that assessee incurred huge losses and if amount is not refunded, its losses would be much more than already computed. [S. 119, 237]**
Petitioner Company was suffering from huge loss for a period of time and they were not even in a position to engage a proper accountant for preparing the accounts and filing the returns in time. This resulted in the Petitioner not approaching the competent authority within time. Therefore Petitioner pleaded for condonation of delay for non payment filing returns. Allowing the WP, the HC held that if the amount claimed was not refunded, definitely assessee's losses would be much more than what was computed presently. In the said circumstances, it would have been appropriate for the CIT to have condoned the delay. (AY. 2004-05, 2005-06)
Beta Cashew & Allied Products (P) Ltd. (2016) 139 DTR 233 / 242 Taxman 373 / 289 CTR 564 (Ker.)(HC)

2138 **S. 237 : Refunds – Deduction at source – Exemption – Interest on foreign loan – Payment of penal interest approved by Government and exempt – Assessee entitled to refund of tax erroneously deducted thereon – Jurisdiction – Territorial jurisdiction – Communication of order by Deputy Commissioner Mumbai – Central Board of Direct Taxes passing order at Delhi – Part of cause of action arising within jurisdiction of court at Delhi – Objection raised for first time at stage of argument – Objection not sustainable. [S.2(28A), 10(15)(iv)(c), 195, Constitution of India, Art. 226]**
On a writ petition, held, allowing the petition, (i) that the Central Board of Direct Taxes did not give any opportunity to the assessee of being heard nor was the order directly communicated to the assessee. The assessee became aware of the order only when a copy thereof was enclosed with the letter of the Deputy Commissioner dated February 16, 1999. The ground on which the application for refund was rejected, i.e., that the

penal interest was paid by the assessee as a result of violation of the agreement and was therefore, not exempt under section 10(15)(iv)(c) of the Act, was factually incorrect. Clause 27 of the agreement itself provided for waiver in the event of default by SIFL subject to certain conditions. The penal interest was imposed as part of the conditions of the agreement itself. Therefore, the payment of penal interest could not be said to be for breach of the terms of the conditions but in terms of the conditions imposed for condoning such breach. The order therefore, proceeded on an erroneous interpretation of the clauses of the agreement. The order rejecting the refund did not state that the conditions contained in the Circular dated August 6, 1998 was not satisfied. Therefore, the order rejecting the assessee's application for refund was not sustainable.

(ii) That the objection regarding territorial jurisdiction was raised for the first time by the Department at the stage of arguments and not in the counter affidavit filed by the Department. The order passed by the Central Board of Direct Taxes at Delhi and a part of the cause of action had arisen within the jurisdiction of the Delhi High Court. The objection was to be rejected. The Deputy Commissioner was to pass appropriate orders granting refund to the assessee with admissible interest. The decision of the Central Board of Direct Taxes communicated to the assessee by its letter dated December 8, 1998 and further communicated by the Deputy Commissioner by the letter dated February 16, 1999 were quashed.

CEAT Ltd. v. CBDT (2016) 383 ITR 300/ 240 Taxman 147 / 286 CTR 225 / 135 DTR 50 (Delhi)(HC)

S. 244. Interest on refund where no claim is needed.

S. 244 : Refunds – Interest on refunds – Assessee becoming entitled to refund pursuant to assessment order – Refund adjusted against dues for succeeding AY after three years – Entitled to interest on sum for period of delay. [S. 244(IA)) 2139

For the AY 1987-88, the assessee filed its return on the basis of self-assessment and paid tax in a sum of ₹ 3,23,68,834 on September 12, 1987. Assessment was made under section 143(3) of the Act pursuant to which an amount of ₹ 2,03,29,841 was found refundable to the assessee. Instead of immediate refund of this amount, the Assessing Officer ordered that the sum be adjusted against the demand for the year 1986-87. It was ultimately adjusted on July 25, 1991. The assessee claimed interest for the period from March 28, 1988 to July 25, 1991 but the claim was rejected by the Assessing Officer. However, the Commissioner (Appeals) allowed the assessee's appeal holding that interest was payable on the sum under section 244(1A) of the Act. This was upheld by the Appellate Tribunal as well as by the High Court. Held, affirming the decision of the High Court, that the amount in question, though found refundable to the assessee, was utilised by the Department and, therefore, interest was payable under section 244(1A) of the Act. (AY. 1985-86 to 1987-88)

CIT v. Jyotsna Holdings P. Ltd. (2016) 382 ITR 451 / 238 Taxman 558 (SC)

Editorial : CIT v. Jyotsna Holdings P. Ltd. (2006) 284 ITR 121 (Delhi)(HC).

S. 244A. Interest on refunds.

2140 **S. 244A : Interest on refunds – Self assessment tax was paid and later on said amount became refundable due to appellate proceedings, assessee was entitle to interest on amount of interest. [S.140A, 156]**
High Court held that the provisions under section 244A do not distinguish the cases where payment is made on assessment under section 140A. The Explanation of section 244A(1) does not give room for an interpretation that if a person has paid money otherwise than by way of demand under section 156, the assessee is not entitled to interest on refund under section 244A and therefore, the assessee was entitled to interest under section 244A on the amount of refund. (AY. 1991-92)
Rajaratna Mills Ltd. v. CIT (2015) 64 taxmann.com 89 (Mad.)(HC)
Editorial : SLP of revenue was admitted ; CIT v. Rajaratna Mills Ltd. (2016) 241 Taxman 313 (SC)

2141 **S. 244A : Interest on refunds – Delay in filing return – Condonation of delay – Delay attributable to assessee – Claim to interest on refund rightly rejected.**
The liability to pay interest on refund arose from the date when the claim for refund was made with all necessary particulars. Section 244A(2) imposed a restriction on payment of interest when the procedure for refund was on account of the delay attributed to the assessee. Admittedly, there was delay on the part of the assessee which gave rise to a situation to condone it. Delay was condoned only for the purpose of accepting the return. But it could not be stated that the delay was not attributable to the assessee. Even where the delay was condoned, when it was attributable to the assessee, there was justification on the part of the Commissioner to deny interest under section 244A(2). Therefore, the claim to interest was rightly rejected. (AY. 1997-98)
Pala Marketing Co-op. Society Ltd. v. CIT (2016) 389 ITR 304 / (2017) 291 CTR 116 (Ker.) (HC)

2142 **S. 244A : Interest on refunds – Delay in refund due to finalisation of returns and process of curing defects in certificate for deducting tax – Delay attributable to assessee – Refusal to pay interest by Department was held to be proper.**
Delay in the proceedings resulting in refund was definitely with reference to the finalisation of returns and not in regard to the proceedings for refund. Therefore, the delay was attributable to the assessee. The obligation to provide a certificate for deducting tax was on the deductor. If the defect was noticeable on receipt of the certificate, it was for the deductee who made a claim on the basis of the certificate to get the defects cured. Since substantial time had elapsed in curing the defects, the delay was attributable to the assessee. When a statute in the form of section 244A(2) clearly specified that interest need not be paid if the proceedings of refund were delayed for reasons attributable to the assessee, no interference was warranted in the refusal of the Department to pay interest.(AY 1995-96)
State Bank of Travancore v. CCIT (2016) 389 ITR 449 / 290 CTR 103 / (2017) 244 Taxman 222 (Ker.)(HC)

S. 244A : Interest on refunds – Interest on refund could be withheld in terms of sub – Section (2) of section 244A, only if it was found that assessee was responsible for causing any delay in proceedings which resulted into refund, assessee was entitled to refund. [S. 154] 2143

Allowing the petition, the Court held that Interest on refund could be withheld in terms of sub-section (2) of section 244A, only if it was found that assessee was responsible for causing any delay in proceedings which resulted into refund. Assessee was entitled to refund. Part of period for which interest is due cannot be excluded in rectification proceedings. (AY. 2008-09)

Ajanta Manufacturing Ltd. v. Dy. CIT (2016) 290 CTR 110 / 72 taxmann.com 148 / (2017) 391 ITR 33 (Guj.)(HC)

S. 244A : Interest on refunds – Interest under section 244A is payable on refund arising on account of Double Taxation Relief. [S.90] 2144

During the assessment the Assessing Officer allowed interest under section 244A to assessee at certain part of refund. However, according to him no interest under section 244A was allowable on DTAA relief under section 90 of the Act. On appeal the CIT(A) and the Tribunal agreed with the assesse's contention and allowed assessee interest under section 244A of the Act.

Before the High Court, the Department contended that interest under section 244A of the Act is only available on refunds arising out of tax paid/collected as advance tax or TDS. Disregarding the Department's contention the High Court held that the relief under Section 90 of the Act is available in respect of the income tax which is payable both in India as well as in the other Countries with which India has DTAA. Therefore, relief under Section 90 of the Act is to be allowed while computing the tax liability in India by virtue of credit being given to the extent that tax has been paid abroad. Therefore, the tax payable is to be computed on the income to be assessed. Thereafter the credit which is available to the assessee in view of DTAA is to be taken into account and if there is any excess which the assessee has paid into the Indian Treasury, then, he is entitled to the refund of the same which would also carry interest in terms of Section 244A of the Act. As a result the Department's appeal was dismissed. (AY. 2003-04)

CIT v. Tech Mahindra Limited (2016) 240 Taxman 143 / 141 DTR 202 / 289 CTR 454 (Bom.)(HC)

S. 244A : Interest on refunds – Non-resident – Interest on income tax refund is a debt claim payable by revenue which shall be exempt in India – DTAA-India-Italy. [S. 90, Art. 12] 2145

On appeal : Held, allowing the appeal, that the law was well-settled by the Supreme Court to the effect that refund due and payable to the assessee was a debt owed and payable by the Revenue. Therefore, what was due as a refund to the assessee and what was payable as interest on such refund were debt claims within the meaning of Article 12(4) of the Double Taxation Avoidance Agreement between India and Italy, consequently satisfying the parameters of Article 12(3)(a) according to which interest arising in a contracting State will be exempt from tax in that State, if the payer of the interest is the Government of that contracting State or a local authority. The payer of

the interest was the Government of the Contracting State, namely, the Government of India, and therefore, Article 12(6) of the Agreement had no application at all. (AY. 2000-01, 2001-02, 2002-03)

Ansaldo Energia SPA v. CIT (IT) (2016) 384 ITR 312 / 240 Taxman 107 / (2017) 148 DTR 250 / 293 CTR 461 (Mad.)(HC)

Editorial: Orderin Ansaldo Energia SPA v. DDIT(IT) (2016) 48 ITR 572 (Chennai)(Trib.) is reversed.

2146 **S. 244A : Interest on refunds – Deductor claimed interest on refund – Held, interest on such refund to be granted as the deductor is an assessee – Held, interest to be granted from date of application for refund and not from the date of agreement waiving third installment. [S. 2(7)(c), 163]**

The deductor-company entered into an agreement with a German company for transfer of technical know-how and was required to make the payment of technical know-how fees in three instalments. The deductor-company deducted tax at source on all the three instalments and deposited same in advance with department. Subsequently, the German company was not able to fulfil its obligations and by agreement dated 1-7-1992 agreed to waive the third instalment. The deductor-company filed an application for refund and same was granted. The deductor also made an application for interest u/s. 244A on the said refund which was rejected by CCIT and CBDT on the ground that deductor-company was not assessee in respect of this transaction and therefore, not eligible for interest u/s. 244A. High Court held that deductor-company was in fact the assessee by virtue of section 2(7)(b) r.w.s. 163. Further, it was held that, deductor-company, on failure to deduct tax would have become assessee-in-default and by that angle also deductor qualified as an assessee u/s. 2(7)(c). It was held that refund granted by the CBDT would fall within the provisions of section 240. Further, the High Court relied upon the judgment in case of *Union of India v. Tata Chemicals Ltd. [2014] 6 SCC 335* for stating that even if there is no express statutory provision for payment of interest on the refund of excess amount/tax collected by the revenue, the Government cannot shrug off its apparent obligation to reimburse the deductor's lawful monies with the accrued interest for the period of undue retention of such monies. Further, if the contention of the Revenue was accepted it would result in causing great hardship to the honest taxpayers. Held, deductor-company eligible for interest u/s. 244A. However, such interest accrued from the date of making application for refund of tax and not from the date of agreement waiving third instalment, since the deductor-company did not make any application for refund till 2 years after the agreement for waiver.

Sunflag Iron & Steel Co. Ltd. v. CBDT (2016) 387 ITR 674 / 238 Taxman 243 / 137 DTR 177 / 287 CTR 309 (Bom.)(HC)

2147 **S. 244A : Interest on refunds – Interest is allowed on refund of excess payment on self – Assessment of tax and Explanation to section 244A(1)(b) does not bar payment of interest on such excess refund. [S. 140A,154]**

The question before HC was whether Tribunal was justified in granting interest u/s. 244A(1)(b) on excess payment of self-assessment of tax in view of s. 244A(1)(b) r.w Explanation thereto of the Act which provides that, date of payment of tax means date

on and from which the amount of tax specified in the of notice of demand u/s. 156 is paid in excess of such amount. Another question before the Tribunal was whether interest granted u/s. 244 can be withdrawn u/s. 154.

On analyzing various judicial precedents, the HC held that clause (b) of sub-s. (1) of s. 244A is residual in nature and provides for interest on refund of excess self-assessment tax paid by the assessee. Further, the Explanation to s. 244A(1)(b) would have no application since the tax in question was not paid consequent to any notice of demand u/s. 156 but was paid u/s. 140A. Hence, according to mandate of s. 244A(1)(b) interest is payable on refund of excess self-assessment tax from the date of payment of such tax to the date when the refund is granted.

On the second question of law, the HC held that 'mistake apparent from the record' is rectifiable u/s. 154. Thus, the pre-condition to invoke s. 154 is the presence of a mistake and that the same must be apparent from the record. The power to rectify a mistake u/s. 154 does not extend to revision or review of the order and hence, interest granted u/s. 244A cannot be withdrawn u/s. 154.(AY. 1992-93, 1993-94)

CIT v. Birla Corporation Ltd (2016) 131 DTR 153/ 284 CTR 97 / 238 Taxamn 482 (Cal.) HC)

S. 244A : Interest on refunds – Refund determined was less than 10 per cent of gross tax, assessee would be entitled to interest on amount of refund for period of delay. [S. 143(1)] 2148

Tribunal held that even where refund determined was less than 10 per cent of gross tax, assessee would be entitled to interest u/s. 244A from date of passing of order u/s. 143(1) up to actual date of granting refund. (AY. 2009-10)

Rajashekhar Swaminathan Iyer v. Dy. CIT (2016) 160 ITD 638 (Mum.)(Trib.)

S. 244A : Interest on refunds – Interest cannot be denied to the assessee on account of delay in grant of refund. [S.154] 2149

Tribunal held that where assessee was entitled to refund of TDS and proceedings resulting in refund had been delayed on ground that relevant TDS certificate did not bear stamp of company issuing such certificate, delay could not have been attributable to assesse. Provisions of s. 244A(2) could not have been invoked by AO to deny interest u/s. 244A(1) on account of delay in grant of refund. (AY. 2003-04)

Pfizer Corporation, Panama v. Dy. DIT (2016) 160 ITD 644 / 182 TTJ 902 (2017) 145 DTR 234 (Mum.)(Trib.)

S. 244A : Interest on refunds – Amount refunded to Assessee should be first adjusted against interest component and balance, if any, should be adjusted towards tax component. 2150

The assessee was entitled to refund from the AO while giving effect to the order of the CIT(A); only part amount was refunded to it. The Assessee alleged that the Assessing Officer ought to have adjusted the refund granted to the assessee first against interest refund due and, thereafter, against the principal amount of tax refund due instead of adjusting the same first against the principal (tax) refund due and keeping the interest amount aside. The ITAT observed that where the amount of tax demanded is paid by the

assessee it shall first be adjusted towards the interest payable and the balance, if any, to the tax payable. No specific provision had been brought on the statute with respect to the adjustment of refund issued earlier for computing the amount of interest payable by the Department to the assessee on the amount of refund due to the assessee. Under these circumstances, fairness and justice demands that the same principle should be applied while granting the refund as had been applied while collecting the amount of tax. (AY. 2002-03)
Union Bank of India v. ACIT (2016) 52 ITR 221 / (2017) 162 ITD 142 (Mum.)(Trib.)

2151 **S. 244A : Interest on refunds – Self assessment tax – Refund of excess self – assessment tax will not carry any interest from date of payment but it will carry interest from date of processing of return under section 143(1) till date of granting of refund. [S.140A, 143(1)]**
Payment of excess self-assessment tax on being allowed credit for against tax payable assumes character of tax paid upon processing of return for relevant year resulting in refund and thus refund of excess self-assessment tax will not carry any interest from date of payment but it will carry interest from date of processing of return under section 143(1) till date of granting of refund. (AY. 1994-95)
Raymond Ltd. v. Dy. CIT (2015) 173 TTJ 572 / 129 DTR 269 (Mum.)(Trib.)

S. 245. Set-off of refunds against tax remaining payable .

2152 **S. 245 : Set-off of refunds against tax remaining payable – It was illegal and the Department was not entitled to adjust the amount refundable to the assessee. [S. 240]**
On a writ appeal: allowing the writ appeal, the Court held that the assessee was entitled to the refund. The court had confirmed the orders of the appellate authorities deleting the additions made on account of the surcharge on sales tax and turnover tax paid by the assessee and entitling it to refund pertaining to the previous assessment years 2007-08 to 2011-12. There had been no appeal against that judgment till date. Therefore, the assessee's total income could not have been determined by adding the surcharge on sales tax and the turnover tax for the assessment year 2012-13. It was illegal and the Department was not entitled to adjust the amount refundable to the assessee. (AY. 2012-13)
Kerala State Beverages (M&M) Corpn. Ltd. v. JCIT (2016) 388 ITR 600 / 142 DTR 134 / 293 CTR 581 / 79 taxmann.com 429 (Ker.)(HC)
Editorial: Decision of the single judge of the Kerala High Court in Kerala State Beverages (M&M) Corporation Ltd. v. Joint CIT [2016] 386 ITR 148 (Ker) is reversed.

2153 **S. 245 : Set off of refunds against tax remaining payable – Prior intimation to assessee is mandatory.**
The mandatory requirement of section 245, is that a prior intimation must be given to the assessee if a refund is proposed to be adjusted against the arrears of tax.
Contrary to the mandate of section 245 of the Act, without any prior order or prior intimation to the assessee, an adjustment of the refund against the arrears of tax was made which was legally impermissible. (AY. 1991-92, 1995-96)
Sangam Theatre P. Ltd v. CIT (2016) 386 ITR 23 / 137 DTR 281 (Delhi)(HC)

S. 245 : Set-off of refunds against tax remaining payable application for stay of demand allowed taking into account adjustment – Directions cannot be issued to grant refund. [Constitution of India, Art. 226] 2154

Once the order adjusting the refund had been issued and the appellate authority had taken cognizance of the adjustment while granting stay, a direction to refund the amount, as claimed, was not sustainable. Merely because there was some irregularity in the procedure adopted by the Department, direction could not be issued to grant refund. Although at the time when the order was passed on January 30, 2015, the refund was not in existence and it came into effect only on February 6, 2015 and under normal circumstances, stay could be obtained by remitting 15% of the amount demanded, the provision would not apply when a right to set off was available to the Department under section 245.

Kerala State Beverages (M&M) Corporation Ltd. v. JCIT (2016) 386 ITR 148 / (2017) 149 DTR 45 (Ker.)(HC)

S. 245 : Set off of refunds against tax remaining payable – Adjustment of refund without giving an opportunity was held to be bad in law – Directed the department to refund the amount of refund adjusted with interest. 2155

Approach of the department of setting off / adjusting refund against demand without serving a prior s. 245 intimation to the assessee and without providing opportunity of hearing to assessee & without arriving at a satisfaction to the effect that such adjustment of refund can only be the mode of recovery of demand is bad in law. Dept directed to refund the amount set off / adjusted together with interest. (AY. 2006-07)

Vijay Singh kadam v. CCIT (2016) 384 ITR 69 (Delhi)(HC)

CHAPTER XIX-A
SETTLEMENT OF CASES

S. 245C. Application for settlement of cases.

2156 **S. 245C : Settlement Commission – Settlement of cases – Search and seizure – Pendency of proceedings – Order served – Rejection of application by Settlement Commission was held to be not justified – Application for settlement was restored to the file of Commission at stage of 245D(1) – Period of 14 days as provided in Section 245D(1), would run from date this order was first communicated by either of parties to Commission. [S. 132, 153A, 245D(1)]**

Consequent to search, notices were issued u/s. 153A to for AYs 2008-09 to 2013-14. In response to notices returns were filed. As the assessments were pending the assessee has filed application for settlement. Assessee sought to serve copy of application for settlement filed by assessee with Commission for AYs 1998-99 to 2014-15 with AO along with intimation in prescribed Form 34BA of IT Rules. However, AO did not accept copy of application for settlement and returned it with handwritten endorsement. Assessee sent copy of settlement application on which AO made endorsement along with prescribed intimation in Form 34BA by speed post. Assessment orders for AYs. 2008-09 to 2014-15 were issued and sent by Speed Post to assessee. Thereafter, assessee's application for settlement came up for admission before Commission for orders u/s. 245D(1). Commission passed order at stage of Section 245D(1) rejected application for settlement on the ground that there was no pending assessment before AO when application for settlement was filed with Commission. The assessee filed the writ petition against the rejection order of the Settlement Commission. Allowing the petition the Court held that the assessment order for purposes of Chapter XIX A of Act could be said to have been made when it was served upon assessee concerned,keeping in view object and purpose of introducing Chapter XIX A into Act i.e., Settlement provisions. Therefore, order of Settlement Commission was quashed and set-aside. Application for settlement was restored to the file of Commission at stage of 245D(1).

Yashovardhan Birla v. Dy. CIT (2016) 140 DTR 177 / 289 CTR 482 (Bom.)(HC)

2157 **S. 245C : Settlement Commission – Settlement of cases – The return of income and notice u/s. 148 were issued prior to the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 coming into force, application submitted by the assessee offering undisclosed foreign income and assets before Settlement Commission were maintainable. [S. 148, 153C, 245BA, Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015**

Allowing the petition the Court held that ; the action of the Settlement Commission, held that, the assessee had filed their return of income and notice was issued u/s. 148 of the Act prior to the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 coming into force w.e.f. 01-07-2015. Thus, the applications submitted before the Settlement Commission were maintainable. (AY. 2005-06 to 2014-15)

Arun Mammen v. UOI (2016) 290 CTR 644 / 241 Taxman 135 / (2017) 391 ITR 23 (Mad.)(HC)
Kandathil M. Mammen v. UOI (2016) 290 CTR 644 / 241 Taxman 135 / (2017) 391 ITR 23 (Mad.)(HC)

S. 245C : Settlement Commission – Full and true disclosure of income – Where assessee at time of settlement raised/revised offers of tax marginally in order to put an end to entire dispute through settlement, it could not be said that original or initial declaration was not true and full disclosure. [S.245D] 2158

Dismissing the appeal of the Revenue High Court held that, the scope of inquiry, whether by the High Court under Article 226 or by the Supreme Court under Article 136 was to see whether the order of the Commission was contrary to any of the provisions of the Act and if so, apart from the ground of bias and malice which constitute a separate and independent category as it prejudices the applicant. The Court further held after relying upon the judgment of the Supreme Court in case of *Ajmera Housing Corpn v. CIT (326 ITR 642)*, that the revised offers of tax was in the nature of spirit of settlement and cannot be seen in strict sense of abandoning initial disclosures and replacing the same by fresh disclosures on the basis of such revised offers. What in essence the assessee did was to raise their offers marginally to put an end to the entire dispute through settlement or in the spirit of settlement as was referred to in the said letter. Accordingly, the Court held that it cannot be accepted that there was no full and true disclosure in the application.

CIT v. ITSC (2016) 241 Taxman 371 / 290 CTR 635 / (2017) 390 ITR 306 (Guj.)(HC)

S. 245C : Settlement Commission – For purpose of maintainability of a settlement application, a case would be pending only as long as order of assessment is not passed and date of dispatch of service of order on assessee would not be material for such purpose. [S. 153A, 245D] 2159

On 7-1-2014, a search was conducted on the assessee. Thereafter, a notice under Section 153A of the Act was issued on 2-7-2014. The assessee filed the return of income in response to such notice on 27-11-2014.

The AO passed the assessment orders for five assessment years in question on 15-3-2016 and the same were sent for service personally, by deputing an Inspector of his office, to the partners of the assessee firm at its office on 15.3.2016. However, the partners refused to receive the orders. A report to this effect was made by the Inspector and placed before the AO, a copy of which was produced along with an affidavit.

On 16-3-2016, the assessee filed application for settlement before the Settlement Commission. Before the settlement bare facts were that the order of assessment dated 15-3-2016 was served on the assessee on 21-3-2016. Thus, according to the assessee, the application for settlement having already been filed on 16-3-2016 even before the orders of assessment were served, such application before the Settlement Commission would be maintainable. Even if such orders were passed on 15-3-2016, as contended by the Department, since the same were not served on the assessee, the assessment proceedings would be deemed to be pending and, therefore, application for settlement would be maintainable.

However, according to the Department, as soon as the orders of assessment were passed. Irrespective of dispatch of the orders of assessment or service thereof on the assessee, application for settlement would not be maintainable.

The High Court held that for the purpose of application under Section 245C(1) of the Act, a case would be pending only as long as the order of assessment is not passed. Once the assessment is made by the Assessing Officer by passing the order of

assessment, the case can no longer be stated to be pending. Application for settlement would be maintainable only if filed before the said date. Date of dispatch of service of the order on the assessee would not be material for such purpose. High Court dismissed the petitions filed by the assessee. (AY. 2010-11 to 2014-15)
Shalibhadra Developers v. Secretary & Ors. (2016) 143 DTR 1 / (2017) 291 CTR 87 / 245 Taxman 160 (Guj.)(HC)
Shanti Buildcon v. Secretary & Ors. (2016) 143 DTR 1 / (2017) 291 CTR 87 / 245 Taxman 160 (Guj.)(HC)

2160 **S. 245C : Settlement Commission – Filing of return is not mere technical requirement – Mere fact that there were several partners and several firms belonging to assessee group would not result in complexity of investigation especially when revenue had clearly set out as to what was nature and circumstances of case – Rejection of the petition was held to be justified. [S. 132, 158BC, 245D]**
Dismissing the petition against the order of the Settlement Commission the Court held that requirement to file return under clause (a) of proviso to section 245C(1) is a pre-requisite to be entitled to file an application before Settlement Commission and it cannot be reduced to an insignificant or a mere technical requirement. Mere fact that there were several partners and several firms belonging to assessee group would not result in complexity of investigation especially when revenue had clearly set out as to what was nature and circumstances of case.
Dix Francis v. ITSC (2016) 289 CTR 404 / (2017) 391 ITR 401 / 244 Taxman 126 (Mad.) (HC)

2161 **S. 245C : Settlement Commission – Application by person related to applicant – Meaning of "related party" – Effect of Explanation to section 245C(1) – Company would be a related party only if a director of such company has a substantial interest in applicant – Clubbing of shares were not permitted – Petition was dismissed.**
Holding a substantial interest in the specified person, by a director of the applicant, is a necessary qualifying condition. If the Legislature had intended to enlarge the ambit of the qualifying condition by including a relative of the director it would have specifically provided so. A company would not qualify as a related party merely because any relative of one of its directors has a substantial interest in the specified person.
Beneficial owner of the share as referred to in Explanation (b)(A) refers to shares held in a company by a person either in his own name or in the name of other persons. A corporate entity is a separate legal entity. Merely because a director of the specified person holds shares in a company which in turn holds shares in the company that would not make the director the beneficial holder of the shares of the company and, thus, qualify the applicant as a related party. The words used are "any director of such company" and "any relative of such director". Clubbing of shares were not permitted. Petition of assessee was dismissed.
Rockland Hotels Ltd. v. ITSC (2016) 380 ITR 197 / 236 Taxman 160 / 282 CTR 142 (Delhi) (HC)

S.245D. Procedure on receipt of an application under section 245C

S. 245D : Settlement Commission – Full and true disclosure of income – Marginal changes by assessee in the spirit of settlement – Initial disclosures being replaced by fresh disclosures was held to be valid –Writ petition of revenue was dismissed. [S. 245C. Art. 226] 2162

Dismissing the petition of revenue, the Court held that the revised offers of tax were in the spirit of settlement and could not be seen in the strict sense as the initial disclosures being replaced by fresh disclosures on the basis of such revised offers. What in essence the assessee did was to raise its offers marginally to put an end to the entire dispute through settlement. The order passed by the Settlement Commission was valid.

CIT v. ITSC (2016) 241 Taxman 371 / 290 CTR 635 / (2017) 390 ITR 306 (Guj.)(HC)

S. 245D : Settlement Commission – Rectification of mistake – Secretary, Settlement Commission cannot pass the rectification order – Order was passed not only without hearing assessee, but also without recording any reasons as to why rectification application made by petitioner was not being allowed in its entirety, same was justified to be set aside. [S.245C, 245D(4), 245D (6B)] 2163

Assessee filed application for rectification dated 23rd October, 2015 *inter alia* pointing out circumstances which would make it impossible for them to comply with orders dated 27th August, 2015 as rectified by order dated 20th October, 2015 (to illustrate his properties being under attachment). It was this application for rectification which had been disposed of by the Secretary of the Commission in his Communication dated 28th December, 2015. The assessee filed the writ petition against the said order. Allowing the petition the Court held that Secretary cannot dispose the application filed before the settlement commission. It was for Commission to consider applications which were filed before it seeking modification or rectification of orders passed by it and same could not be outsourced by Commission to its Secretary. Omission was composed of persons who were not only of highest integrity but also of outstanding ability having special knowledge with regard to issues relating to direct taxes and business accounts. Due to aforesaid abilities of members of Commission that had to be brought into play while disposing of applications for Settlement made to the Commission as also applications of rectification/modification of its orders. Admittedly this had not been done in this case as assessee's application for rectification had been disposed of by Secretary of Commission. In the peculiar facts of case, orders dated 20th October, 2015 was set aside, being order passed on Petitioner's rectification application u/s. 245(D)(6B), as it was an order passed not only without hearing assessee, but also without recording any reasons as to why rectification application made by Petitioner was not being allowed in its entirety. Accordingly the order was set aside.

Vinod R. Jadhav v. ITSC (2016) 144 DTR 112 / 290 CTR 674 (Bom.)(HC)

S. 245D : Settlement commission – Amount lying with the Department which was seized during the search operation should be taken into account when computing the additional taxes to be paid under the amended S..245D(2D). [S. 245D(2D)] 2164

The High Court held that the amount lying with the Department which was seized during the search operation should be taken into account when computing the

additional taxes to be paid under the amended S.245D(2D) more particularly when the Department has not returned the cash even after 12 years and the assessee was willing to surrender the same.
Maheshbhai Shantilal Patel v. ITSC (2016) 241 Taxman 94 (Guj.)(HC)

2165 **S. 245D : Settlement commission – Order of the Settlement Commission set aside as the objections of the Revenue as per the report filed under section 245D(2C) of the Act was not considered by the Settlement Commission. [S. 245D(2C)]**
The High Court set aside the order of the Settlement Commission as the Commission did not consider the report filed by the Commission as it had filed the same belatedly and therefore, directed the Commission to decide the same after considering the report of the Commissioner.(WP No. 26 of 2016 dt 28-4-2016) (AY. 2007-08 to 2014-15)
PCIT v. Income-tax Settlement Commission (2016) 386 ITR 456 / 240 Taxman 137 / 289 CTR 493 (Bom.)(HC)

2166 **S. 245D : Settlement Commission – Settlement Commission accepting application and further order for proceeding further – Finding that application was valid was tentative – Writ would not issue to quash proceeding. [S. 245C, 245D(2C)]**
The assessee having applied for settlement of the income for the AY 2013-14, the Settlement Commission passed its first order dated January 28, 2015 under section 245D(1). and allowed the application to be proceeded further with. The Settlement Commission thereafter passed another order dated March 23, 2015 under section 245D(2C) of the Act and allowed the application to proceed further from that stage. The Income-tax Department challenged these orders on various grounds:
Held, that the findings of the Settlement Commission on the fulfilment of the requirements of a valid offer were merely tentative and it would be open for the Settlement Commission to examine these aspects before passing final order under sub-section (4) of section 245D of the Act. The orders were not liable to be quashed. (SCA NO 12209/15 dt. 8-12-2015)
PCIT v. Settlement Commission (2016) 386 ITR 660/ 65 taxmann.com 309 (Guj.)(HC)

2167 **S. 245D : Settlement Commission – Adjudication is not required on Commissioner' s report which is submitted in first instance objecting settlement application on the ground that there was no full and true disclosure as Settlement Commission has to pass final order after obtaining further report of Commissioner and after being satisfied that there was full and true disclosure – Petition of revenue was dismissed. [S. 245D(1), 245D(2C), 245D(4)]**
The assessee filed an application for settlement of its case before the Settlement Commission. The Settlement Commission proceeded with the application and called for report from the Commissioner. The Commissioner, in the report, objected application on ground that there was no full and true disclosure and requisite tax had also not been paid. The Commissioner argued that the Settlement Commission was required to adjudicate on objection filed by him. The Settlement Commission, however, chose to proceed with further enquiry. On writ, the Commissioner contended that the Settlement Commission could not assume jurisdiction to consider the application without adjudicating his objection at admission stage itself.

The High Court held that it was evident that the Settlement Commission was satisfied that there was a full and true disclosure of the income which was not disclosed before the AO in the application and the manner in which such income had been derived and the additional income tax payable on such income.
Further, High Court held that even assuming that the Settlement Commission had glossed over the initial report submitted by the Commissioner, as the procedure contemplated a further report to be submitted by the Commissioner, after examination of the annexure to the application, statements and other documents accompanying such annexure and on the basis of a further enquiry, if any, all of which was not made available to the Commissioner in the first instance, and the Settlement Commission being in a position to still address the question whether a full and true disclosure of the income which was not disclosed before the AO and being required to pass an appropriate order, the Revenue could not be said to be prejudiced in any fashion. Therefore, no procedural violation was caused by the Settlement Commission. It had only taken a prima facie view that the application was not invalid. A final order will necessarily have to be passed under section 245D(4) only after obtaining the report of the Commissioner under Rule 9 and after being satisfied that there is full and true disclosure by the applicant.
The High Court after relying on the decision of the Apex Court in case of Ajmera Housing Corpn. (2010) 326 ITR 642 (SC), dismissed the petition of the Revenue. (AY. 2006-07)
CIT v. RNS Infrastructure Ltd. (2016) 238 Taxman 416 / 135 DTR / (2017) 292 CTR 507 370 (Karn.)(HC)

S. 245D : Settlement Commission – Full and true disclosure of income and manner in which such income derived – Self – assessment tax – Total income – Meaning of – Additional tax – Special formula – Deeming fiction – Amount of tax calculated on total income in application reduced by tax calculated on total income returned for that year – Assessee not paying self – assessment tax in return u/s 153A and section 143(2) – Settlement application not valid. [S. 143(2), 153A, 245D(2C)]. 2168
Once an application is made by the assessee for settlement of his case, the different stages before the Commission come with time frame. Even the final order which the Commission may pass has a deadline beyond which if no order is passed, the proceedings would abate. At a stage where the Commission is required to ascertain where an assessee has paid the additional tax with interest thereon only upon which application can be allowed to proceed further, no complex exercise or verification is envisaged. If the concept of total income contained in the Act is imported as such a stage, it can give rise to multiple disputes and lengthy debates with respect to the total income of an assessee and whether full tax on such income has been paid or not. At such a stage, the Legislature does not envisage the Commission to go into a complex exercise of ascertaining the total income of the assessee and further ascertaining his tax liability on such income. Therefore, the Legislature has provided for a simple formula possible of a simple arithmetical application. In a given case, the assessee may be entitled to a refund once the Commission passes its final order. Such isolated case, however, would not govern the interpretation of sub-sections (1B) and (1C) of

section 245C. Any such interpretation would give rise to complex consideration by the Commission of the assessee's total income not as defined in sub-section (1B) to but as otherwise understood and referred to in section 5. The Legislature never intended that at the stage of ascertaining whether the assessee has deposited the additional tax on an application made for settlement of the case, such complex exercise should be undertaken by the Commission. Further, accepting any such interpretation would defeat the very purpose of introducing the simplicity of computation of "total income" of an assessee for the purpose of the provision and his liability to pay additional tax with interest thereon. Subsequent to the search, the assessee filed the returns u/s. 139(1) and after the issue of section 153A notices for the AYs 2006-07 to 2011-12, the assessee had offered to tax the amount amounting to ₹ 34,74,47,123 which was the total amount admitted u/s. 132(4) under the AYs 2007-08 to 2012-13. Therefore, the assessee had not paid the self-assessment tax in the return u/s. 153A and section 143(2) for the AYs 2007-08 to 2012-13, the application was not valid and the order passed by the Commission was liable to be quashed. (AY. 2006-07 to 2012-13)

CIT v. Kiti Construction Ltd. (2015) 280 CTR 73 / 124 DTR 289 / (2016) 380 ITR 82 (MP) (HC)

2169 **S. 245D : Settlement Commission – Department cannot challenge the interim order of Settlement Commission where the Settlement Commission had valid jurisdiction – The Department had the liberty to raise objections before the Settlement Commission. [S. 245D(1)]**

A search and seizure operation was carried out at the business premises of assessee company as well as the residential premises of the Directors of the assessee company. During the pendency of assessment proceedings, the assessee-company filed application before the Settlement Commission. The settlement application of the assessee-company was admitted by an order passed u/s. 245D(1). The Department filed a writ petition before the HC praying for quashment of order passed u/s. 245D(1) by the Settlement Commission admitting assessee's application. The High Court while dismissing the appeal, held that:

Chapter XIX-A provides for a complete mechanism for dealing with settlement applications and the said mechanism is complete code in itself.

Settlement Commission has a jurisdiction to provide for the terms of the Settlement including demanding any tax, penalty or interest. The Commission has the jurisdiction to examine as to whether any order has been obtained by way of fraud or misrepresentation of the facts.

Department cannot challenge the interim order of Settlement Commission where the Settlement Commission had valid jurisdiction.

The Department had the liberty to raise objections before the Settlement Commission. (AY. 2007-08 to 2014-15)

CIT v. Asian Natural Resources India Ltd. (2015) 235 Taxman 419 / 117 DTR 426 / (2016) 282 CTR 569 (MP)(HC)

S. 245F. Powers and procedure of Settlement Commission.

S. 245F : Settlement Commission – Does not have power to direct special audit under section 142(2A) of the Act – No power of regular assessment which vested in Assessing Officer. [S. 142(2A), 245C] 2170

Held, allowing the petition, (i) that the Commission did not engage itself in the process of assessment and could not make an assessment order. The order that the Commission makes u/s. 245D(4) was not in the nature of an assessment but by way of a settlement and contains the terms of settlement. Thus, the powers which are vested in an income-tax authority and could be exercised by the Commission are such which have a nexus with the settlement proceedings which would not include the making of an assessment under the Act.

(ii) That since the requirement of a special audit falls under the procedure for assessment which is distinct and different from settlement proceedings, the Commission would not have jurisdiction to direct a special audit as it does not have any nexus with the settlement proceedings. All that the Commission is required to do in the course of the settlement proceedings is to ensure that the assessee who has made the application for settlement of his case has, *inter alia*, made a full and true declaration of his hitherto undisclosed income and the manner in which it was derived. If the accounts put forth by the assessee before the Commission are found by the Commission on the basis of the available records or the reports of the Commissioner to be neither full nor true then the only option available with the Commission is to reject the application for settlement and relegate the assessee to the normal provisions of assessment under the Act. The Commission could not, by itself, enter upon an assessment and step into the shoes of an Assessing Officer for the purposes of making an assessment.

Chapter XIX-A provisions contemplate assessment by settlement and not by way of regular assessment u/s 143(3) or "assessment" u/s. 143(1) or u/s 144 and Chapter XIX-A is a code by itself.(AY 2004-05 to 2011-12)

Agson Global P. Ltd. v. ITSC (2016) 380 ITR 342 / 237 Taxman 158 / 282 CTR 441 / 130 DTR 1 (Delhi)(HC)

S. 245H. Power of Settlement Commission to grant immunity from prosecution and penalty.

S. 245H : Settlement Commission – Power – Immunity from prosecution and penalty – Satisfaction of Settlement Commission that applicant co- operated in proceedings and had made a full and true disclosure of income and sources of such income – Taking a lenient view would defeat legislative intent – Settlement Commission noting assessee's extension of co – operation but failing to record its satisfaction in regard to full and true disclosure of income – Matter remanded to Settlement Commission to decide afresh. [S. 245C] 2171

Held, that a perusal of the order of the Settlement Commission showed non-application of mind by it to the mandatory requirement of recording its satisfaction that the conditions prescribed under section 245H(1) of the Act were fulfilled. The Settlement Commission had noted that the assessee had extended its co-operation in the hearing,

but failed to record its satisfaction that the assessee made a full and true disclosure of its income and the source thereof. Further, the report submitted by the Department was not discussed. The Settlement Commission was performing the important task of exercising its discretionary powers under the mandate of section 245H(1) to grant immunity from prosecution and penalty. The legislative object and purpose of vesting it with such powers would be defeated if a lenient view was taken of the fulfilment of the statutory requirements. The order of the Settlement Commission was set aside and the matter was remanded to the Settlement Commission for decision afresh.
CIT v. BDR Builders and Developers Ltd. (2016) 385 ITR 111 (Delhi)(HC)

S. 245HA. Abatement of proceeding before Settlement Commission.

2172 **S. 245HA : Settlement Commission – Change of law – Provision for abatement of proceedings where no order passed by cut-off date – To be read down – Abatement only where failure owing to reasons attributable to applicant. [S. 245C]**
Following *Union of India v. Gurmeet Kalra* reported as *Union of India v. Star Television News Ltd. [2015] 373 ITR 528 (SC),* it was held that only where the application for settlement could not be disposed of for any reasons attributable on the part of the applicant would proceedings abate u/s. 245HA(1)(iv). Settlement Commission directed 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.
CIT v. Rajendra Kumar Verma (2016) 380 ITR 430 / 243 Taxman 172 / 135 DTR 244 / 286 CTR 343 (SC)
Editorial: Appeal from Rajendra Kumar Verma v. DG (Inv) (2012) 345 ITR 32 (All.)(HC)

CHAPTER XIX-B
ADVANCE RULINGS

S. 245R. Procedure on receipt of application.

S. 245R : Advance rulings – Issuance of notice under section 143(2) without any specific queries is not a bar on application for advance ruling. 2173

Allowing the petition the Court held that; in the notice issued to the assessee under section 143(2) of the Act, the Assessing Officer only stated that there were certain points in connection with the return of income submitted by the assessee for the assessment year 2012-13 on which the Assessing Officer would like some further information. The notice did not address itself to any specific question. It did not disclose application of mind to the returns, except the fact that it had conformed to the instructions which compelled the Assessing Officer to issue a scrutiny notice on account of the international transaction reported by the assessee. Such notices *ipso facto* would not be sufficient to attract the automatic rejection of application under proviso to section 245R(2). The assessee's application for advance ruling was to be processed and independently dealt with on its merits by the Authority for Advance Rulings.

Sage Publications Ltd. v. Dy. CIT(IT) (2016) 387 ITR 437 / 73 taxmann.com 85 (Delhi)(HC)
Editorial : SLP of revenue is dismissed Dy.CIT v. Sage Publications Ltd. UK. (2017) 246 Taxman 57 (SC)

S. 245R : Advance rulings – Mere issue of notice under section 143(2) without any specific queries – Would not bar an application for advance ruling. [S. 143(2)] 2174

Notice that was issued to the assessee was a notice under section 143(2)(ii) of the Act and not section 143(2)(i). The notice issued under section 143(2) by the Assessing Officer on August 25, 2011 in relation to the return filed for the assessment year 2010-11 merely reproduced the language of section 143(2)(ii) of the Act. This notice in any event, did not set out the opinion of the Assessing Officer that he considered it necessary or expedient to issue such notice for any of the reasons specified in section 143(2)(ii). Therefore, the issuance of the notice under section 143(2) would not constitute a bar in terms of clause (i) to the first proviso under section 245R(2) of the Act in as much as the notice did not refer to any particular "question" which could be stated to be pending consideration.

Hyosung Corporation v. AAR (2016) 385 ITR 95 / 138 DTR 337 / 288 CTR 19 (Delhi)(HC)

S. 245R : Advance rulings – Mere notice under section 143(2) without any specific queries would not mean matter was pending before income – tax authorities – Such notice would not bar an application for advance ruling. [S. 143(2)] 2175

Mere issuance of a notice under section 143(2) to the assessee by merely stating that there are certain points in connection with the return of income on which the AO would like some information did not amount to the issues raised in the application filed by the assessee before the Authority for Advance Rulings being already pending before the Authority for Advance Rulings. Therefore, even in relation to the applications for the assessment year 2013-14, it could not be said that on the date of filing of the applications the issue raised therein was pending consideration before the income-tax

authorities. There was no statutory bar to the Authority for Advance Rulings considering the applications.(AY 2012-13, 2013-14)
LS Cable and Systems Ltd. v. CIT (2015) 288 CTR 23 / (2016) 385 ITR 99 / 138 DTR 340 / (2017) 78 taxmann.com 55 (Delhi)(HC)

2176 **S. 245R : Advance rulings – Transaction designed *prima facie* for avoidance of income-tax – Supreme court grants leave to appeal against the High Court's order in the case of Goodyear Tire & Rubber Co.**
Assessee, a US company,proposed to transfer its 74% shareholding in an Indian company, Goodyear India Ltd. to its 100% Singaporean subsidiary, Goodyear Orient Company (Pte) Limited without consideration. Assessee filed an application before the Authority for Advance Rulings ('AAR') to ascertain the tax implications arising from the above transaction. AAR held that there would be no tax liability in the hands of the assessee or the Singapore company. AAR further held that even if the assessee had received consideration, there would be no tax liability as the Indian company whose shares were sold was a listed company and the capital gains would be exempt under section 10(38) and therefore the said transaction cannot be said to be designed for avoidance of tax. In a writ petition filed by the revenue authorities, the High Court refused to interfere with the order of the AAR as no illegality was pointed out in the AAR's ruling. Supreme Court has granted leave to appeal against the High Court's order.
DIT(IT) v. Goodyear Tire & Rubber Co. (2016) 236 Taxman 389 (SC)

2177 **S. 245R : Advance rulings – A notice u/s. 143(2)(ii) cannot be issued in a routine, casual or mechanical manner but after forming an opinion that it is "necessary or expedient" to do so. A S. 143(2) notice in the standard form is not a bar u/s. 245R(2) for admission of an AAR application for advance ruling. [S.143(2), Constitution of India, Art. 14]**
The challenge in the main petition was to an order dated 7th August 2013, passed by the Authority for Advance Rulings ('AAR') whereby the Petitioner's application for determination of the question regarding taxability of its profits arising from offshore supplies was rejected on the ground that the bar under clause (i) below the proviso to Section 245R (2) of the Income-tax Act, 1961 ('Act') to the AAR allowing the application stood attracted. It was held that once notice was issued to the petitioner under Section 143(2) of the Act, it should be construed that the question raised in the application was a question that was 'pending' adjudication and therefore the aforementioned bar in terms of clause (i) below the proviso to Section 245 R (2) of the Act could apply. HELD by the High Court:
(i) Under Section 143(2)(ii) of the Act, an AO can serve on the assessee a notice requiring him to attend his office and produce any evidence on which the assessee seeks to rely in support of return if the AO "considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not underpaid the tax in any manner'. Therefore, the scope of the enquiry that an AO can undertake in terms of Section 143(2)(ii) is a wide ranging one. What is relevant for the present case is that prior to issuance of the notice under Section 143(2)(ii) the AO has to form an opinion that it is 'necessary or expedient' to ensure that an Assessee has not (i) understated the income or (ii) has not computed excessive loss, or (iii) has not

underpaid the tax in any manner. The AO is, therefore, not expected to issue a notice under Section 143 (2) (ii) in a routine or casual or mechanical manner.
(ii) Turning to the notice issued in the instant case to the Petitioner under Section 143(2) (ii) of the Act, it is seen that it is in a standard format which merely states that "there are certain points in connection with the return of income on which the AO would like some further information." In any event the question raised in the applications by the Petitioner before the AAR do not appear to be forming the subject matter of the said notice under Section 143 (2) (ii) of the Act. Consequently, the mere fact that such a notice was issued prior to the filing of the application by the Petitioner before the AAR will not constitute a bar, in terms of clause (i) to the proviso to Section 245-R (2) of the Act, on the AAR entertaining and allowing the application.(AY. 2010-11)
Hyosung Corporation v. AAR (2016) 382 ITR 371 / 284 CTR 121 / 131 DTR 369 / 238 Taxman 401 (Delhi)(HC)
Editorial : SLP of revenue is dismissed, CIT v. Hyosung Corporation (2017) 244 Taxman 286 (SC)

CHAPTER XX
APPEALS AND REVISION

S. 246A. Appealable orders before Commissioner (Appeals).

2178 **S. 246A : Appeal Commissioner (Appeals) – Appealable orders – Assessment treating assessee as resident – Dismissal of writ petition on ground of availability of remedy of appeal – Appeal – Supreme Court – High Court failing to consider Explanation to section 246 – Liberty to assessee to seek review – High Court to consider on merits. [S. 246, Constitution of India, Art. 136]**

Where, on a writ petition filed by the assessee challenging as without jurisdiction an assessment by the Income-tax Officer for the assessment year 2013-14 treating him as resident because he was a non-resident and could have been assessed only by the Commissioner (International Taxation), the High Court dismissed the writ petition on the ground that the assessee had an alternative remedy of filing an appeal under section 246(1)(a), on appeal : Held, that the High Court having omitted to take note of the Explanation under section 246, the assessee was to be granted liberty to approach the High Court by way of a review petition which the High Court shall consider on the merits.

Petition under Article 136 of the Constitution for special leave to appeal from the judgment and order dated May 9, 2016 of the Allahabad High Court. (AY. 2013-14)

Abid Ali Khan v. ITO (2016) 389 ITR 82 / 144 DTR 372 / (2017) 291 CTR 312 (SC)

Editorial : The judgment of the High Court is reported as Abid Ali Khan v. ITO [2016] 389 ITR 80 (All) (HC), the assessee was to be granted liberty to approach the High Court by way of a review petition which the High Court shall consider on the merits.

2179 **S. 246A : Appeal – Commissioner (Appeals) – Powers – Power to admit additional evidence – Revenue not able to disprove additional evidence – Decision based on additional evidence was held to be valid. R.46A]**

Exercise of power by the Commissioner (Appeals) under Rule 46A of the Income-tax Rules, 1962, is to enable the appellate authority to pass orders for substantial cause while entertaining additional evidence. The appellate authority is empowered to allow additional evidence to do substantial justice between the parties. The appellate authority may admit the evidence and decide the appeal. The appellate authority may keep the appeal pending and direct the AO to ascertain the facts, essential for the purpose of deciding the appeal and then, on the basis of the remand report, decide the appeal. Where additional evidence is adduced, the other side has to be given an opportunity to explain or rebut such additional evidence. It is also well-settled that if evidence has been allowed to be let in, without objection, it will not be open to the party aggrieved to raise any objection, as to its admissibility, at a subsequent stage.

CIT v. Sangu Chakra Hotels P. Ltd. (2016) 389 ITR 117 / 74 taxman.com 76 / (2017) 150 DTR 259 (Mad.)(HC)

S. 246A : Appeal – Commissioner (Appeals) – Intimation issued u/s. 200A is appealable. [S. 156, 200A, 234E] 2180

Commissioner (Appeals) has held that the appeal is not maintainable against the order of Assessing Officer passed while processing the TDS returns/statements and charging of fees under section 234E of the Act. No appeal is provided against the intimation issued under section 200A of the Act. Allowing the appeal the Tribunal held that such intimation issued by the Assessing Officer after processing the TDS returns is appealable. The demand raised by way of charging of fees under section 234E of the Act is under section 156 of the Act and any demand raised under section 156 of the Act is appealable under section 246A(1)(a) and (c) of the Act. (ITA No. 1292 & 1293/PN/2015, dt. 23.09.2016) (AY.2013-14)

Gajanan Constructions v. DCIT (Pune)(Trib.); www.itatonline.org

S. 246A : Appeal – Commissioner (Appeals) – Appealable orders – Deduction at source – Order passed by A.O. u/s. 195(2) cannot be challenged before as there is a specific provision u/s. 248 for filing appeal against such order. [S.195(2), 248] 2181

In the appeal, the order appealed against was an order passed u/s. 195(2) against ONGC requiring it to deduct tax at source on payments made to the assessee. There was no final determination of liability under the Act as far as the assessee was concerned which can only be determined when assessment is framed against the assessee. That besides, there being a specific provision u/s. 248 for filing appeal against order passed u/s. 195(2), that too by payer/deductor of tax at source, the said order cannot be challenged u/s. 246A by department. Therefore, the appeal filed by the assessee before the CIT(A) against the order passed u/s. 195(2) in the case of ONGC was not maintainable. The CIT(A) is not competent under the provisions of S. 246A to entertain such an appeal. (AY. 2013-14)

DCIT v. Abu Dhabi Ship Building PJSC (2016) 159 ITD 438/ 138 DTR 124/ 179 TTJ 537 (Mum.)(Trib.)

S. 246A : Appeal – Commissioner (Appeals) – Additional evidence – Matter remanded to AO for admitting additional ground. 2182

On appeal, the Tribunal held that the assessee was prevented by the reasonable cause from making a claim before the AO during the assessment proceedings and had accordingly raised an issue before the CIT(A). Therefore, the additional ground raised by the assessee was admitted and the issue was remitted to the AO to consider and allow the discount on debentures on proportionate basis. (AY. 2006-07 and 2007-08)

Rain Commodities Ltd. v. Dy. CIT (2016) 46 ITR 1 (Hyd.)(Trib.)

Rain Cements Ltd. v. Dy. CIT (2016) 46 ITR 1 (Hyd.)(Trib.)

S. 248. Appeal by a person denying liability to deduct tax in certain cases.

2183 **S. 248 : Appeal – Commissioner (Appeals) – Denying liability to deduct tax – If assessee had filed petition on or before date of hearing of Appeal, Appellate Authority should not brush aside petition merely for reason that petition was not filed along with appeal memo – If order of remittances for more than one financial year and consolidated order is passed, then separate appeal shall be required to be filed for each year. [S.195(2)]**

If Assessee had filed petition on or before date of hearing of Appeal, Appellate Authority should not brush aside petition merely for reason that petition was not filed along with appeal memo.

The requirement of compliance of the condition of bearing of liability of TDS by the payer is not required to be met for filing of appeal u/s. 248 with respect to the remittances made prior to 01.06.2007.

If order of remittances for more than one financial year and consolidated order is passed, then separate appeal shall be required to be filed for each year.

International Air Transport Association v. ADIT (2016) 140 DTR 225 / 179 TTJ 254 (Mum.) (Trib.)

S. 249. Form of appeal and limitation.

2184 **S. 249 : Appeal – Commissioner (Appeals) – Stay was not granted as the petitioner did not come within the ambit of Instruction No. 1914. [S. 201, 220]**

Dismissing the petition the Court held that petitioner did not come within the ambit of Instruction No. 1914, it could not escape its liability to deposit entire tax liability before admission of its appeal before CIT(A). (AY. 2011-12 to 2014-15)

Bank of Baroda v. ITO (2016) 288 CTR 478 / 73 taxmann.com 55 (Karn.)(HC)

2185 **S. 249 : Appeal – Commissioner (Appeals) – Form of appeal and limitation – condonation of delay of 175 days – delay was due to assessee waiting for outcome of penalty proceedings – Delay can be condoned.**

It has been held by the Appellate Tribunal that the matter of delay had to be considered on human probabilities. The reason stated by the assessee was that he was waiting for the outcome of the penalty proceedings. Whether a reasonable prudent person would do so was to be considered, the inference of such delay had to be drawn on the basis of circumstances available on record and conduct of the assessee. Considering the surrounding circumstances and applying the test of human probabilities, the plea of the assessee was genuine. (AY. 2010-11)

Ahmed Hussain (S. S. M.) v. ITO (2016) 48 ITR 417 (Chennai)(Trib.)

2186 **S. 249 : Appeal – Commissioner (Appeals) – Form of appeal and limitation–Delay of 619 days in filing the appeal was condoned – Acceptance of explanation furnished should be rule and refusal must be exception more so when no negligence or inaction or want of *bona fide* could be imputed to defaulting party. [S. 246]**

In appeal CIT(A) has condoned the delay of filing appeal of 619 days. Dismissing the appeal of the revenue the Tribunal held that Apex Court in case of *Ram Nath Sao v.*

Gobardhan Sao reported (2002 (3) SCC 195 (Para 12), held that there could not be a straightjacket formula for accepting or rejecting explanation furnished for delay caused in taking steps. Courts should not proceed with tendency of finding fault with cause shown and reject petition by slipshod order in over jubilation of disposal drive. Acceptance of explanation furnished should be rule and refusal must be exception more so when no negligence or inaction or want of *bona fide* could be imputed to defaulting party. While considering matter, Courts should not lose sight of fact that by not taking steps within time prescribed valuable right had accrued to other party which should not be lightly defeated by condoning delay in a routine like manner. By taking a pedantic and hyper technical view of matter, explanation furnished should not be rejected when stakes were high and/or arguable points of facts and law were involved in case, causing enormous loss and irreparable injury to party against whom lis terminates either by default or inaction and defeating valuable right of such a party to have decision on merit. While considering matter, Courts had to strike balance between resultant effect of order it was going to pass upon parties either way. The CIT(A) after taking into consideration reasons and circumstances causing delay had condoned delay. (AY. 2009-10)
Dy.DIT (IT) v. Bramhacorp Hotels & Resorts Ltd. (2015) 70 SOT 25 (Pune)(Trib.)

S. 250. Procedure in appeal.

S. 250 : Appeal – Commissioner (Appeals) – Cannot dismiss an appeal for non-prosecution and that he has to apply his minds to all the issue raised in the appeal. [S. 246A, 251] 2187
High Court held that from reading of sections 250 and 251, it was very clear that once an appeal is preferred before the CIT(A), then in disposing off the appeal, he is obliged to make such further inquiry that he thinks fit or direct the Assessing Officer to make further inquiry and report the result of the same to him as found in section 250(4). Further, section 250(6) obliges the CIT(A) to dispose of an appeal in writing after stating the points for determination and then render a decision on each of the points which arise for consideration with reasons in support. High Court also held that once an assessee files an appeal u/s. 246A, it is not open to him as of right to withdraw or not press the appeal rather the CIT(A) is obliged to dispose them on merits. Accordingly, it was held that the CIT(A) cannot dismiss an appeal for non-prosecution and that he has to apply his mind to all the issues which arise from the impugned order before him whether or not the same had been raised by the appellant before him. (AY. 2006-07)
CIT v. Premkumar Arjundas Luthra (HUF) (2016) 240 Taxman 133 (Bom.)(HC)

S. 250 : Appeal – Commissioner (Appeals) – Recovery – Stay – Early hearing of appeal – Action of the assessee of filing writ petition to seek early hearing of appeal before CIT(A), while simultaneously seeking adjournment before CIT(A) on frivolous grounds is a " delaying tactic" and an "abuse of the legal process". Petition was dismissed and the assessee was directed to pay the cost of ₹ 20,000. [S. 220(2), 220(6)] 2188
Assessee has filed the petition against the stay of recovery. Assessee also moved petition for an early hearing of appeal. The matter was fixed for hearing before the CIT(A) for deciding the quantum appeal, however the assessee requested for adjournments, which

was granted. Before the Court it was argued that the stay may be granted. Dismissing the petition the court held that action of the assessee of filing writ petition to seek early hearing of appeal before CIT(A), while simultaneously seeking adjournment before CIT(A) on frivolous grounds is a "delaying tactic" and an "abuse of the legal process". Petition was dismissed and the assessee was directed to pay the cost of ₹ 20,000.
Tulsidas Trading Pvt. Ltd. v. TRO (2016) 139 DTR 175 / 288 CTR 202 (Bom.)(HC)

2189 **S. 250 : Appeal – Commissioner (Appeals) – Procedure – Additional evidences to be admitted in case sufficient time was not given to the Assessee at the time of assessment and the AO did not call for specific details.**
The income of the assessee was assessed consequent to a search conducted in the premises of Suresh Nanda group in Kolkata. Confirmation of parties was called upon by the AO on 28-10-2009 and the first hearing was conducted on 17-11-2009. The last hearing was on 11-12-2009 and the assessment order was passed on 29-12-2009, without calling for any additional details. The assessee submitted confirmation of various parties during the course of assessment. Pursuant to the AO's order, the assessee filed additional evidences which were accepted by the CIT(A). The Department filed an appeal and the ITAT held that additional evidences warranted to be admitted by the CIT(A) since there wasn't sufficient time given to the assessee at the time of assessment. The AO did not point out any deficiency in the documents submitted and the Assessee came to know the mind of the AO regarding the non-satisfaction of evidences only upon receipt of the order. (AY. 2007-08)
ACIT v. Vikrant Puri (2016) 47 ITR 708 (Delhi)(Trib.)

2190 **S. 250 : Appeal – Commissioner (Appeals) – Procedure – Rule 46A of the Income Tax Rules which regulates the admission of additional evidence by the CIT(A) cannot override the principles of natural justice. [R.46A]**
The assessee could collect various evidences only after passing of the assessment order. According to the assessee, these additional evidences are vital documents which are required to be considered in order to adjudicate the issue in a judicious manner. The principle *"Audi alteram partem"*, i.e. no man should be condemned unheard is the basic canon principles of natural justice and accordingly we find merit in the contentions of the assessee that Rule 46A of the Income Tax Rules cannot over ride the principles of natural justice. Hence we are of the view that the learned CIT(A) was not justified in refusing to admit the various additional evidences furnished by the assessee. Since the assessee was not given opportunity to contradict the findings given by the AO by not admitting the additional evidences, we are of the view that the Ld. CIT(A) should re-adjudicate all the issues afresh by admitting the additional evidences. (I.T.A. No.5138/Mum/2015, dt. 06.04.2016)(AY. 2007-08)
Avan Gidwani v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 251. Powers of the Commissioner (Appeals).

S. 251 : Appeal – Commissioner (Appeals) – Powers – Jurisdiction to go into issue and he could decide the status of assessee in appeal as appeal is continuation of original proceedings. [S. 184] 2191

Dismissing the petition the Court held that under section 251(1) of the Act, the powers of the First Appellate Authority are coterminous with those of the Assessing Officer and the appellate authority can do what the Assessing Officer ought to have done and also direct him to do what he had failed to do. If the Assessing Officer had erred in concluding the status of the assessee as a firm, it could not be said that the Commissioner (Appeals) had no jurisdiction to go into the issue. The appeal was in continuation of the original proceedings and unless fetters were placed upon the powers of the Appellate Authority by express words, the appellate authority could exercise all the powers of the original authority. The assessee was directed to extend its co-operation to the authorities and not to protract the proceedings except for *bona fide* cause. (AY. 2012-13)

Megatrends Inc v. CIT (2016) 388 ITR 16 / 74 taxmann.com 197 / (2017) 149 DTR 113 (Mad.)(HC)

S. 251 : Appeal – Commissioner (Appeals) – Powers – Show-cause notice – AOP – Finding that firm cannot be partner in partnership contrary to law – Show-cause notice liable to be set-aside. [S.4, 184, Constitution of India, Art. 226] 2192

The assessee was assessed in the status of a partnership. The return of income was processed and an order was passed. The assessee filed an appeal before the Commissioner (Appeals) and during the pendency of the appeal, a show-cause notice was issued by the Commissioner (Appeals) questioning the status of the assessee as a partnership and calling upon the assessee to show-cause why its status should not be changed to that of "association of persons". The assessee challenged the notice in a writ petition, which came to be dismissed directing the assessee to submit its explanation and contest the show-cause notice on its merits rather than questioning it in a writ proceeding. On appeal :

Held, allowing the appeal, that the Commissioner (Appeals) committed a fundamental error in holding that only natural legal persons could be partners in a firm and this led to the disallowance of an expenditure claimed towards remuneration and interest paid to the partners. The finding that a firm could not be a partner in a partnership was contrary to law. It was not necessary to go into the question of jurisdiction of the Commissioner (Appeals) at this stage when the show-cause notice was wrong and liable to be set aside. (AY. 2012-13)

Megatrends Inc. v. CIT (2016) 383 ITR 53 / 139 DTR 93 / 287 CTR 689 (Mad.)(HC)

Editorial : Decision of the single judge of the Madras High Court in Megatrends Inc. v. CIT [2016] 382 ITR 13 / 238 Taxman 192 / 139 DTR 96 (Mad.) is set aside.

2193 **S. 251 : Appeal – Commissioner (Appeals) – Powers – Power of enhancement – Show cause notice issued intending to assess the assessee as AOP instead of Firm and for disallowance of expenditure – Assessee filed a writ petition for quashing the notice – Held, assessee can file explanation before the CIT(A) – writ not maintainable. [S. 4, 184]**

The assessee was a partnership firm trading in stocks, shares, debentures, manufacturing, buying, selling and transporting of various consumer and industrial commodities. During the assessment proceedings, AO disallowed donations made u/s. 35(1)(ii)to the tune of ₹ 2,62,50,000/-. During the appellate proceedings, CIT(A) required the assessee to show cause as to why the assessment of the assessee firm should not be enhanced on two grounds viz., he required the assessee to show-cause as to why the assessee should not be assessed as an AOP and not a firm by pointing out that a partnership firm could not be a partner in a firm as indicated in the case of the assessee and secondly he also called upon the assessee firm to show-cause as to why an amount of ₹ 96,60,000/- may not be disallowed as expenditure. Against the said notice, the assessee-firm filed a writ petition. High Court held that assessee can very well submit their explanation and contest the same on merits before the CIT(A), and, therefore writ was not maintainable. (AY. 2012-13)

Megatrends Inc. v. CIT (2016) 382 ITR 13 / 238 Taxman 192 / 139 DTR 96 / 287 CTR 689 (Mad.)(HC)

Editorial: Order of single judge was set aside in Megatrends Inc. v. CIT (2016) 383 ITR 53 / 139 DTR 93 (Mad.)(HC)

2194 **S. 251 : Appeal – Commissioner (Appeals) – Powers – Power of enhancement. [S. 251(2)]**

Assessment was completed by adding agricultural income. In appeal the CIT(A) further directed AO to tax capital gains in respect of income earn by Assessee on sale of land at Gurgaon. AO directed to compute commission earned by assessee in respect of both sale as well as purchase of agricultural land carried out during year. The Tribunal held that the CIT(A) acted beyond its power by directing AO to tax capital gains in respect of sale of land at Gurgaon, though, there was no addition made by AO in assessment order to that respect. Capital gain was independent and different source of income and was not subject matter of appeal. In *Shapoorji Pallonji Mistry v. CIT,* Bombay High Court had held that CIT(A) was not empowered to enhance income on an issue which was not subject matter of assessment Delhi High Court in case of *CIT v. Sardari Lal & Co.* held that CIT(A) could not touch upon an issue that did not arise from order of the assessment and was outside the scope of the order of the assessment. The order of CIT (A) does not sustain. Assessee appeal allowed accordingly. (AY. 2009-10)

Bikram Singh v. Dy. CIT (2016) 48 ITR 689 (Delhi)(Trib.)

2195 **S. 251 : Appeal – Commissioner (Appeals) – Powers – Additional evidence – Admission of additional evidence is to be allowed when evidence is relevant and goes to root of matter. [S. 153A, R.46A]**

Assessee availed unsecured loan from creditors, but failed to furnish any documents/ evidence to explain the source and the nature of the receipt in his income tax returns.

CIT(A) rejected application of assessee for admission of additional evidence under Rule 46A as original return was filed in October, 2008, and return u/s. 153A was filed in September, 2012, therefore, assessee had sufficient time to file the evidence before AO. CIT(A) denied deletion of addition made by AO on account of agricultural income as difference in such income between two returns were not reconciled through any evidence on record. The ITAT held that evidence sought to be admitted being PAN numbers and bank statements of creditors along with letters of creditors acknowledging the loans were relevant and went to root of the matter, therefore, ought to have been admitted as additional evidence. (AY. 2008-09)
Naresh Chauhan v. Dy.CIT (2016) 48 ITR 1 (Chd.)(Trib.)

S. 251 : Appeal – Commissioner (Appeals) – Powers – Interest on loan paid during the year can be claimed as an allowance before appellate authorities. 2196
The assessee was a Government owned NBFC paid interest on bank loan. However, deduction was not claimed in the return of income. A claim was made before the CIT(A) which was rejected on the ground that no revised return was filed by the Assessee and the claim was neither debited to P&L A/c nor was it allowed or disallowed u/s. 43B. On appeal, the ITAT allowed the claim of the Assessee and held that irrespective of the method of accounting and whether the amount was debited to P&L A/c or not, interest and other expenses covered by s. 43B would be allowable only in the year of actual payment and not in any other year. Further, the ITAT observed that a new claim can be made before the appellate authorities and filing of revised return will not be necessary to make a new claim. (AY. 2001-02, 2003-04 to 2008-09)
West Bengal Infrastructure Development Finance Corporation v. ACIT (2016) 45 ITR 285 (Kol.)(Trib.)
DCIT v. West Bengal Infrastructure Development Finance Corporation (2016) 45 ITR 285 (Kol.)(Trib.)

S. 251 : Appeal – Commissioner (Appeals) – Power to make enhancement and go beyond the subject matter of appeal. 2197
CIT(A) has power of enhancement and can go beyond the subject matter of appeal. (AY. 2010-11)
Sundaram Medical Foundation v. Dy. CIT (E)-I (2016) 45 ITR 500 (Chennai)(Trib.)

S. 251 : Appeal – Commissioner (Appeals) – Additional evidence – Rule does not contemplate that the CIT(A) should call for objections before admitting the additional evidence. [R. 46A] 2198
It was held that Rule 46A does not contemplate a procedure whereby the CIT(A) should first call for objections of AO regarding admissibility of the additional evidence and again call for objections regarding the veracity and relevance of the additional evidence once such evidence has been admitted. (AY. 2009-10)
ITO v. LGW Ltd. (2016) 130 DTR 201 (Kol.)(Trib.)

S. 253. Appeals to the Appellate Tribunal.

2199 **S. 253 : Appellate Tribunal – Limitation – Filing of appeal before wrong forum on Chartered Accountant's advice does not justify three years delay – On facts the appeal was dismissed.**
Dismissing the appeal the Court held that ;Filing of appeal before wrong forum on Chartered Accountant's advice does not justify three years delay. On facts of the case the delay was not condoned. (AY. 2006-07)
Inderchand D. Kochar v. ACIT (2016) 388 ITR 500 / 73 taxmann.com 96 / (2017) 145 DTR 223 / 291 CTR 572 (Mad.)(HC)
Ramesh Kumar Kochar v. ACIT (2016) 388 ITR 500 / 73 taxmann.com 96 (Mad.)(HC)
Sarala Kanwar v. ACIT (2016) 388 ITR 500 / 73 taxmann.com 96 (Mad.)(HC)
Suresh Kumar Kochar v. ACIT (2016) 388 ITR 500 / 73 taxmann.com 96 (Mad.)(HC)
Anita Kochar (Smt.) v. ACIT (2016) 388 ITR 500 / 73 taxmann.com 96 (Mad.)(HC)

2200 **S. 253 : Appellate Tribunal – Cross objection is not prescribed against appeal filed under section 263 of the Act – Hence cross objection is not maintainable. [S. 253(4), 264]**
The High Court has held that cross objections under section 253(4) can be filed only in an appeal against order of the Deputy Commissioner–Appeals, the Commissioner of Appeals, the Assessing Officer preferring an appeal in pursuance of the directions of the Dispute Resolution Panel. In the instant case, the revenue has filed cross objections under section 253(4) in an appeal preferred by the Assessee against the order of the revisional authority exercising the powers under section 263. It was held that no such cross objections are maintainable in terms of section 253(4) of Act and the High Court dismissed the Revenue's appeal. (AY. 2007-08)
CIT v. New Mangalore Port Trust (2016) 382 ITR 434 / 238 Taxman 397 / 283 CTR 342 (Karn.)(HC)

2201 **S. 253 : Appellate Tribunal – Appeal filed by the assessee firm signed by manager – Tribunal dismissed the appeal on preliminary issue of competence of manager to sign appeal memos – Held, manager has no authority to file appeal – Held, Department had also incorrectly accepted the return signed by the manager – Held, mistake was rectified by filing fresh Form 36, matter remanded to be decided on merits. [R. 45 , 47]**
Tribunal dismissed the appeal filed by the assessee firm on the technical ground that the appeal memorandum had been signed by the manager of the firm and not by the managing director or any of the partners. Assessee filed petition for restoration of the appeal but same was also dismissed. Assessee went to the High Court. Department argued that even at the time of filing of the appeal, the Tribunal had issued a defect memo and that a query was also raised by the Tribunal, however, assessee emphasised that manager is the competent person to sign the appeal memos. High Court held that admittedly, manager was not the correct person to sign the appeal memo. High Court also held that initial mistake is only on the part of the revenue, in accepting the return of income filed by the manager, who is allegedly incompetent and, therefore, it would have led the assessee to form an impression that when he is competent to file the return

of income, he would also be competent to sign the memo of appeal. Further, since the assessee had filed revised Form 36, therefore the matter was set aside to the Tribunal to decide on merits. (AY. 2003-04)
Singara Nilgiri Plantation Co. v. Dy. CIT (2016) 238 Taxman 613 / 138 DTR 139 (Mad.) (HC)

S. 253 : Appellate Tribunal – Inordinate delay of 8 years in filing the appeal by department – No reasonable cause shown for not filing the appeal in time – Delay not condonable. 2202
Where there is nothing on record to show or even indicate that a decision was taken by the Revenue to file the appeal but it was due to some other factors that the appeal was not filed in time, there is no occasion to even examine reasonableness of the cause of delay of almost eight years in filing of appeal and therefore, the said delay cannot be condoned. Possibility of damage to the Revenue's cause in other assessment years cannot be reason enough to condone the delay.
ACIT v. YKK India (P) Ltd. (2016) 139 DTR 353 (Delhi)(Trib.)

S. 253 : Appellate Tribunal–Cross objections – Commissioner (Appeals) not adjudicating grounds relating to validity of reassessment proceedings for failure to furnish reasons and merits of additions involved – Cross Objections cannot be filed on such a ground – Assessee can appeal before Tribunal. [S. 143(2), 254(1)] 2203
The Commissioner (Appeals) had quashed the reassessment proceedings on the ground that the Assessing Officer had not issued notice under section 143(2). He had not adjudicated the grounds relating to validity of the reassessment proceedings for non-furnishing of reasons and other grounds on merits of the additions involved. The Department filed appeal before Tribunal and the assessee filed cross-objections. The Tribunal held that if the assessee was aggrieved by non-adjudication per se, the assessee could come before the Tribunal only by way of an appeal and not by way of cross objections. The Legislature has chosen to use the expression "against such order or any part thereof" in section 253(4), which means that cross objections can be filed with reference to the same ground of appeal which is adversely decided against the assessee in appeal. If, there has been no adjudication on any of the grounds of appeal raised before the Commissioner (Appeals), the cross objections cannot be filed on such a ground though raised but not decided specifically. (AY. 2009-10)
DCIT v. Indo American Hybrid Seeds India P. Ltd. (2016) 52 ITR 201 (Bang.)(Trib.)

S. 253 : Appellate Tribunal – Delay of 338 days was not condoned as the explanation was vague. 2204
In an affidavit, as a reason, the assessee attributed delay to an agricultural activity and study of child. Tribunal held that the assessee's explanation was vague, and thus, delay could not be condoned. (AY. 2007-08, 2008-09)
J.N. Chandrashekar v. ITO (2016) 160 ITD 653 (Bang.)(Trib.)

2205 **S. 253 : Appellate Tribunal – Order of Chief CIT rejecting application for exemption was held to be appealable before Tribunal. [S. 10(23)(c)(vi)]**
The CIT rejected application on ground that it was empowered to collect funds and accept funds and it could manage other institutions as well.
Before the ITAT the revenue raised a preliminary objection that appeal filed by assessee against the order passed by Chief Commissioner was not maintainable. ITAT held that S. 253 provides a right to the assessee to file appeal before the Tribunal against the orders mentioned therein. (AY. 2013-14)
Dharmaj Kelvani Mandal v. CCIT (2016) 161 ITD 841 (Ahd)(Trib.)

2206 **S. 253 : Appeal Tribunal – No need to file separate appeals. [S. 201(1), 201(1A)]**
Tribunal held that there is no need to file separate appeals in respect of defaults under section 201(1) & 201(1A) as there is no provision in the Act mandating the filing of separate appeals either before CIT(A) or the Tribunal against the order covering defaults under sub-section (1) or sub-section (1A) of section 201. (AY. 2006-07, 2007-08)
C. J. International Hotels Ltd. v. Addl. CIT (2016) 158 ITD 287 / 177 TTJ 447 / 137 DTR 289 (Delhi)(Trib.)

2207 **S. 253 : Appellate Tribunal – In case of order passed by DRP, right to file an appeal by department does not extend to a point decided either way by Assessing Officer/TPO himself, which remains intact even after direction given by DRP. [S.144C]**
Tribunal held that after the insertion/amendment by the Finance Act, 2012 of/to sub-sections (2A) and (4) of section 253, the Department has acquired a right to file appeal or cross-objection against the assessment order passed in pursuance of the direction of the DRP to the extent it is aggrieved against such direction. It has no right to file appeal or cross objection against the voluntary decision of the AO/TPO which was not subject matter of any adverse direction by the DRP. It can be clarified here that what has been prohibited against such an adverse position is the appellate recourse and not other remedies, if any, available as per law *de hors* the appellate option. In so far as the adverse direction given by the DRP is concerned, the Assessing Officer has now got a right to assail its correctness before the Tribunal. Adverting to the facts of the instant case, though the revenue had a right to file appeal or cross-objection against the direction of the DRP in accepting the cash system of accounting followed by the assessee, but it chose not to do so. Thus the doors of this route are foreclosed. (AY. 2011-12)
SIS Live v. ACIT (2016) 175 TTJ 643 / 131 DTR 221 (Delhi)(Trib.)

2208 **S. 253 : Appellate Tribunal – Order passed by Commissioner (Appeals) on application seeking stay of demand is not a final order and, thus, such an order is not appealable before Tribunal [S.10(20), 250]**
The assessee filed its return claiming income as exempt by virtue of it being a local authority u/s. 10(20). The AO rejected the assessee's claim and raised certain amount of tax. Against said order, the assessee filed appeal before the CIT(A). During pendency of appeal, assessee filed an application for stay of demand, CIT(A) rejected assessee's application.

In view of difference of opinion between the Members of the Tribunal on question as to whether order passed dismissing assessee's application for stay of demand was an appealable order or not, matter was referred to the Third Member. S.250 provides for procedure in appeal which envisages that the order of the CIT(A) disposing of the appeal shall be in writing and shall state the point for determination, the decision thereon and the reasons for the decision. But at the time of disposal of stay application, neither the appeal of assessee was considered by the CIT(A) nor disposed of as envisaged in the relevant provisions of law. It was only the first appellate authority having passed the order, on the stay application moved by the assessee, against which assessee has preferred appeals. It is not in dispute that powers to grant ancillary and incidental relief is there but there should be appeal. ITAT held that order passed by CIT(A) on application seeking stay of demand is not a final order and, thus, such an order is not appealable before Tribunal. (AY. 2001-02, 2002-03, 2003-04 & 2006-07)
Rajya Krishi Utpadan Mandi Parishad v. ITO (2015) 153 ITD 101 / (2016) 158 ITD 71(TM) (Luck)(Trib.)

S. 253 : Appellate Tribunal – Cross objection – Revenue appeal was dismissed because of low tax effect – Cross-objection cannot be dismissed in limine. [S 268A, ITAT R. 22, 27] 2209

Tribunal held that where against order of Commissioner (Appeals), revenue filed appeal before Tribunal and assessee also filed cross-objection and Tribunal dismissed appeal of revenue because of low tax effect, cross-objection could not be dismissed *in limine* for reason of dismissal of revenue's appeal. (AY. 2010-11)
ACIT v. Ajay Kalia (2016) 157 ITD 187 / 135 DTR 147 / 178 TTJ 507 (Delhi)(Trib.)

S. 253 : Appellate Tribunal – Fee provided under section 253(6) was not paid by revenue hence the appeal of revenue was dismissed.[S. 144C, 253(6), 253(2A)] 2210

Revenue has preferred appeals to the Tribunal against the order passed under section 253(2A) without payment of institution feany step to pay the fee. It was pointed out at the time of filing of appeals but the revenue had not taken any step to pay the fee. Therefore the appeal was posted for dismissal and the Commissioner posted for Tribunal told that since the memorandum of appeal is not accompanied by the fee as prescribed, there is no discretion to the Tribunal to accept memorandum of appeal filed, in violation of the statutory provisions. Memorandum of appeals filed by the Revenue are hereby rejected as not maintainable. (AY. 2010-11)
ACIT v. D. E. Shaw India Software (P) Ltd. (2016) 156 ITD 594 / 175 TTJ 492 / 129 DTR 199 (Hyd.)(Trib.)
ACIT v. Deloitte Consulting India (P) Ltd. (2016) 175 TTJ 492 / 129 DTR 199 (Hyd.)(Trib.)
ACIT v. Deloitte Support Services India (P) Ltd. (2016) 175 TTJ 492 / 129 DTR 199 (Hyd.) (Trib.)
ACIT v. Deloitte Tax Services India (P) Ltd. (2016) 175 TTJ 492 / 129 DTR 199 (Hyd.)(Trib.)
Editorial : Law is amnded by the Finance Act, 2016, w.e.f 1-07-2012 retrospectively.

S. 254. Orders of Appellate Tribunal

2211 **S. 254(1) : Appellate Tribunal – Delay – Limitation – Order passed without considering application and without condoning delay – Order without jurisdiction – Tribunal has no jurisdiction to entertain appeal unless delay is condoned. [S. 253]**
Allowing the petition the Court held that unless the delay in filing the appeal of the Revenue had been condoned, the Tribunal had no jurisdiction, power or authority to entertain the appeal and pass any effective order on it as no appeal could be deemed to be pending before the Tribunal until the delay in filing it had been condoned. The fact that the matter was within the knowledge of the assessee had no relevance. The Tribunal was not correct in entertaining the appeal without considering the issue of limitation and without condoning the alleged delay. That being the position since there was an application for condonation of delay, which had not been considered by the Tribunal and the final order had been passed allowing the appeal of the Revenue and the order of the Tribunal being couched in a matter that the appeal of the assessee could not be separated from the appeal of the Revenue, the order of the Tribunal was liable to be quashed. Referred *Noharlal Verma v. District Co-operative Central Bank Ltd. (2008) 14 SCC 445* (AY. 1995-96)
Md. Sayeed v. Dy. CIT (2016) 389 ITR 351 (Patna)(HC)

2212 **S. 254(1) : Appellate Tribunal – Additional grounds – Assessee not pressing issue before Commissioner (Appeals) – Appellate Tribunal allowing additional ground as being question of law – No substantial question of law arose. [S. 260A]**
Dismissing the appeal of revenue, the Court held that no error had been pointed out by the Department in the Appellate Tribunal's order in allowing the additional ground of appeal with regard to prepayment of deferred sales tax liability taken by the assessee as purely a legal issue, though the assessee had not pressed the issue before the Commissioner (Appeals). No substantial question of law arose for consideration.
CIT v. BEHR India Ltd. (No. 1) 389 ITR 419 (Bom.)(HC)

2213 **S. 254(1) : Appellate Tribunal – Additional grounds – Question arising from facts already on record of assessment proceedings – Tribunal can adjudicate – Matter remanded. [R. 11, 29]**
The usage of the words "pass such orders thereon as it thinks fit" in section 254(1) gives wide powers to the Tribunal and such powers are not limited to adjudicating issues arising from the order appealed from alone. Any interpretation to the contrary would go against the basic purpose for which the appellate powers are given to the Tribunal under section 254 which is to determine the correct tax liability of the assessee.
A harmonious reading of section 254(1) and Rules 11 and 29 of the Income-tax (Appellate Tribunal) Rules, 1963, coupled with the basic purpose underlying the appellate powers of the Tribunal leaves no manner of doubt that the Tribunal while exercising its appellate jurisdiction would have the discretion to allow new grounds to be raised before it or additional questions of law arising out of the record before it. What cannot be done is examination of new sources of income for which separate remedies are provided to the Revenue under the Act. (AY. 2007-08)
VMT Spinning Co. Ltd. v. CIT (2016) 389 ITR 326 / 74 taxmann.com 33 (P&H)(HC)

S. 254(1) : Appellate Tribunal – Discretionary power to consider issue raised for first time before it – Tribunal need not remand the matter to Assessing Officer. 2214

Dismissing the appeal of assessee the Court held that the assessee did not raise the claim with respect to the interest and salary paid to the partners either before the Assessing Officer or before the Commissioner (Appeals). The claim was raised only when the matter was argued. This claim could not have been considered by the Tribunal in the absence of supporting documents, including the partnership deed. The fact that issues relating to sale of branded items and bulk sales were remanded for fresh adjudication to the Assessing Officer would not mean that the Tribunal should have remitted this claim of the assessee also to the Assessing Officer. Thus the Tribunal had not committed any illegality. (AY. 2007-08, 2008-09)

Classy The Antique Defend Furniture v. Dy. CIT (2016) 387 ITR 212 / 242 Taxman 469 (Ker.)(HC)

S. 254(1) : Appellate Tribunal – Additional evidence – Deduction at source – Refusal of Tribunal to admit additional evidence was held to be not justified – Assessing Officer directed to examine relevant challan and determine amount of deduction at source. [S. 40(a)(ia), 192, ITATR. 1963, R. 29] 2215

Allowing the appeal the Court held that it was a fit case for the Appellate Tribunal to have exercised its powers under Rule 29 of the Appellate Tribunal Rules, 1963 requiring the production of the challan evidencing the payment of the tax deducted at source in the Government treasury and to have directed the authorities to examine the genuineness of the challan. The order of the Appellate Tribunal refusing to allow the assessee to adduce additional evidence was to be quashed and the Assessing Officer was to examine the challan and accordingly determine the amount of deduction for tax payable. (AY. 2010-11)

Haryana State Road and Bridges Development Corporation Ltd. v. CIT (2016) 388 ITR 253/ 243 Taxman 187 (P&H)(HC)

S. 254(1) : Appellate Tribunal – Best judgment assessment – Concurrent finding of authorities not based upon evidence – Order of Appellate Tribunal perverse – Order was set aside to. [S. 144] 2216

Allowing the appeal of assessee the Court held that although there had been a concurrent finding by the authorities, the finding was not based upon any evidence and was without taking into account relevant materials. It was not necessary for the Assessing Officer to produce materials to show the basis on which he had estimated, but he must be rational and reasonable while assessing the assessee to the best of his judgment and there was an element of guess-work in a best judgment assessment. Making a best judgment assessment could not be a ground for fixing any unjustifiable sum of income or profit without reference to it in the preceding assessment years. In the immediately preceding assessment year the assessee's final net profit rate after deduction of partners' salaries, interest and depreciation had come to 4.46 per cent. when the assessment was made under section 143(3) of the Income-tax Act, 1961 which rate was definitely a relevant material and should have been taken into consideration by the Assessing Officer and the appellate authorities while considering the rate of

10 per cent introduced by the Assessing Officer. The Appellate Tribunal had given a complete go-by to its several decisions fixing the final net profit rate of 6 per cent in the case of other similarly situated assessees who were also in civil contract works of the Government and no reasonable man could have estimated the net profit at more than 8 per cent. In the case of the assessee, even after the deduction on account of partners' salaries, interest and depreciation, it still had led to a net profit rate of approximately 7.9 per cent which was much above the net profit rate as it had been found after regular assessment was made of the same assessee. The said rate was also not in accordance with the other decision of the Appellate Tribunal in the case of similarly situated contractor. The order of the Appellate Tribunal was perverse. Matter remanded. (AY. 2004-05)

Prasad Construction and Co. v. CIT (2016) 388 ITR 579 / (2017) 152 DTR 72 (Patna)(HC)

2217 **S. 254(1) : Appellate Tribunal – Reassessment – Order being perverse the order of Tribunal was set aside. [S. 147, 148]**

Allowing the appeal of revenue, the Court held that Tribunal, which was the final fact finding authority, failed to properly analyse the evidence on record and without appropriate reasons confirmed the order of the Commissioner (Appeals) with regard to the deletion of additions made by the Assessing Officer. That in the order of the Commissioner (Appeals), the statements of the persons who were said to have loaned money to the assessee through its finance division were not analysed properly or considered the way they deserved to be. The holding of the Commissioner (Appeals) that the transactions had "more or less been unequivocally confirmed" was not only self-contradictory, but also against the record. The order of the Appellate Tribunal did not clarify the matter either and no discussion was found therein with regard to the statements of the alleged creditors of the assessee-firm. Reliance was placed on the statement of one S, a partner of the assessee-firm without comparing it with the statements of the alleged creditors. The Appellate Tribunal failed to find out about the finality of the proceedings before the civil court and confirmed the order of the Commissioner (Appeals). The order of the Appellate Tribunal was perverse. Matter remanded. (AY. 2003-04)

CIT v. Ajay Electronic (2016) 388 ITR 272 (P&H)(HC)

2218 **S. 254(1) : Appellate Tribunal – Duty to pass reasoned order – Failure to pass reasoned order – Matter remanded.**

Allowing the appeal of revenue, the Court held that the Supreme Court in *Kranti Associates P. Ltd. v. Masood Ahmed Khan (2010) 9 SCC 496* statutorily requires recording of reasons and requirement of passing a reasoned order by an authority whether administrative, quasi-judicial or judicial. The Income-tax Appellate Tribunal being the final fact finding authority should pass a well reasoned order after examining the entire evidence on record. Held, that a perusal of the order passed by the Tribunal showed that findings had not been recorded after giving detailed reasons and considering the overall material and evidence an record. The order of the Tribunal was to be set aside. Matter remanded to Tribunal. (AY. 2007-08)

CIT v. Banarsi Sweets P. Ltd. (2016) 387 ITR 172 (P&H)(HC)

S. 254(1) : Appellate Tribunal – Tribunal has the power to consider issue not raised before Commissioner (Appeals) but raised before it first time. 2219

Dismissing the appeal of revenue the Court held that the powers of the Tribunal are wide enough to consider a point which may not have been urged before the Commissioner (Appeals) as long as the question requires to be examined in the interest of justice. Held accordingly, that the Tribunal had not exceeded its jurisdiction in examining the question whether the Assessing Officer was justified in extending the time for the auditor nominated under section 142(2C) of the Income-tax Act, 1961, to submit the audit report.

PCIT v. Nilkanth Concast P. Ltd. (2016) 387 ITR 568 / 241 Taxman 194 (Delhi)(HC)

Editorial : Order in Nilkanth Concast P. Ltd. v. Deputy CIT (2016) 48 ITR (Trib.) 264 (Delhi) is affirmed. SLP is granted to the revenue , PCIT v.Nilkanth Concast (P) Ltd v. Ltd (2017) 246 Taxman 371 (SC)

S. 254(1) : Appellate Tribunal – Tribunal passing two conflicting orders for same year on different dates – Circumstances in which such orders came to be passed unclear – Matter remanded to Tribunal to be decided afresh. [S. 11, 12, 12A] 2220

The Appellate Tribunal allowed the appeal of the Revenue on January 23, 2014 holding the activities of the trust were not charitable and upheld the assessment order. Another order came to be passed by the Tribunal on October 9, 2012 in the assessee's favour for the same year. On appeals both by the Department and the assessee: Held, that it was not clear how the second order was passed without recalling the earlier order. At first the matter was decided in favour of the assessee and later the converse view was taken. The matter was to be remanded to the Tribunal to decide afresh after hearing both the parties. (AY. 2006-07)

Gurudaspur Improvement Trust v. CIT (2016) 387 ITR 741 (P&H)(HC)

S. 254(1) : Appellate Tribunal – Additional ground – Second round of appeal – No estoppel against the law – Pure question of law can be raised in second round of appeal. [S. 158BC] 2221

Question of law raised in HC was by revenue was the admissibility of additional ground raised by assessee before Tribunal in second round of appeal challenging the very jurisdiction of AO to make block assessment u/s. 158BC was rightly entertained by Tribunal. The Hon'ble Court dismissed the appeal and held that there were no estoppels against law. Fact that assessee took part in the first round of litigation without raising said ground cannot stop the assessee from raising the pure question of law in the second round of appeal. Further the order of Tribunal allowing additional ground was never challenged by the Revenue.

CIT v. Jolly Fantasy World Ltd. (2015) 373 ITR 530 / 231 Taxman 668 / (2016) 139 DTR 163 (Guj.)(HC)

Editorial : SLP was dismissed (2016) 73 taxmann.com 159 / 242 Taxman 113 (SC)

S. 254(1) : Appellate Tribunal – Business expenditure – Tribunal holding liability not accrued in year in question deciding on basis of order for preceding year was held to be not proper – Matter remanded. [S. 37(1), 145] 2222

Allowing the appeal of revenue the Court held that if there was a difference in the clauses of the agreements for the two years and the dispute between the seller and the

assessee which had not existed during the earlier AY, the Tribunal had not considered the different fact-situation in the AY 1986-87 from that existing in 1985-86. The matter was restored to the Tribunal for final disposal in the context of the fact situation as existing for the AY in question. The order of the Tribunal was quashed and set-aside. Matter remanded. (AY. 1986-87)
CIT v. Monika India (No.2) (2016) 386 ITR 617 / 286 CTR 435 / 135 DTR 290 (Bom.)(HC)

2223 **S. 254(1) : Appellate Tribunal – Powers – Delay of 997 days in filing application could not be condoned. [S. 11, 12A]**
The assessee had filed an application u/s. 12A of the Act for registration of trust which was rejected by the Commissioner of Income-tax. Against the said order, the assessee filed an appeal before the Tribunal belated by 997 days. The Tribunal did not condone the delay and rejected the appeal. Dismissing the appeal Court held that the assessee could not provide the details of counsel who advised them that registration u/s. 12A is not a condition precedent for seeking relief u/s. 11. In absence of the same, delay of 997 days in the filing of appeal could not condoned.
Spporthi Sadan Convent v. CIT (2016) 239 Taxman 68 (Karn.)(HC)

2224 **S. 254(1) : Appellate Tribunal – Duty – Deduction at source – Conflicting opinions expressed by Tribunal in same judgment – Non application of mind – Matter remanded for rehearing. [S. 40(a)(ia), 194C]**
Allowing the appeal of revenue the Court held that the tribunal had expressed conflicting opinions in the same judgment and that the deletion of addition of a sum of more than ₹ 3 crores was made in a slipshod manner by the Tribunal without applying its mind. Matter remanded. (AY. 2006-07)
CIT v. Vikas Coal Co. (2016) 385 ITR 536 (Cal) (HC)

2225 **S. 254(1) : Appellate Tribunal – Precedent – Tribunal in refusing to follow judgment of the co-ordinate Bench in the assessee's own case (holding that transfer fees and TDR premium received by a co-operative society is not taxable on principles of mutuality) without giving reasons is not justified and is breach of principles of judicial discipline – Order of Tribunal was set aside. [S. 4]**
Allowing the appeal of assessee the Court held that Tribunal in refusing to follow judgement of the co-ordinate bench in the assessee's own case (holding that transfer fees and TDR premium received by a co-operative society is not taxable on principles of mutuality) without giving reasons is not justified and is breach of principles of judicial discipline. Order of Tribunal was set aside. (AY. 1996-97, 2000-01, 2001-02, 2002-03, 2006-07, 2007-08)
Hatkesh Co-op. Housing Society Ltd. v. ACIT (2016) 234 Taxman 213 (Bom.)(HC)
Editorial : Order of Tribunal in Hatkesh Co-op Housing Society Ltd. v. ACIT (2013) 27 ITR 494 (Mum.)(Trib.) is set aside.

S. 254(1) : Appellate Tribunal – Duti – Condonation of delay of 843 days – An appeal was wrongly filed before the AO and not CIT(A) as an unintentional on part lapse of the assessee. The AO ought to have returned the appeal to enable the assessee to take corrective steps. The likelihood of error is inherent in human nature. The power of condonation is in view of human fallibility and must be exercised in cases of *bona fide* lapses – Awarded cost of ₹ 10000, to the assessee. 2226

Assessing Officer passed the order on 31-12-2007, the appeal was filed before the Assessing Officer instead of CIT(A) on 8th February 2008 (within the period of limitation). After realizing the mistake correct appeal was filed along with condonation of delay on 12th May 2011. CIT(A) by his order dated 4th August, 2011 rejected the application for condonation of delay and dismissed the appeal. In appeal Tribunal also affirmed the order of CIT(A). On further appeal to High Court allowing the appeal the Court held that it is very clear that the appellant as well as the department *bona fide* proceeded on the basis that its appeal before the CIT(A) is pending. The lapse on the part of the assessee was unintentional. Further, the analogy made in the impugned order with nature is inappropriate. Human interaction is influenced by human nature. Inherent in human nature is the likelihood of error. Therefore, the adage "to err is human". Thus, the power to condone delay while applying the law of limitation. This power of condonation is only in view of human fallibility. The laws of nature are not subject to human error, thus beyond human correction. In fact, the Apex Court in State of *Madhya Pradesh v. Pradip Kumar (2000) 7 SCC 372* has observed to the effect that although the law assists the vigilant, an unintentional lapse on the part of the litigant would not normally close the doors of adjudication so as to be permanently closed, as it is human to err. In this case, we have found that it is an unintentional lapse on the part of the appellant. We are, therefore, of the view that the impugned order is not sustainable and the question as framed is answered in favour of the appellant assessee. Court also directed the assessee for payment of costs of ₹ 10,000/- by a pay order drawn in the name of "The Principal Commissioner of Income Tax-15, Mumbai" within a period of four weeks from today. (ITA No. 192 of 2014, dt. 19.07.2016) (AY. 2005-06)

Prashnath Project Ltd. v. DCIT (Bom.)(HC); www.itatonline.org

S. 254(1) : Appellate Tribunal – Duty – Cross – Objection – Tribunal is duty bound to consider submissions in regard to cross-objection. [S. 153A, R. 27] 2227

The Commissioner (Appeals) deleted the addition. In the Department's appeal before the Tribunal, the assessee filed a cross-objection contending that no material was found in support of addition. The Tribunal refused to entertain the cross-objection application under Rule 27 of the Income-tax (Appellate Tribunal) Rules, 1963, stating that the contention had not been taken in the first instance before the Commissioner (Appeals). On appeal:

Held, that the Tribunal was duty bound to consider the assessee's contention, rather than brushing aside the cross-objections. The order of the Tribunal to the extent that it denied the right of the assessee to urge cross-objections was to be set aside. The right of the parties to urge contentions in support of their submissions on the merits was to be reserved. (AY. 2000-01)

Brijwasi Impex P. Ltd. v. CIT (2016) 384 ITR 320 (Delhi)(HC)

2228 **S. 254(1) : Appellate Tribunal – Duty – Assessment of third person – Failure by Appellate Tribunal to record finding regarding satisfaction and consider whether satisfaction note was antedated – Matter remanded. [S. 158BC, 158BD]**
Allowing the appeal of the revenue the Court held that the Appellate Tribunal being the final fact finding authority had not recorded any finding with regard to the recording of the satisfaction note dated May 31, 2005. Further nothing was observed whether the satisfaction note, if any, produced by the Department was ante-dated or not. Under such circumstances, the matter was to be remanded to the Appellate Tribunal to examine the matter afresh and record a reason based finding. (BP. 1-4-1997 to 8-5-2003)
CIT v. Anupam Nagalia (2016) 384 ITR 442 (P&H)(HC)

2229 **S. 254(1) : Appellate Tribunal – New ground – Issue purely one of law – Tribunal can permit issue to be raised for first time before it. [S. 143(2), 147, 148, 292BB]**
Where no evidence or disputed facts are sought to be brought on record, and the issue being purely one of law, the Appellate Tribunal can permit the assessee to raise such a point before it. (AY. 2005-06 to 2008-09)
PCIT v. Silver Line (2016) 383 ITR 455 / 283 CTR 148 / 65 taxmann.com 137 / 129 DTR 191 (Delhi)(HC)

2230 **S. 254(1) : Appellate Tribunal – Duty – Pass a reasoned order in view of binding precedent of Apex Court in *Kranti Associates Pvt. Ltd. v. Masood Ahmed Khan [2010] 9 SCC 496* – Order of Tribunal was set aside.**
Court held that, the Supreme Court in *Kranti Associates Pvt. Ltd. v. Masood Ahmed Khan (2010) 9 SCC 496* has dealt with the requirement of passing a reasoned order by an authority whether administrative, quasi-judicial or judicial.
The source of credit entries in the bank account was not explained by the assessee and no enquiry whatsoever was made by the Assessing Officer to find out the genuineness of the deposits. The Commissioner held the assessment proceedings to be prejudicial and erroneous to the interests of the Revenue and cancelled them directing the Assessing Officer to complete the assessment *de novo* after affording fresh opportunity to the assessee. The Tribunal set aside the order of the Commissioner. On appeal to the High Court. Held, that the Tribunal being the final fact finding authority was required to deal with all aspects of the factual matrix and then record its conclusions based thereon. It had failed to do so. Hence its order was not valid. Matter remanded to the Tribunal to pass a reasoned order. (AY. 2007-08)
CIT v. Indra Sen Aggarwal (2016) 383 ITR 592 / 138 DTR 76 (P&H)(HC)

2231 **S. 254(1) : Appellate Tribunal – Duty – Business expenditure – Non-consideration of material placed on record would itself lead to perversity in findings of facts arrived by Tribunal which would call for interference of the High Court. [S. 37(1), 260A]**
The assessee paid commission (a) to taxi drivers, travel agents etc. to procure more business for Assessee and (b) to its staff for sale of tickets. The AO disallowed the said commission. The CIT(A) examined material and other evidence on record and allowed deduction to the extent amounts were verified and disallowed deduction for amounts which could not be verified. On department's appeal the Tribunal reversed

findings of the CIT(A) without considering the details filed before the lower authorities. On assessee's appeal the High Court held that the CIT(A) whilst coming to the conclusion that the assessee was entitled for deduction in respect of commission paid to taxi drivers, travel agents etc., had minutely scrutinized the material on record, but, however, on perusal of the impugned order, it appeared that the Tribunal had not at all scrutinized the material whilst reversing the findings of the Commissioner. In fact, there were no reasons recorded in the impugned order of the Tribunal to hold that the findings of the CIT(A) cannot be sustained. Non-consideration of such material would itself lead to perversity in the findings of fact, arrived at by the Tribunal which would call for interference of Court in the present appeal. As far as claim of the Assessee towards deduction on account of commission paid to the staff was concerned, the Tribunal can re-examine the matter on its own merits in the light of the judgment of the Supreme Court in the case of *Shahzada Nand & Sons v. CIT (AIR 1977 SC 1182)* wherein Supreme Court accepted that there can be cases where commission could be paid also to the staff for carrying out extra services. Accordingly, matter was restored to Tribunal to adjudicate the issue as per directions. (AY. 2009-10)
Emerald Cruises v. ITAT (2016) 238 Taxman 143 (Bom.)(HC)

S. 254(1) : Appellate Tribunal – Power – It is the inherent power of the Tribunal to consolidate the appeals if the issues are similar and the reasons for consolidating the same is to be recorded in writing. 2232

The High Court has held that it is the inherent power of the Tribunal to consolidate the appeals if the issues involved in the appeal are similar and identical to avoid conflicting directions and orders and the same have to be recorded in writing. If they involve common questions, common arguments, they can be conveniently disposed of by a common order. However, it was held that there was no justification for consolidating matters and by keeping the earlier case pending till further appeals accumulated for subsequent years raising the same issues and questions. In that event, it would be wiser to decide the earliest case and if the same applies on facts and there is nothing different or distinguishing factor brought on record in successive assessment years, then the earlier decision can be applied and followed. (AY. 2001-02)
DIT v. Societe Generale (2016) 237 Taxman 182 (Bom.)(HC)

S. 254(1) : Appellate Tribunal – Power – Remand was not a power to be exercised in a routine manner and should be used sparingly as an exception only when the facts warranted such course of action. 2233

Allowing the appeal of the assessee the Court held that the jurisdiction of the Tribunal being that of the last fact finding authority, it was empowered to examine the documents placed by the assessee in support of its claim. It was a settled law that remand was not a power to be exercised in a routine manner and should be used sparingly as an exception only when the facts warranted such course of action. When the materials were available on record, the Tribunal ought to have arrived at a conclusion rather than further remanding the matter to the Assessing Officer that too, after giving a positive finding that the methodology adopted by the assessee was on a scientific and reasonable basis. No proper reasoning was given by the Tribunal for exercising the power of

remand. The directions issued by the High Court while remanding the matter to the Tribunal were not considered by the Tribunal in the true spirit. It was the obligation cast on the Tribunal to examine the case of the assessee in the light of the judgment of the Supreme Court and to come to a decision. But, remanding the matter to the Assessing Officer was in disregard of the judgment of the court. The Tribunal was to consider the case of the assessee in the light of the directions issued by the court and applying the principles of law laid down by the Supreme Court, which stated that the provision for warranty could be made permissible if the requirements were fulfilled. Matter remanded. (AY. 2002-03, 2003-04)
Dell International Services India P. Ltd. v. ACIT (2016) 382 ITR 37 (Karn.)(HC)

2234 **S. 254(1) : Appellate Tribunal – Duties – No jurisdiction to make addition which Assessing Officer or Commissioner (Appeals) did not make and on which no appeal or cross objection filed by Department.**
Held, allowing the appeal, that it was not open to the Tribunal to confirm the addition because no such addition was made. When the Department had not filed cross objections against the order of the Commissioner (Appeals) in respect of the impugned sum, there was no basis for the Tribunal to confirm the addition. The addition made by the Tribunal for the first time was in excess of its jurisdiction. [BP. 1-4-1998 to 21-04-1998)
Sheo Kumar Mishra v. Dy. CIT (2016) 382 ITR 424 / 134 DTR 376 / 287 CTR 75 (Cal.)(HC)

2235 **S. 254(1) : Appellate Tribunal – Duties – Adjournment – Failure by ITAT to grant an adjournment requested due to bereavement results in breach of principles of natural justice – Matter was set aside.**
In the peculiar facts and circumstances of the case and in the interest of justice, the learned Tribunal could have given an opportunity of hearing to the appellant for the subsequent date. Having failed to grant a short adjournment has resulted in passing the impugned order in breach of the principle of natural justice which calls for the interference of this Court. The substantial question of law is answered accordingly.
Zuari Global Ltd. v. Pr. CIT (2016) 383 ITR 171 (Bom.)(HC)

2236 **S. 254(1) : Appellate Tribunal – Precedent – Non-consideration by the ITAT of a judgement of the Co-ordinate Bench makes the order a non-speaking one and breaches the principles of natural justice – Order of Tribunal was set aside. [S. 14A, R.8D]**
Allowing the appeal, the Court held that in fact the impugned order of the Tribunal in paragraph 6 thereof does record the appellant's reliance upon the decision of the Court of its coordinate Bench in *J.K. Investors (Bombay) Ltd v. Assistant Commissioner of Income Tax (ITA No. 7858/MUM/2011)* decided on 13th March, 2013. However, thereafter the impugned order does not deal with the appellant's reliance upon the decision of the Tribunal in J. K. Investors (supra) while dismissing the appellant-assessee's appeal before it. In fact the impugned order of the Tribunal ought to have dealt with its decision in J. K. Investors (supra) and considered its applicability to the present facts. In view of the fact that the impugned order of the Tribunal does not deal with its decision in J. K. Investors (supra) relied upon by the appellant assessee in support of its submission as recorded in the impugned order itself makes the impugned order a non-speaking

order and, therefore, in breach of principles of natural justice. The substantial question of law is answered in the affirmative i.e., in favour of the appellant and against the revenue. However, the issue of applicability of Rule 8D of the Rules or otherwise has yet to be determined by the Tribunal. In these circumstances, we set aside the impugned order dated 10th July, 2013 passed by the Tribunal and restore the entire appeal to the Tribunal for fresh disposal in accordance with law. All contentions of both sides left open. (ITA No. 2342 of 2013, dt. 08.03.2016)
DSP Investment Pvt. Ltd. v. ACIT (Bom.)(HC); www.itatonline.org

S. 254(1) : Appellate Tribunal – Precedent – Binding nature – Jurisdictional High Court – Law declared by the decision of the High Court will be binding upon all authorities and Tribunals functioning with in State – Duty of Tribunal to follow decision of jurisdictional High Court and Co. – Ordinate Tribunal – Writ is maintainable. [S. 14A, Constitution of India, Art. 226] 2237

Law declared by the decisions of the High Court will be binding upon all authorities and Tribunals functioning within State; when an appeal is not entertained then the order of the Tribunal holds the filed and the Co-ordinate Benches of Tribunal are obliged to follow the same. Duty of Tribunal to follow decision of jurisdictional High Court and Co-ordinate Tribunal. Not following the judgment of Jurisdictional High Court, the Writ is maintainable and the Court would quash such an order. (AY. 2008-09)
HDFC Bank Ltd. v. DCIT (2016) 383 ITR 529 / 132 DTR 89 / 284 CTR 414 (Bom.)(HC)

S. 254(1) : Appellate Tribunal – Power – The power under Rule 12 of ITAT Rules is to either reject a memorandum of appeal or return it for correction, if the memorandum of appeal is not in the prescribed form. It is only after the memorandum of appeal is put in the prescribed form that it has to be represented for acceptance under Rule 7. [S. 260A, R. 7, 12] 2238

Against the order of the Commissioner (Appeals), the revenue filed an appeal before the Tribunal in the prescribed form. The Tribunal by order dated 6-11-2007 dismissed the appeal on the ground that the revenue had not obtained approval of the Committee on Disputes (COD) to prosecute a dispute with the assessee, a public sector company, which was required in view of the decision of the Supreme Court in the case of *ONGC v. CCE (2004) 6 SCC 437*. Thereafter on 17-2-2011, the Supreme Court in the case of *Electronics Corpn. of India Ltd. v. Union of India (2011) 332 ITR 58* held that the approval of COD was no longer required to prosecute a dispute amongst the departments of the Government and Public Sector undertakings inter se. Consequent to the above, in the year 2012 the revenue filed a miscellaneous application before the Tribunal for recall of the order dated 6-11-2007. The Tribunal by order dated 8-2-2013 dismissed the above application as being beyond the period of limitation provided in section 254(2). Before the High Court, the Revenue contended that there was no occasion to apply section 254(2) to its application for recall of the order dated 6-11-2007. It was further argued that order dated 6-11-2007 was not an order passed under section 254(1) but an order under rule 12 of the Income-tax (Appellate Tribunal) Rules, 1963, and accordingly, no period of limitation applied.
The High Court held that rule 12 could not have any application, as the *sine qua non* for its application was that the memorandum of appeal was not in the prescribed form.

Admittedly, in instant case, the memorandum of appeal was in the prescribed form. The appeal filed by the revenue itself was listed for hearing on 6-11-2007 before a Division Bench of the Tribunal leading to an order under section 254(1). This order was an appealable order under section 260A.

The High Court further observed that whenever a memorandum of appeal is rejected under Rule 12, then it has to be represented under Rule 7. In the instant case, no memorandum of appeal has been represented by the revenue under Rule 7. This also is indicative of the fact that the order dated 6-11-2007 of the Tribunal has not been exercised under Rule 12 but under section 254(1). Moreover the period from the date of rejection of the memorandum of appeal till the date of representation after amending the memorandum of appeal would not be excluded while computing the period of limitation as provided under the Act for the purposes of filing an appeal before the Tribunal. (AY. 2000-01)

CIT v. Air India Ltd. (2016) 383 ITR 284 / 237 Taxman 639 / 131 DTR 81 / 289 CTR 287 (Bom.)(HC)

2239 **S. 254(1) : Appellate Tribunal – Additional evidence – CIT(A) ought to have given opportunity to Assessing Officer before admitting additional evidence. [S. 144, 250, R. 46A(3)]**

A best judgment assessment was passed under section 144 of the Act by Assessing Officer, disallowing deductions under section 10A of the Act. On appeal, CIT(A) set aside the assessment order after considering the documents furnished and the evidence placed on record by the assessee. Aggrieved the Revenue appealed against the CIT(A) order before the Tribunal.

Tribunal dismissed the revenue's appeal and held that there is no requirement in law that the CIT(A) should invariably consult or confront the Assessing Officer every time additional evidence is obtained by CIT(A) on its own motion. Also in cases wherein the additional evidence is in nature of clinching evidence, leaving no further room for any doubt or controversy, in such case no useful purpose would be served in performing the ritual or forwarding the evidence to the assessing officer and in obtaining his report. Revenue preferred appeal before the High Court against the impugned order. High Court noted that the Tribunal had failed to note that Rule 46A(3) requires the assessing officer to be given an opportunity to examine the documents produced by the assessee for the first time before the CIT(A). This mandate of Rule 46A(3) could not have been dispensed with, as it is a statutorily prescribed rule of natural justice. High Court held that Rule 46A(3), cannot be whittled down or brushed aside as performing a ritual. While sub rule (4) confers power on the first appellate authority to cause production of documents, justice and fair play would require the Assessing Officer to be given the opportunity to examine such documents and put forth his objections. Accordingly, the High Court held that the document which the assessee intends to place before the appellate authority, cannot be entertained by CIT(A) except on fulfilment of the following conditions:- (1) recording reasons in writing for receiving such evidence; and (2) giving the assessing authority an opportunity to examine the documents.

As a result High Court set aside the CIT(A) order and directed to pass a fresh order after giving the Assessing Officer opportunity of being heard. (AY. 2010-11)

CIT v. NE Technologies India (P) Ltd. (2016) 237 Taxman 151 (AP)(HC)

S. 254(1) : Appellate Tribunal – Duties – Right of Respondent in an appeal before Tribunal – The respondent cannot assail the finding of the CIT(A) without filing an appeal – Rule 27 would not permit the respondent to expand the scope of an appeal and argue on issues which are not subject matter of appeal. [S. 68, 153A, R. 27] 2240

Pursuant to a search and seizure action, the AO invoked the provisions of S. 153A of the Act and completed the assessment by bringing to tax share application money as unexplained u/s. 68 of the Act.

The CIT(A) held that addition u/s. 68 was beyond the scope of S. 153A, however, upheld the addition on merits. The Tribunal though allowed the revenue to assail the finding of the CIT(A) on scope of Sec. 153A, reversed the assessment order.

Against the order of the Tribunal, the Revenue preferred an appeal before the HC wherein it was held that the issue whether the additions made by the AO were outside the scope of s. 153A, had been decided by the CIT(A) in favour of assessee, against which no appeal was preferred by the Revenue before the Tribunal and thus, had attained the finality. In absence of any appeal, the Tribunal could not have disturbed the said findings. Further, the Revenue cannot take recourse to Rule 27 of the ITAT (Rules), 1963 as it would not extend to permitting the respondent to expand the scope of an appeal and assail the decision on issues, which are not subject matter of the appeal.(AY. 2008-09)

CIT v. Divine Infracon (P) Ltd. (2016) 131 DTR 395 (Delhi)(HC)

S. 254 (1) : Appellate Tribunal – Powers – Tribunal does not have inherent power to dismiss an appeal in default on account of absence of appellant on date of hearing. [R. 24] 2241

The ITAT does not have inherent power to dismiss an appeal in default on account of absence of appellant on date of hearing. (AY. 2004-05)

Partha Mitra v. ITO (2016) 161 ITD 25/ (2017) 183 TTJ 330 / 145 DTR 99 (TM)(Kol.)(Trib.)

S. 254(1) : Appellate Tribunal – Stay of demand to be granted if the assessed income is 10 times that of the returned income. 2242

The assessee had applied for stay of demand before the ITAT. The ITAT held that since the assessed income was 10 times that of the returned income, the demand was high pitched and liable to be stayed in view of CBDT Instruction No. 96 dated 21-0-1969. (AY. 2011-12)

Dimension Data Asia Pacific Pte. Ltd. v. DCIT (2016) 52 ITR 155 / (2017) 183 TTJ 673 (Mum.)(Trib.)

S. 254(1) : Appellate Tribunal – Stay – Collection and recovery – Assessee deemed in default – Adjustments were made contrary to the decision of the Co-ordinate benches of the Tribunal, stay on recovery of outstanding demand was to be granted. [S. 2(14)), 92B, 92C, 220] 2243

Tribunal held that where TPO made addition to assessee's ALP in respect of rendering IT enabled services to its AEs, in view of fact that TPO had included/excluded certain concerns in final set of comparables which were contrary to ratio of certain decisions of Co-ordinate Benches of Tribunal, stay on recovery of outstanding demand was to be granted. (AY. 2011-12)

Vodafone India Services (P.) Ltd. v. DCIT (2016) 158 ITD 264 (Mum.)(Trib.)

2244 **S. 254(1) : Appellate Tribunal – Additional grounds – Transfer pricing – Arm's length price – Assessee can raise additional ground to seek exclusion of a comparable included in assessee's own TP study when he had not raised such ground before any of lower authorities. [S. 92C]**

Assessee can raise additional ground to seek exclusion of a comparable which was included in assessee's own TP study even though he had not raised such ground before any of lower authorities. (AY. 2007-08)

Novell Software Development (India) (P.) Ltd. v. Dy. CIT (2016) 158 ITD 237 / 178 TTJ 629 (Bang.)(Trib.)

2245 **S. 254(1) : Appellate Tribunal – Precedent – Co-ordinate benches cannot disregard the view of another Co-ordinate Bench.**

The Tribunal held that it is well settled in law that Co-ordinate Benches cannot disregard the view of another Co-ordinate Bench, it is however equally true that it is vital to the administration of justice that those exercising judicial power must have the necessary freedom to doubt the correctness of an earlier decision if and when subsequent proceedings bring to light that is perceived by them as an erroneous decision in the earlier case. (AY. 2009-10)

Dy. CIT v. Kalpataru Power Transmission Ltd. (2016) 177 TTJ 394 / 133 DTR 113 / (2017) 162 ITD 18 (Ahd.)(Trib.)

2246 **S. 254(1) : Appellate Tribunal – Corrigendum – Additional evidence – Tribunal cannot consider new material or information which comes to the possession of the AO after passing the assessment order – The appellate procedure is designed to adjudicate matters that were originally framed in the assessment order and new material cannot be considered.**

It is an admitted fact that the statement taken from Shri Jagdish Prasad Purohit was not considered by the AO. Under the scheme of the Act, the order passed by the assessing officer is being contested by the assessee before Ld. CIT(A) and thereafter, by both the parties before the Tribunal, if they feel aggrieved by the order passed by Ld CIT(A). After passing the assessment order, the assessing officer becomes *functus officio* and hence, if any material or information comes to the knowledge of the AO subsequently, then the assessing officer is required to follow the course of action provided under the Act and the Income-tax Act does not provide for modification of the order that has already been passed. The appellate procedure has been designed to adjudicate the matters that were originally framed in the assessment order. Hence, in our considered view, it may not be correct an altogether new material at this stage. Further, the Ld. AR has submitted that Shri Jagdish Prasad Purohit has not implicated the assessee in the statement and he has retracted from the statement by filing an affidavit. He has also furnished a copy of retraction statement. These limited facts show that the statement given by Shri Jagdish Prasad Purohit and its reliability are debatable. Since the additional evidence sought to be relied upon by the revenue is a debatable one; since the same was not considered or relied upon by the AO and since alternative course of action is available to the revenue under the Act to deal with the same, in our view, it should not be admitted at this stage. Accordingly we are of the view that the grounds

urged by placing reliance on the same are also liable to be dismissed. Accordingly we decline to admit the additional evidence filed by the revenue and the revised grounds urged by the revenue in connection there with are also dismissed. (ITA No. 2034/mum/2014, dt. 09.05.2016) (AY. 2009-10)
H. K. Pujara Builders v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 254(1) : Appellate Tribunal – Duties – A liberal view must be taken in matters of condonation of delay. A delay of 2,191 days caused by an employee leaving the services of the assessee and not handing over papers to the assessee deserves to be condoned. 2247

There was a delay of 2,191 days in filing the instant appeal. In the affidavit, the assessee stated that the employee concerned, who was handling with the taxation matter left the assessee company and due to inadvertent mistake, the papers and documents, related to the appeal remained to be handed over, which caused the delay.
Held, if a litigant satisfies the Courts that there was sufficient reason for availing the remedy after the expiry of limitation, delay could be condoned. In every case of delay, there can be some lapses on the part of the litigant concern. That alone is not enough to turn down the plea and to shut the doors against him, unless and until, it makes a mala-fide or a dilatory statutory, the court must show utmost consideration to such litigant. In matters concerning the filing of appeals, in exercise of the statutory right, a refusal to condone the delay can result in a meritorious matter being thrown out at the threshold, which may lead to miscarriage of justice. Since the employee who was earlier handling the tax matters of the assessee company, while leaving the job of the assessee company, did not handover the relevant papers either to the assessee or to the next person, a fact which caused the delay, the delay was liable to be condoned by taking a lenient view. (ITA No. 3786/Mum/2012, dt. 18.03.20165) (AY. 2002-03)
Lahoti Overseas Ltd. v. DCIT (Mum.)(Trib.); www.itatonline.org

S. 254(1) : Appellate Tribunal – Duties – Delay of 1,737 days was condoned. [S. 10(10C)] 2248

Tribunal has condoned the delay of 1737 days on the ground that delay was due to callousness and lack of commitment of his authorised representatives and health problems of assessee, keeping in view fact that assessee would be otherwise entitled to benefit of deduction under section 10(10C) as per CBDT Instruction and keeping in mind circumstances in which appeal of assessee was filed belatedly, delay in filing appeal was to be condoned. (AY. 2004-05)
Anupam Biswas v. ITO (2016) 157 ITD 445 (SMC) (Kol.)(Trib.)

S. 254(1) : Appellate Tribunal – Duties – Delay of 2,192 days – Reason of waiting for decision of regular appeal cannot be a sufficient reason to condone the delay. [S. 12AA] 2249

Dismissing the appeal the Tribunal held that the explanation of the assessee that the delay of filing of appeal of 2192 days was on the plea of waiting for decision of regular appeals for other assessment years would not amount to a sufficient cause for condonation of delay in filing appeal against said rejection order. (AY. 2009-10 to 2011-12)
Baddi Barotiwala Nalagarh Development Authority v. CIT (2016) 157 ITD 571(Chd.)(Trib.)

2250 **S. 254(1) : Appellate Tribunal – Additional grounds – Facts necessary to apply filter sought to be relied upon in the additional ground are already available on record – Assessee can claim the said filter for necessary adjudication – Additional Ground admissible. [S. 92C]**

On admissibility of additional ground, question as to whether the aforesaid two companies are comparable or not with the assessee as per FAR analysis has to be decided on the basis of data which is available in public domain. Therefore, facts necessary to apply the filter sought to be relied in the additional grounds are already available on record. Therefore, there can be no valid objection to deciding the question of applying the aforesaid filter, if otherwise it is found to be a valid filter. Decision of Quark Systems clearly supports the plea of assessee. Question as to whether the turnover filter was a filter applied in determining ALP in software development services is a matter of judicial decision. Thereby, ground of appeal deserves to be admitted for adjudication. (AY. 2006-07)

FCG Software Services (India) (P) Ltd v. ITO (2016) 176 TTJ 145 / 66 taxmann.com 296 (Bang.)(Trib.)

2251 **S. 254(1) : Appellate Tribunal – Duties – Right of Respondent – Revenue has no right to appeal against view taken by AO/TPO himself. [R. 27]**

Though revenue has right to file cross objections against the adverse order of the CIT(A) but it has no right to file appeal against the view taken by the AO/TPO himself which was not disturbed in the first appeal. When TPO himself considered ASE Ltd. as comparable, there could be no reason for revenue to be aggrieved against its inclusion; and department could take recourse to other legal remedies, if any, available as per law insofar as its grievance against decision of Assessing Officer/TPO was concerned. (AY. 2007-08)

ACIT v. Tech Books Electronics P. Ltd (2016) 176 TTJ 20 / 65 taxmann.com 241 (Delhi) (Trib.)

2252 **S. 254(1) : Appellate Tribunal – Additional evidence – Ledger account is not an additional evidence. [R. 29]**

The assessee submitted copy of ledger account during the hearing of the appeal before the CIT(A). Since copy of the ledger account of the assessee was placed before the authorities during the first appellate proceedings and assessment proceedings, it could not be treated as additional evidence. Therefore, there was no requirement of invoking provisions of Rule 29 of the 1963 Rules for admission and consideration of additional evidence. (AY. 2009-10)

Vipin Malik v. ACIT (2016) 45 ITR 589 (Delhi)(Trib.)

2253 **S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Order becoming erroneous due to subsequent amendment of law with retrospective effect by words "marketing of agricultural produce grown by its members" – Order can be rectified. [S. 80P(2)(a)(iii)]**

Once an amendment of law is made and it is applicable with retrospective effect, it is deemed to be in existence from the date when it is made applicable and if an order is

passed contrary to the amended law, there is a mistake of law in the order and such a mistake must be rectified.
Parliament by the Income-tax (Second Amendment) Act, 1998, which came into force on January 8, 1999, amended the provisions of section 80P(2)(a)(iii) with retrospective effect from April 1, 1968. The amendment introduced the words "the marketing of agricultural produce grown by its members or" with retrospective effect, i.e., April 1, 1968. The Supreme Court in *National Agricultural Co-operative Marketing Federation of India Ltd. v. Union of India (2003) 260 ITR 548 (SC*) upheld the retrospective amendment.
The assessee, a co-operative society, had been making purchase of food grains from its member societies as an agent of the Government and selling it to the Food Corporation of India. The income arising therefrom was exempt from tax under section 80P(2)(a)(iii) as held by the Court in the assessee's own case in *CIT v. Haryana State Co-operative Supply and Marketing Federation Ltd. (1990) 182 ITR 53 (P&H)*. For the assessment years 1990-91, 1992-93, 1993-94 and 1995-96, the Tribunal rectified its orders and withdrew the exemption. On appeals to the High Court: Held, dismissing the appeals, that the order of rectification was valid. (AY. 1990-1991 to 1995-96)
Haryana State Co-op. Supply and Marketing Federation Ltd. v. CIT (2016) 389 ITR 266 (P&H)(HC)

S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Mistake apparent on face of record, can be mistake on part of litigant or his advisors. [S. 115WC, 154] 2254
Held, that section 254(2) did not provide that it had to be a mistake solely on the part of the Appellate Tribunal to recall an order and that the statutory power could also be exercised in the case of mistake apparent on the part of the litigant or his advisors. Neither the Appellate Tribunal nor the assessee was aware of the judgment of the jurisdictional High Court. Therefore, the prayer for leave to withdraw the appeal and the order allowing the prayer were both based on a mistake. The order was to be set aside. The Appellate Tribunal was directed to hear the matter on its merits. Mahamaya Banerjee [1989] AIR 1989 Cal. 106 relied on.
Binaguri Tea Company P. Ltd. v. Dy. CIT (2016) 389 ITR 648 / 75 taxmann.com 106 / (2017) 147 DTR 364 (Cal.)(HC)

S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – A Writ Petition filed little after four months of receipt of impugned order suffers from "delay". If the Writ Petition does not explain the reasons for the "delay", it is liable to be dismissed – Affidavit if desired should be filed before the Tribunal and not first time before the High Court. [Constitution of India, Art. 226] 2255
Dismissing the petition against the order passed by the Tribunal u/s. 254(2), the Court held that (i) We find that the impugned order of the Tribunal was passed on 4th December, 2015, received by the petitioner on 28th December, 2015. This petition has been filed on 29th April, 2016. The petition states that according to the petitioner, there is no delay in filing the petition. However, this Court is of the view that there is a delay and delay may be condoned. However, no reasons with particulars are specified in the petition. In view of the fact that the petition itself does not explain the reason for the

delay, the petition is liable to be dismissed. Court also observed that the affidavit if desired should be filed before the Tribunal and not first time before the High Court. (AY. 2006-07)
Shirpur Gold Refiner Ltd. v. ITAT (2017) 291 CTR 112 / 144 DTR 108 (Bom.)(HC)

2256 **S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – In an order passed in a Miscellaneous Application, the Tribunal cannot deal with the merits of the issue. The Tribunal must recall the original appellate order and refix the matter for hearing and pass an order u/s. 254(1) of the Act. [S. 254(1)]**
This Court in its order dated 31st July, 2007 has while setting aside the order dated 7th March, 2007 of the Tribunal dismissing the petitioner's Miscellaneous Application had held that there was an error apparent from the record in the order dated 9th May, 2006. The direction of the Court in its order dated 31st July, 2007 to the Tribunal to dispose off the Miscellaneous Application on merits as there is an error apparent on record in the order dated 9th May, 2006. This disposing of Miscellaneous Application could only be after recalling the conclusion in its order dated 9th May, 2006 allowing the Revenue's appeal and hearing the petitioner on the issue of penalty being imposable even in the absence of a demand notice being served upon the assessee. This was for the reason that its conclusion was reached without having considered the petitioner's contention that no penalty can be imposed in the absence of receipt of a demand notice by the petitioner. However, the Tribunal in the impugned order has dealt with the issue of imposition of penalty being imposed under Section 221 of the Act even without service of demand notice under Section 156 of the Act upon an assessee. This the Tribunal could have only done while passing an order in appeal. The consequent order which would have been passed in appeal would enable the parties to challenge the same before this Court in an appeal under Section 260A of the Act. The procedure adopted by the Revenue in this case has deprived the right of statutory appeal to the petitioner. No appeal is entertained by this Court from an order dismissing the Miscellaneous Application for rectification under Section 254(2) of the Act [*Chem Amit v. ACIT (2005) 272 ITR 397 (Bom.)(HC)*]. Thus in the process of atoning for a mistake, one should take utmost care to ensure no further prejudice is caused. The rejection on merits of the contentions of the parties by the Tribunal on a substantial question of law is subject to the statutory right of appeal under Section 260A of the Act. This right cannot be bypassed by dealing with the merits in a Miscellaneous Application for rectification. (AY. 2001-02)
Safari Mercantile Private Limited v. ITAT (2016) 386 ITR 4 / 287 CTR 593 / 73 taxmann.com 287/ 139 DTR 89 (Bom.)(HC)

2257 **S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Review or recall of order is not permitted.**
Question of law in HC was whether review or recall of the order in the order of Tribunal was maintainable as Rectification Application u/s. 254(2) was rejected by the Tribunal. The Hon'ble HC dismissed appeal of the assessee and held that Tribunal in its order impugned has taken into consideration the arguments raised by the counsel for the assessee and arrived at a finding that in the earlier order passed by it which was on merits, the claim about S. 142(2A), was specifically dealt by it. Once the Tribunal

in its earlier order has decided claim on merits, may be whatever conclusion has been drawn, the Tribunal rightly came to the conclusion that no mistake crept in its earlier order. Assessee by way of moving application u/s. 254(2), in fact, tried to review the order which was correctly been rejected and question of review did not arise. (AY. 1988-89 to 1997-98)
Bhagwan Singh Palaria v. CIT (2016) 134 DTR 67 (Raj.)(HC)

S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Inordinate delay in filing application – Rejection of application was held to be justified. [S. 253] 2258
Dismissing the appeal of revenue, the Court held that there was inordinate delay in filing application for restoration of appeal hence rejection of application was held to be justified. (AY. 2001-02)
CIT v. State Bank of Hyderabad (2016) 382 ITR 499 (T&AP)(HC)

S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Rule of consistency – Interest income whether business income or income from other sources – Matter remanded. 2259
Assessee treating interest as business income. Assessing Officer and appellate authorities treating it as income from other sources. Tribunal can examine whether order sought to be rectified has apparent error of law not limited to mistakes of fact apparent on face of record. Tribunal dismissing rectification application filed by assessee. Tribunal to examine issue in light of stand of Department in earlier and later AYs. Rule of consistency is to be followed. Matter remanded. (AY. 2006-07)
Promain Ltd. v. CIT (2016) 382 ITR 25 (Delhi)(HC)

S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Power of rectification – Finding on merits cannot be challenged in the guise of rectification. [S. 119(2)(b), 237] 2260
The Assessing Officer held that the assessee is not eligible for refund claimed in the return of income as the return was filed belatedly and the assessee was asked to approach the CBDT by filing an application under section 119(2)(b) of the Act, if required. Aggrieved by the intimation, the assessee filed an appeal before the CIT(A), who dismissed the appeal holding that the intimation by the Assessing Officer is not an order under section 237 of the Act. Aggrieved, the assessee filed an appeal before the Tribunal, wherein it was held that the communication of the Assessing Officer rejecting the refund amounted to an order passed under section 237 of the Act. Aggrieved, the revenue filed a miscellaneous application before the ITAT seeking to rectify the order which was dismissed on the ground that the ITAT cannot reverse its order in the garb of rectification. On appeal by the Revenue, the High Court dismissed the appeal holding that as the order of the Tribunal cannot be a subject matter of rectification when it held on merits that the communication amounted to an order under section 237 of the Act and the Revenue had a remedy of filing an appeal before the High Court against the same.
CIT v. Sri. Ponkumar Magnesite Mines Lorry Transport Operator Periyagollapatti (2016) 236 Taxman 410 (Mad.)(HC)

2261 **S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Mercantile system of accounting – Income yet to accrue – Interest brought to tax and levy upheld by Tribunal – Assessee's application pointing out error – Based on facts Tribunal subsequently passing rectified order – Within jurisdiction of Tribunal.**
Dismissing the appeal of revenue, the Court held that the Tribunal was not shown to have been unjustified in rectifying its mistake and deleting the addition. The Tribunal had not exceeded its jurisdiction under section 254(2) in passing the modified order. (AY. 2002-03)
CIT v. West Bengal Infrastructure Development Finance Corporation Ltd. (2016) 385 ITR 672 (Cal.)(HC)

2262 **S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Additional income declared during survey – Bogus commission expenditure was held to be not allowable – Rectification application was held to be not maintainable. [S. 37(1), 133A]**
Dismissing the rectification application of the assessee, the Tribunal held that bogus commission expenditure was claimed to set off the additional income which was declared in the course of survey hence, rectification application was held to be not maintainable. (AY. 2008-09)
H. Gouthamchand Jain v. ITO (2016) 159 ITD 526 (Chennai)(Trib.)

2263 **S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Miscellaneous application was filed after seven years of impugned order was held to be not maintainable as the Tribunal has no power to condone the delay as the petition was not filed with in four years. [S. 254(1)]**
Tribunal dismissed appeal for want of prosecution. Assessees filed M.As after seven years of impugned order. According to them, dismissal of appeal for want of prosecution could not be considered an order under section 254(1) and, therefore, time-limit prescribed u/s. 254(2) did not apply. Tribunal held that dismissal of appeal for want of prosecution, though according to assessees was illegal or contrary to law, was nevertheless an order passed u/s. 254(1) in which event remedy available to assessees was to file a petition before Tribunal to recall order within a period of 4 years. Beyond such period Tribunal had no power to condone delay and, therefore, miscellaneous application were not maintainable.
Paresh Dhanji Chedda v. Dy. CIT (2016) 160 ITD 656 / (2017) 184 TTJ 132 / 149 DTR 124 (Hyd.)(Trib.)

2264 **S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Application to reagitate an issue which has already been decided by the Tribunal was held to be not maintainable.**
Assessee filed a rectification application contending that while passing its order, Tribunal did not consider its plea that it had transferred land under joint development agreement to a builder and, thus, said land could not be included in its taxable wealth. Tribunal held that; it had recorded a clear finding in its order that title of land had not been passed on to developer, and, thus, assessee-company continued to be owner of land and was liable to pay wealth-tax. The assessee had filed rectification application to

re-agitate an issue which had already been decided by Tribunal. Therefore, rectification Application was to be rejected. Tribunal also observed that conduct of the petitioner in an uncertain terms as it resulted in colossal waste of valuable time of this Tribunal. (AY. 2004-05 to 2007-08)
Triad Resorts & Hotels (P.) Ltd. v. WTO (2016) 160 ITD 668 (Bang.)(Trib.)

S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Income from house property – Income from sub-lease of property, neither main object nor business activity was to take on lease and sub-let properties, rightly taxed as income from house property, Rectification Application was dismissed. [S. 22, 28(i)] 2265
Tribunal has held that the income from sub-lease of property was assessable as income from house property. The assessee has filed Rectification Application on the basis of *Chennai Properties & Investments Ltd v. CIT (2015) 373 ITR 673 (SC).* Dismissing the rectification the Tribunal held that in this case neither object nor main business activity of assessee was to take on lease and sub-let properties. Since order of the Supreme Court was distinguishable on facts, same could not be applied. Income from sub-lease of property is to be assessed as income from house property. (AY. 2003-04 to 2008-09)
Prolific Consultancy Services (P.) Ltd. v. ITO (2016) 161 ITD 296 / (2017) 183 TTJ 801 / 151 DTR 107 (Mum.)(Trib.)

S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Non-consideration of the verdict of the Tribunal constitutes a mistake apparent from the record. [S. 9(1)(iv), 195(2)] 2266
Allowing the petition the Court held that non-consideration of the verdict of the Tribunal in Solid Works Corporation (51 SOT 34) and misreading of the Delhi High Court's verdict in Ericsson AB constitutes a mistake apparent from the record u/s. 254(2) and the orders have to be recalled. (dt. of order 18.11.2016.) (117 group matters)
Reliance Communication Ltd. v. DDIT (2017) 149 DTR 17 / 183 TTJ 388 (Mum.)(Trib.)
Reliance BPO Ltd. v. DDIT (2017) 149 DTR 17 / 183 TTJ 388 (Mum.)(Trib.)
Reliance Telecom Ltd. v. DDIT (2017) 149 DTR 17 / 183 TTJ 388 (Mum.)(Trib.)

S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Subsequent decision of High Court reversing the view of the ITAT constitute mistake apparent from record. [S. 14A] 2267
The Rectification Application was filed on the basis of Delhi High Court decision in *CIT v. Holcim India (P) Ltd. (2014) 90 CCH 0081 (Delhi)(HC)* wherein the Court held that provisions of section 14A cannot be invoked when no exempt income was earned by assessee during the relevant financial period. Allowing the petition the Tribunal held that non consideration of proposition of law laid down by the High Court is a mistake apparent from record. Tribunal followed the ratio in *ACIT v. Saurashtra Kutcch Stock Exchange Ltd. (2003) 262 ITR 146 (Guj.)(HC)*. (MA. No. 269/Del/2014 /ITA No. 4395/Del/2013, dt. 19.02.2016) (AY. 2008-09)
Green Meadows Pvt. Ltd. v. ITO (Delhi)(Trib.); www.itatonline.org

2268 **S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Keyman insurance policy – Tribunal decided on the basis of IRDA circulars – Mistake apparent on record. [S. 10(10D)].**

Assessee took Keyman Insurance Policies on life of its employee and claimed deduction in respect of premium. Tribunal decided the issue on the basis of IRDA circulars which has no role to play in deciding whether premium on insurance policies paid are covered by scope of 'keyman insurance policy' under section 10(10D). On Rectification Application by assessee, allowing the petition the Tribunal held that the order of the Tribunal sufferred from mistake apparent from record particularly when specific submissions of assessee were not adjudicated. Matter remanded. (AY. 2006-07)

F.C. Sondhi & Co. (India) (P.) Ltd. v. Dy. CIT (2016) 156 ITD 103 / 178 TTJ 237 / 134 DTR 186 (Asr.)(Trib)

2269 **S. 254(2A) : Appellate Tribunal – Stay – Tribunal has power to grant stay for a period exceeding three hundred and sixty five days.**

Dismissing the appeal of revenue, the Court held 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. (AY. 2009-10)

PCIT v. Carrier Air Conditioning and Refrigeration Ltd. (2016) 387 ITR 441 (P&H)(HC)

2270 **S. 254(2A) : Appellate Tribunal – Stay – Tribunal was justified in extending further stay on tax demand**

Where appeal is not disposed of within statutorily prescribed period of 365 days from date of grant of initial stay and such delay is not attributable to assessee, Tribunal was justified in extending further stay on tax demand. (AY. 2007-08, 2008-09, 2010-11)

ITO v. Anil Girishbhai Darji (2016) 239 Taxman 146 (Guj.)(HC)

2271 **S. 254(2A) : Appellate Tribunal – Stay – Tribunal has power to grant stay beyond 365 days. [S. 254(1)]**

Dismissing the writ petition of revenue the Court held that as 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" has been struck down in *Pepsi Foods Pvt. Ltd. v. ACIT (2015) 376 ITR 87 (Del.)* as being arbitrary, unreasonable and discriminatory, the law laid down in *Narang Overseas (P) Ltd. v. ITAT (2007) 295 ITR 22 (Bom.)* & *CIT v. Ronuk Industries Ltd. (2011) 333 ITR 99 (Bom.)* that the ITAT has power to grant stay beyond 365 days has to be followed. (AY. 2009-10 to 2012-13)

CIT v. Tata Teleservices (Maharashtra) Ltd. (2016) 133 DTR 119 / 286 CTR 336 (Bom.)(HC)

2272 **S. 254(2A) : Appellate Tribunal – Stay – The Tribunal has power to extend stay beyond period of 365 days provided delay in disposal of appeal is not attributable to assessee. [S. 254(1)]**

The Tribunal has power to extend stay beyond period of 365 days provided delay in disposal of appeal is not attributable to assessee. (AY. 2008-09)

L.G. Electronics India (P.) Ltd. v. ACIT (2016) 179 TTJ 705 / 64 taxmann.com 111 / 138 DTR 194 (Delhi)(Trib.)

S. 254(2A) : Appellate Tribunal – Stay – Delay in disposing of appeal is not attributable to assessee, Tribunal has power to grant extension of stay of recovery of outstanding demand beyond 365 days in deserving cases. [S. 220] 2273

Delay in disposing of appeal is not attributable to assessee, Tribunal has power to grant extension of stay of recovery of outstanding demand beyond 365 days in deserving cases. (AY. 2007-08)

SAP Labs India (P.) Ltd. v. ACIT (2016) 157 ITD 705 / 179 TTJ 515 (Bang.)(Trib.)

S. 255. Procedure of Appellate Tribunal.

S. 255 : Appellate Tribunal – Procedure – Functions – Representation by Commissioner (DR) and Senior (DR) – Penalty – Concealment – As per CBDT Instruction No. 9/2013 dated 22.07.2013, appeals against imposition of penalty or levy of interest in which the aggregate of penalty imposed or interest levied by the AO is more than ₹ 3 crore in the cities of Mumbai and Delhi are to be argued by the CIT(DR) and matters other than this are to be argued by the Senior DR. 2274

As per CBDT Instruction No. 9/2013 dated 22.07.2013, appeals against imposition of penalty or levy of interest in which the aggregate of penalty imposed or interest levied by the AO is more than ₹ 3 crore in the cities of Mumbai and Delhi are to be argued by the CIT(DR) and matters other than this are to be argued by the Senior DR (ITA No. 7034 TO 7038/Del/2014, dt. 21.06.2016) (AY. 2006-07)

M. G. Contractors Pvt. Ltd. v. DCIT (Delhi)(Trib.); www.itatonline.org

S. 255 : Appellate Tribunal – Special Bench – Matter before a Division Bench of Tribunal for giving effect to majority opinion of Accountant Member and Third Member and assessee raised objections urging to adjourn matter or refer matter to President for Constitution of a Special Bench, objections were liable to be rejected and majority view deserved to be confirmed. [S. 271(1)(c)] 2275

CIT(A) deleted penalty imposed upon assessee under section 271(1)(c). Third Member of Tribunal concurring with view taken by Accountant Member opined that CIT(A) was not justified in deleting penalty. When Competent Authority placed matter before a Division Bench for giving effect to majority opinion, assessee raised objections urging to adjourn matter or refer matter to President for Constitution of a Special Bench. Earlier a Division Bench of Tribunal in case of *Jupiter Corporation Services Ltd. v. Dy. CIT (2015) 62 taxmann.com 58 (Ahd.)* on similar issue in favour of revenue. In view of above decision, objections raised by assessee were liable to be rejected and majority view deserved to be confirmed. (AY. 1995-96 to 1997-98)

ACIT v. Megh Malhar Finstock (P.) Ltd (2016) 157 ITD 593 (Ahd.)(Trib.)

S. 256. Statement of case to the High Court.

S. 256 : Reference – High Court – Reference jurisdiction High Court should not act as an appellate Court to review such findings of fact arrived at by the Tribunal by a process of reappreciation and reappraisal of the evidence on record. 2276

The Court held that it is well settled that issues of fact determined by the Tribunal are final and the High Court in exercise of its reference jurisdiction should not act as an

appellate Court to review such findings of fact arrived at by the Tribunal by a process of reappreciation and reappraisal of the evidence on record. On merit dismissed the appeal of assessee. (AY. 1984-85)
Ganapathy & Co. v. CIT (2016) 381 ITR 363 / 237 Taxman 587 / 283 CTR 121 / 130 DTR 233 (SC)

2277 **S. 256 : Reference – High Court – Monetary limits prescribed for litigation by revenue – Effect of CBDT Instruction No. 5 of 2014 – Instruction applicable to pending references – Reference returned unanswered.**
Where a reference under section 256(1) of the was filed in which tax effect was less than ₹ 4 lakhs. Held, that Instruction No. 5 of 2014 issued by the Central Board of Direct Taxes was applicable to the reference, even if it was pending. The tax effect involved was less than the monetary limit prescribed by the instruction. There was nothing to indicate that the issue raised in this particular reference would fall within the exclusion clause in the instruction or that the issue had a cascading effect. Therefore, the reference was to be returned unanswered. (AY. 1988-89)
CIT v. Computer Point (I) Ltd. (2016) 381 ITR 441 (Bom.)(HC)

2278 **S. 256 : Reference – High Court – Failure to serve reference as provided by Rule 658 of the Bombay High Court Rules upon the Respondent means that the applicant is not interested in pursuing the reference and the same has to be returned unanswered.**
Dismissing the Reference of the assessee the Court held that this Reference under Section 256(1) of the Income-tax Act, 1961 by the Income Tax Appellate Tribunal (Tribunal) seeks our opinion on two substantial questions of law as framed by it. However, Mr. Rattesar, the learned counsel appearing for the applicant assessee very fairly states that he is not in a possession of evidence to show that the Reference has been served upon the Revenue. This Reference is of the year 2000. In terms of Rule 658 of the Bombay High Court (Original Side) Rules, the party at whose instance a Reference has been made to this Court is required to take all such steps as are necessary to have a notice issued and served upon the opposite party within two months from the receipt of notice of the Reference from the High Court.
In view of the fact that the applicant assessee has no evidence of having served the Reference upon the Respondent Revenue, we are not inclined to examine the questions of law as raised for our opinion at the instance of the applicant assessee. Mr. Ravi Rattesar states that he has now served the Respondent Revenue and would request that the Reference be taken up for disposal. This Reference pertains to the year 2000 relating to A.Y. 1985-86. This non-compliance with the requirement of service for over sixteen years is itself an indication of the applicant not being serious about pursuing this Reference. Thus we decline to extend time. In the above view, the Reference is returned unanswered. However, it is made clear that the question raised hereinabove are left open for consideration in an appropriate case, if not already decided. (ITA No. 11 of 2000, dt. 19.08.2016) (AY. 1988-89)
Naath industries Pvt. Ltd. v. CIT (Bom.)(HC); www.itatonline.org

S. 260A. Appeal to High Court.

S. 260A : Appeal – High Court – Substantial question of law – Duty of High Court to frame – Decision of appeal without doing so – Order set aside and matter remanded for consideration afresh 2279

Where the appeal under section 260A of the Income-tax Act, 1961 had been decided by the High Court without framing any substantial question of law : Held, that the High Court ought to have framed the substantial questions of law arising in the appeal before answering them. The High Court having not done that, the order passed by it was liable to be set aside and the matter remanded to the High Court for consideration *de novo* after formulating the substantial questions of law arising, if any.

Jai Hind Cycle Company Ltd. v. CIT (2016) 388 ITR 482 / 243 Taxman 354 / 144 DTR 321 / (2017) 291 CTR 239 (SC)

Editorial: Decision of the Telangana and Andhra Pradesh High Court in CIT v. Jaihind Cycle Co. [2014] 367 ITR 421 (T&AP) is set aside.

S. 260A : Appeal – High Court – Review – Appeal of department was dismissal on ground tax effect below limit set by Board – Affidavit of Department showing tax effect above limit – Request to High Court to consider review petition and if necessary appeal on merits [S.268] 2280

Allowing the petition the Court held that where the High Court disposed of the Department's appeal without entering into the merits on the ground that the tax demand which formed the subject matter of the appeal was less than ₹ 2 lakhs and dismissed the review petition filed by the Department as not maintainable against an order passed under the provisions of section 260A of the Income-tax Act, 1961, on appeal to the Supreme Court :

The Department having filed an affidavit explaining how the notional tax effect was far beyond the amount of ₹ 2 lakhs, and the court having taken a view that a review would be available of orders passed under section 260A of the Act, the court, without expressing any opinion on the merits of the matter, allowed the appeals, set aside both the orders passed by the High Court and requested the High Court to decide the review petition and thereafter the appeal itself, if so required, on the merits.

CIT v. Automobile Corporation of Goa Ltd. (2016) 387 ITR 140 / 242 taxman 101 / 290 CTR 485 / 144 DTR 166 (SC)

Editorial : Decisions of the Panaji Bench of the Bombay High Court set aside. (ITA No. 7 of 2004 dt 25-8-2010, Review Petition No. 26 of 2010 dt. 28-3-2012)

S. 260A : Appeal – High Court – Substantial question of law – Evasion of tax – Sale of flats below market rate – High Court ought to have framed question whether assessee had recourse to colourable device to evade tax [S. 4, 28(iv), 69B] 2281

Where the High Court held that the Tribunal was justified in holding, based on the documents produced including the balance-sheet and the fact that the two entities to which flats were sold by the assessee had made payment in advance but the assessee had not explained the reason for selecting one for a deal at lower rate, that both sales were not genuine and that there had been an attempt to suppress the real income on

which the tax had to be computed, and that therefore, no substantial question of law arose, on appeal to the Supreme Court :
Held, the High Court should have framed the substantial question of law pertaining to the issue whether the assessee had recourse to any kind of colourable device to evade the tax. (AY. 2005-06)
Diamond Investment and Properties v. ITO (2016) 389 ITR 289 (2017) 292 CTR 252 / 147 DTR 59 / 247 Taxman 225 (SC)
Editorial: Decision of the Bombay High Court in Diamond Investment and Properties v. ITO (2017) 247 Taxman 250 (Bom.)(HC) was directed to frame the question of law.

2282 **S. 260A : Appeal – High Court – Deduction at source – Contractor – Opportunity of being heard – Assessee not heard by High Court – Review petition dismissed by High Court – Appeal – Supreme Court – Orders set aside and matter remanded for decision afresh [S. 194C]**
Held, allowing the appeal, that it was a fact that the assessee was not heard when the judgment was delivered. Even the review petition filed by the assessee was also rejected. In the circumstances, the judgment was to be set aside and the matters remitted to the High Court for hearing afresh. (AY. 1997-98)
Novo Nordisk Pharma India Ltd. v. CIT (2016) 389 ITR 134 / 144 DTR 369 / (2017) 244 Taxman 53 / 291 CTR 21 (SC)
Editorial: CIT v. Novo Nordisk Pharma India Ltd. (2012) 341 ITR 451 (Karn.)(HC) is set aside.

2283 **S. 260A : Appeal – High Court – Power to recall order – Order passed on appeal was not ex parte – Recall of the order was set aside [Code of Civil Procedure Code, 1908, O.XLI.R. 21]**
Allowing the appeal of revenue, against the order of the High Court recalling its order dated August 27, 2013 (*CIT v. Subrata Roy (2016) 385 ITR 547 (All.)(HC)*) passed on appeals under section 260A(7) of the Act read with rule 21 of Order XLI of the Code of Civil Procedure, 1908; held that a perusal of the order of the Court dated August 27, 2013 on the appeals would go to show that it was not an ex prate order. The participation of the assessee in the hearing of the appeals was also evident from various other parts of the order. Not only was the order not an ex parte order as contemplated by r. 21 of Order XLI, the order passed by the High Court clearly contained findings to the contrary. In these circumstances the High Court did not have the jurisdiction under r. 21 of order XLI of the Code to recall the final order dated August 27, 2013 passed in the income tax Appeals. The power available under r. 21 of order XLI is hedged by certain pre-conditions and unless the pre-conditions are satisfied the power thereunder cannot be exercised. The order of the High Court recalling its order was liable to be set aside leaving the assessee at liberty to challenge the order dated August 27, 2013 in accordance with law, if so advised. Decision of Allahabad High Court was set aside.
CIT v. Subrata Roy (2016) 385 ITR 570 / 287 CTR 129 (SC)

S. 260A : Appeal – High Court – Kerala Court fee – 1% of assessed income – Maximum of ₹ 10,000/ – State Government was to make amendment, matter was stayed till information about steps taken by State Government was provided [Kerala Court Fee Act, 1959, S. 52, 52A] 2284

Sections 52 and 52A of the Kerala Court Fee and Suits Valuation Act, 1959 specified that court fee for filing appeal against order of Tribunal would be where such income exceed ₹ 2 lakh, 1 per cent of assessed income subject to maximum of ₹ 10,000. High Court noted that in many cases total income assessed by the Assessing Officer may not survive at all and thus, matter required. However even after 11 years, it was not known whether an action was taken on recommendation of High Court. Whether, even though instant appeal was heard on merit, matter was to be stayed till relevant information was provided by the State Government.

K. Raveendranathan Nair v. CIT (2016) 236 Taxman 6 (SC)

S. 260A : Appeal – High Court – Question of law – Before the High Court, Department raised question of law only in respect of merits, however, no specific question in respect of the jurisdictional issue; Court issued directions to the Commissioner to examine the issue and take considered view [S. 69C, 153C] 2285

The ITAT in its order allowed the appeal of the assessee on two grounds viz. on the jurisdictional issue that the AO did not have any jurisdiction to pass an order u/s. 153C as well as on the merits that cash payments cannot be added u/s 69C. While challenging the said order before the High Court, the Department only raised question of law in respect of the merits of the addition without challenging the finding of the ITAT in respect of the jurisdictional issue. High Court held that, in absence of any specific grievance with regard to the finding of the Tribunal on applicability of S.153C of the Act, the other questions raised and urged becomes academic. It also directed the CIT to examine the issue and to take corrective measures to ensure that a considered view is taken in respect of the orders of the Tribunal which are being challenged before the Court. Matter was adjourned.

CIT v. Ambit Realty (P) Ltd. (2016) 139 DTR 43 / 288 CTR 50 (Bom.)(HC)
CIT v. Arpit Land (P) Ltd. (2016) 139 DTR 43 / 288 CTR 50 (Bom.)(HC)
CIT v. Ganarya Land (P) Ltd. (2016) 139 DTR 43 / 288 CTR 50 (Bom.)(HC)
CIT v. Lavanya Land (P) Ltd. (2016) 139 DTR 43 / 288 CTR 50 (Bom.)(HC)
CIT v. Krutika Land (P) Ltd. (2016) 139 DTR 43 / 288 CTR 50 (Bom.)(HC)
CIT v. Samson Perinechery (2016) 139 DTR 43 / 288 CTR 50 (Bom.)(HC)

S. 260A : Appeal – High Court – Delay of 1,494, Further it re-filed appeal with a delay of 1,021 days – Reason for delay in re-filing appeal was change of Standing Counsel – High Court was right when it dismissed the petition on the ground of delay as there was no justifiable reason for the delay 2286

Revenue filed appeal before High Court with a delay of 1,494 days. Further it re-filed appeal with a delay of 1021 days. It filed applications seeking condonation of delay. It stated that initially appeal was filed in Gujarat High Court and disposed of by an order with liberty to file a fresh appeal before Bombay High Court and in meantime case of assessee got transferred to New Delhi and thereafter revenue sought opinion

of Standing Counsel and filed appeal before Delhi High Court. It further pointed out that reason for delay in re-filing appeal was change of Standing Counsel. High Court dismissed applications for condonation of delay on plea that there was no justifiable reason for delay in filing appeal and in re-filing appeal and accordingly, dismissed appeal of revenue.
PCIT v. Bhaskar Power Projects (P.) Ltd. (2016) 73 taxmann.com 382 (Delhi)(HC)
Editorial : The Supreme Court dismissed the SLP of the Department; PCIT v. Bhaskar Power Projects (P.) Ltd. (2016) 242 Taxman 367 (SC)

2287 **S. 260A : Appeal – High Court – Question of law – Finding of fact which is perverse gives rise to question of law – Finding based on evidence binding on High Court**
A question of fact becomes a question of law, if the finding is either without any evidence or material or, if the finding is contrary to the evidence, or is perverse or there is no direct nexus between the conclusion of fact and the primary fact upon which that conclusion is based. In the exercise of powers under section 260A, findings of fact of the Tribunal cannot be disturbed.
CIT v. Sangu Chakra Hotels P. Ltd. (2016) 389 ITR 117 / 74 taxmann.com 76 / (2017) 150 DTR 259 (Mad.)(HC)

2288 **S. 260A : Appeal – High Court – Rule of consistency – Order of Tribunal following earlier decision of Tribunal against which no appeal filed by Department – Appeal therefrom not maintainable [S. 2(14), 45, 50C]**
Where the Department had accepted the decision of the court or the Appellate Tribunal on an issue and had not appealed against it, then a subsequent decision following the earlier decision could not be challenged. That the Department had not shown that there were any distinguishing features either in facts or in law in the present appeal from that which arose in the earlier decision of the Appellate Tribunal which was not appealed against. No question of law arose. (AY. 2007-08)
CIT v. Greenfield Hotels and Estates P. Ltd. (2016) 389 ITR 68 / (2017) 77 taxmann.com 308 (Bom.)(HC)

2289 **S. 260A : Appeal – High Court – Questions which was not raised during assessment or appellate proceedings, cannot be raised first time before High Court [S. 2(IA)]**
Court held that, where revenue had not raised issue of expenditure on income from flowers and petals of nursery during assessment proceedings and even during appeal, it could not be introduced for first time in appeal under section 260A.
CIT v. K. N. Pannirselvam (2016) 243 Taxman 219 (Mad.)(HC)

2290 **S. 260A : Appeal – High Court – Cross-objection – Appeal not registered on file of court – Cross – objection is not maintainable [Code of Civil Procedure, 1908, O. 41, r. 22(4)**
The Department filed an appeal against the decision of the Tribunal. The assessee filed a cross-objection against it. The appeal was rejected for non-removal of office objection: Dismissing the cross-objection, that the appeal was never registered on the file of the court. Under Code of Civil Procedure, 1908, O. 41, r. 22(4), the original appeal was required to be "withdrawn" or dismissed "for default" in order to enable the respondent

to maintain its memorandum of cross-objection. The appeal was not dismissed "for default" or "withdrawn" but came to be rejected, not on the merits, but for failure to remove office objections. Compliance with office objections was a necessary process and part of the justice administration system and reflected on the party's conduct of the case. Non-removal of objections despite repeated adjournments within the time specified signified inability or a conscious decision on the part of a litigant to not pursue the case. It was not open to the cross objector to insist, as of right, that the cross-objection must be heard notwithstanding rejection of the appeal. Therefore, since the appeal was not registered in the file of the court, the cross-objection was not maintainable. Once a case is rejected for non-compliance with objections and more particularly after time is extended by the court to remove the objections within the time specified, the appellant loses his remedy of appeal. (AY. 2000-01)
Cipla Ltd v. ACIT (2016) 387 ITR 52 / 290 CTR 387 / 141 DTR 73 / 73 taxmann.com 22 (Bom.)(HC)

S. 260A : Appeal – High Court – Territorial jurisdiction of court – High Court exercising territorial jurisdiction over situs of Assessing Officer has jurisdiction to hear the appeal 2291
The assessee's registered office was at Dharamshala in Himachal Pradesh. For the assessment year 2008-09, notices under sections 142(1) and 143(2) of the Income-tax Act, 1961 were issued to the assessee and the assessment order was passed by the Assessing Officer at Dharamshala. The appeal against the order was filed by the assessee before the Commissioner (Appeals) at Shimla and was allowed. Both the assessee as well as the Department filed cross appeals before the Tribunal at Chandigarh which dismissed the appeal of the Department. On appeal to the Punjab and Haryana High Court: Held, that the Punjab and Haryana High Court had no territorial jurisdiction to adjudicate upon the dispute over an order passed by the Assessing Officer at Dharamshala, Himachal Pradesh. Since the initial process of assessment was started at Dharamshala and the final assessment was made by the Assessing Officer at Dharamshala, Himachal Pradesh, the Punjab and Haryana High Court lacked jurisdiction to adjudicate the matter. (AY. 2008-09)
CIT v. Tibetan Children's Village. (2016) 388 ITR 126 (P&H)(HC)

S.260A : Appeal – High Court – Monetary limits – Circular has retrospective effect [S. 80-IB] 2292
Circular No. 21 of 2015, dated December 10, 2015 provides that appeals shall not be filed before the High Court where the tax effect does not exceed ₹ 20 lakhs. The circular applies retrospectively even to the pending appeals.
CIT v. Micro Instruments Company. (2016) 388 ITR 46 / 289 CTR 152 / 75 taxmann.com 304 (P&H)(HC)

S. 260A : Appeal – High Court – Power to review – On facts petition was dismissed 2293
Court held that the High Court has power to correct apparent errors in its order hence review application - is maintainable, however on facts there was no error apparent on record to justify review accordingly review petition was dismissed.
CIT v. Sherwood Diocesan College Society (2016) 388 ITR 634 (Uttarakhand)(HC)

2294 **S. 260A : Appeal – High Court – Contention that assessees were established for private religious purposes raised for first time before High Court which cannot be considered [S. 11, 12, 12A]**

Court held that the contentions which was not raised before the Tribunal cannot be raised first time before the High Court.

CIT v. Sherwood Diocesan College Society. (2016) 388 ITR 639 (Uttarakhand)(HC)

2295 **S. 260A : Appeal – High Court – High Court has power to correct apparent errors in its order – Review application – Maintainable – No error apparent on record to justify review – To be dismissed [S. 260A(7)]**

The High Court has not only the power, but a duty to correct any apparent error in respect of any order passed by it. This is the plenary power of the High Court. The High Court enjoys the power of review not only as a constitutional court, but as specifically vested by virtue of sub-section (7) of section 260A of the Income-tax Act, 1961. Held, that the review applications were maintainable. However there was no error apparent on the record to justify review. The review applications were to be dismissed.

CIT v. All Saints College Society. (2016) 388 ITR 634 (Uttarakhand)(HC)

Editorial : CIT v. All Saints College Society (2016) 388 ITR 639 (Uttarakhand)(HC) is affirmed.

2296 **S. 260A : Appeal – High Court – Finding of fact based on evidence – No substantial question of law arises – Appeal is not maintainable [S. 69B, 145]**

Dismissing the appeal of revenue, the Court held that if a finding of fact is not challenged as being perverse, the High Court is bound to accept such finding. Court held, no substantial question of law had been framed and the questions pertained to findings of fact, which could not be said to be perverse as it was evident that the books of account of the assessee had been rejected by the assessing authority, in which case the same books of account could not be relied upon to make an addition on account of trade creditors and also for arriving at the closing stock. The Tribunal was justified in deleting the additions to the income. (AY. 2007-08)

CIT v. Bahubali Neminath Muttin (2016) 388 ITR 608 / 242 Taxman 279 / 140 DTR 57 (2017) 291 CTR 214 (Karn.)(HC)

2297 **S. 260A : Appeal – High Court – Income not returned because assessee believed it was not assessable – Tribunal finding that belief was genuine – High Court cannot interfere with finding**

Dismissing the appeal of revenue, the Court held that appreciation of evidence was a question of fact and not a question of law. It was not a matter where the Tribunal had not considered the entire facts and circumstances of the case under which the income was offered by the assessee as the income from house property by submission of revised returns and payment of tax even before the proceedings were initiated by the Department after survey. Apart from the above, the additional aspect was that the view of the Tribunal on acquiring property under barter system could not be totally ruled out. No substantial question of law arose from the order of the Tribunal. (AY. 2007-08)

PCIT v. Minitechs Aerotools P. Ltd. (2016) 387 ITR 166 (Karn.)(HC)

S. 260A : Appeal – High Court – Territorial jurisdiction of High Court – Initial process of assessment and final assessment framed by AO outside territorial jurisdiction of High Court – High Court lacks territorial jurisdiction to adjudicate matter 2298

Dismissing the appeal of revenue, the Court held that Since the initial process of assessment was started at Hyderabad and the final assessment was framed by the AO at Hyderabad, the Punjab and Haryana High Court lacked territorial jurisdiction to adjudicate the matter. (AY. 2004-05)

PCIT v. ITW India Ltd. (2016) 386 ITR 290 (P&H)(HC)

S. 260A : Appeal – High Court – Income-tax – General principles – Rule of consistency – Special Bench of Tribunal for some years holding interest on deposits not chargeable to tax – Department bound to follow judgment of Special Bench [Interest Tax Act, 1974, S. 2(7)] 2299

It was not possible to accept the contention of the Department that the expression "interest on loan and advances" occurring in section 2(7) of the Act should include "interest on deposits" as well notwithstanding that there was no reference to such interest in the definition itself.

The Special Bench of the Appellate Tribunal in *Housing & Urban Development Corporation Ltd v. JCIT dt 25-11-2005 (SB)(Trib.)* and had answered the question in favour of the assessee for the AYs 1992-93, 1993-94 and 1996-97. The present appeals pertained to the AYs 1994-95 and 1995-96. Therefore, by applying the rule of consistency the Department was directed to follow the judgment which had attained finality as the view expressed had been accepted by the Department. (AY 1994-95, 1995-96)

Housing and Urban Development Corpn Ltd v. Dy. CIT (2016) 386 ITR 212 / 140 DTR 108 (Delhi)(HC)

S. 260A : Appeal – High Court – Natural justice – Business loss – Tribunal holding reliance upon statements of persons not produced for cross examination breach of natural justice – Upholding disallowance of loss as not genuine relying on surrounding circumstances and other evidence – Proper [S. 28(i), 254(1)] 2300

On appeal : Held, dismissing the appeal, that the finding of fact recorded by the Tribunal was not shown to be perverse or arbitrary. It was a possible view in the context of facts that arose for consideration. No question of law arose. (AY. 1996-97)

Monika India v. ITO (2016) 386 ITR 639 (Bom.)(HC)

Editorial: SLP filed by the assessee was dismissed Monika India v. ITO (2016) 383 ITR 6 (St.)

S. 260A : Appeal – High Court – Generation of power – Wind mills – Losses incurred in the eligible unit were adjusted against profits of ineligible unit – Appeal not projecting grievance that decision of Special Bench of Tribunal misapplied or not applied – Tribunal's conclusion not made subject matter of challenge – Appeal not maintainable [S. 80IA] 2301

The assessee was engaged in the business of manufacture of material handling equipment and generation of power. It had installed windmills and that was a unit eligible for deduction under section 80-IA. The other unit of the assessee was not

entitled to deduction. The assessee claimed loss on account of the eligible unit for AYs, viz. 2005-06 to 2008-09. These losses incurred in the eligible unit were adjusted against profits of ineligible unit, i.e. the manufacturing unit in the respective years. After adjusting these losses, positive income was determined and tax was paid. For these years in which the eligible unit incurred losses, there was no claim for deduction under section 80-IA by the assessee. The AO disallowed this claim of set off of loss of eligible units against the income of ineligible units in the same year. The losses were, therefore, added in the income of the assessee. The Commissioner (Appeals) granted partial relief. The Tribunal held that loss incurred in business of power generation which was entitled to deduction under section 80IA could be set off against business income from the manufacturing unit. On appeal projecting the applicability of section 80-IA(5) of the Act. Held, that this was not an appeal projecting a grievance that the Special Bench decision in *CIT v. Goldmine Shares and Finance Pvt. Ltd. (2008) 302 ITR 208 (AT)(SB) (Ahd.) (Trib.)* was misapplied or not applied or incorrectly applied. Once the statement of facts about which there was no dispute showed that there was no deduction claimed under section 80-IA for the AYs in question, there was no occasion for the Tribunal to have gone into these questions. Merely because the Tribunal had gone into and considered them, the court was not obliged to go into them given the admitted factual background. The Department's question projected the applicability of section 80IA(5) of the Act. The Tribunal`s conclusion was thus not made subject matter of challenge in this appeal by the Department. (AY. 2005-06 to 2008-09)
CIT v. Hercules Hoists Ltd. (2016) 386 ITR 698 (Bom.)(HC)
Editorial : Order in Hercules Hoists Ltd. v. Asst. CIT [2013] 22 ITR (Trib.) 527 (Mumbai) affirmed. SLP is granted the Department, CIT v. Hercules Hoists Ltd. [2016] 380 ITR 7 (St.)

2302 **S. 260A : Appeal – High Court – Direction by High Court to Tribunal to answer questions of law – Tribunal not correct in closing matter on technicalities – Matter remanded again**
The High Court had observed that the direction of the Board was that "henceforth" appeals shall not be filed in cases where the tax effect did not exceed the monetary limits prescribed in the Instruction. Therefore, the operation of the Instruction was only prospective. This position was made further clear observing that clause 11 of the Instruction clarified that the Instruction would apply to appeals filed on or after July, 10, 2014 only. Matter remanded. (AY. 1979-80)
CIT v. Khairunnisa Ebrahim (Late) (Smt.) (2016) 386 ITR 430 (Ker.)(HC)

2303 **S. 260A : Appeal – High Court – Gratuity provision – Question of fact which was not raised before the Tribunal cannot be raised for the first time before the High Court [S. 40A(7)]**
HC dismissed the plea raised by the assessee first time before the HC which was not raised in any of the lower authorities. HC dismissed the plea as the question of fact which was not raised by it before any of the lower authorities. Therefore provision for the purpose of payment to an approved Gratuity Fund i.e. the LIC Group Gratuity Scheme raised for the first time before the HC cannot be permitted to be raised in HC. (AY. 2003-04)
Bihar State Warehousing Corporation v. CIT (2016) 386 ITR 410 / 242 Taxman 142 / 287 CTR 556 / 139 DTR 16 (Patna)(HC)

S. 260A : Appeal – High Court – Rule of consistency – Capital or revenue receipt – Mesne profits – Special Bench of Tribunal holding mesne profits capital receipt and department not diligent in prsecuting appeal therefrom – Appeal from order following Special Bench not entertained [S. 4, 115JB] 2304

Dismissing the appeal of revenue, the Court held that we find that the issue before the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd. was to determine the character of mesne profits being either capital or revenue in nature. The Special Bench of the Tribunal in Narang Overseas Pvt. Ltd. held that the same is capital in nature. There is no doubt that the issue arising herein is also with regard to the character of mesne profits received by the assessee. In this case also, the amounts are received by the assessee from a person in wrongful possession of its property i.e. after the relationship of landlord and tenant has come to an end. Once the Special Bench order of the Tribunal in Narang Overseas Pvt. Ltd. has taken a view on the character of mesne profits, then unless the Revenue challenges the order of the Special Bench of the Tribunal it would be unfair of the Revenue to pick and choose assessees where it would follow the decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd. The least that is expected of the State which prides itself on Rule of Law is that it would equally apply the law to all assessees.

(iii) We make it clear that we have not examined the merits of the question raised for our consideration. We are not entertaining the present appeal on the limited ground that the Revenue must adopt a uniform stand in respect of all assessees. This is more so as the issue of law is settled by the decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd., (supra). The fact that even after the dismissal of its Appeal (L) No.1791 of 2008 for non-removal of office objections on 25th June, 2009, no steps have been taken by the Revenue to have the appeal restored, is evidence enough of the Revenue having accepted the decision of the Special Bench of the Tribunal in Narang Overseas Pvt. Ltd. Thus, the question as framed in the present facts does not give rise to any substantial question of law. (AY. 2008-09)

CIT v. Goodwill Theatres Pvt. Ltd. (2016) 386 ITR 294 / 241 Taxman 352 / 144 DTR 221 (Bom.)(HC)

S. 260A : Appeal – High Court – Low tax effect – As per the CBDT's low tax effect circular, the tax effect has to be seen each year irrespective of the fact that a common issue arises over several years [S. 80IA] 2305

Circular No.21/2015 dated 10.12.2015 applies retrospectively even to the pending appeals. Although the disputed issues arise in more than one assessment year, in view of Paragraph 5 of the circular, the appeals could be filed only in respect of such assessment years in which the tax effect in respect of the disputed issue exceeds ₹ 20 lakhs. As per paragraph 10 pending appeals below the specified tax limit are to be withdrawn. Further, separate orders for each assessment year have been passed in the present case. Each assessment year is a separate year and the entitlement to the deduction would depend upon the facts and circumstances obtaining in a given year. (ITA No.958 of 2008, dt. 02.09.2016)(AY. 2003-04)

CIT v. Mirco Instruments Company (P&H)(HC); www.itatonline.org

2306 **S. 260A : Appeal – High Court – Delay of 344 days – Extraordinary delay not satisfactorily explained – Casualness of counsel in attending to defects pointed out by Registry – Delay was not condoned**

The Department's appeal to the court was returned by the Registry raising certain objections. There was a delay of 344 days in removing the objections and re-filing the appeal by the Department of which the Department sought condonation. Held, dismissing the appeal, (i) that apart from saying that the appeals had been filed in the discharge of official duties and that some delay had taken place since the concerned officer had to perform other functions as Assessing Officer, there was no satisfactory explanation for the extraordinary delay. There was some casualness on the part of counsel for the Department in attending to the defects pointed out by the Registry. Consequently, the court would not condone the delay in re-filing the appeal.

CIT v. Ashian Needles P. Ltd. (2016) 384 ITR 144 (Delhi)(HC)

2307 **S. 260A : Appeal – High Court – Rule of consistency – Tribunal passing order following its own earlier order on grounds of facts being identical – No reasons in memorandum of appeal or affidavit by Department for filing appeal where earlier order of Tribunal not challenged – Inference is that earlier order of Tribunal accepted by Department – Appeal is not entertained [S. 254(1)]**

Where the Tribunal has taken a view on a legal issue and the Department has in turn either accepted it or challenged it in a higher forum, and a subsequent order of the Tribunal follows the earlier order of the Tribunal, the assessee must be treated in the same manner in which the assessee in the earlier case has been treated. However, there could be valid reasons for the Department to take a different view other than that taken in an earlier similar case. Where the order being challenged before the court has merely followed its earlier order and the Department has accepted it and not filed an appeal against it, the officer concerned must justify the filing of the appeal in this case setting out the reasons therefor in the memorandum of appeal or at least before the hearing in an affidavit filed by the Department before the court. The State cannot act arbitrarily to pick and choose orders from which appeals would be made.

Where the earlier order of the Tribunal in another matter was merely followed by it stating that the facts were identical, and an appeal is filed from the subsequent order, the memorandum of appeal ought to mention whether any appeal was preferred from the earlier order. If not and if it was accepted by the Department, the reason for pursuing appeal from the subsequent order ought to be indicated in the memorandum of appeal or in an affidavit. The necessary information with regard to appeal being filed or not from the earlier order has to be within the knowledge of the Department.

Where the Tribunal had passed orders in favour of the assessee following its own order in a matter on identical facts but no information was forthcoming whether any appeal was filed against the earlier order that was followed by the Tribunal nor had the officer filed any affidavit pointing out the reasons why the order was being challenged where no appeal was filed in the earlier case. Held, dismissing the appeal, that an inference was drawn that the earlier order which was followed by the Tribunal had been accepted by the Department. However, the Department was at liberty to apply to have the appeal

recalled in case any appeal had been filed by it against the earlier order that was followed by the Tribunal.(AY. 2004-05)
CIT v. Synchem Chemicals (I) Ltd. (2016) 384 ITR 498 (Bom.)(HC)
Editorial: The Supreme Court has granted special leave to the Department to appeal against this judgment CIT v. Synchem Chemicals (I) Ltd. [2016] 384 ITR 122 (St.)

S. 260A : Appeal – High Court – Plea urged for first time in appeal before High Court – Not permissible [S. 10(3), 45 56] 2308
That the Assessing Officer was in error in proceeding on the basis that a sum of ₹ 10 lakhs received by each of the assessees was in the nature of a casual and non-recurring receipt which could be brought to tax under section 10(3) of the Act. The Assessing Officer having held that it could not be in the nature of capital gains it was not open to the Department to seek to bring it to tax under the heading revenue receipt. What was in the nature of a capital receipt could not be sought to be brought to tax resorting to section 10(3) read with section 56 of the Act. (AY. 1993-94, 1994-95)
Gynendra Bansal v. UOI (2016) 384 ITR 161 (Delhi)(HC)

S. 260A : Appeal – High Court – Only on substantial question of law – Tribunal upholding assessment of sums as income of assessee from undisclosed sources – Findings based on facts – Appeals not maintainable [S. 153A] 2309
Tribunal upholding assessment of sums as income of assessee from undisclosed sources. Held, dismissing the appeals, that the appeals were not maintainable as they did not give rise to any questions of law to be considered by the court under section 260A. The findings in the Tribunal's order were entirely factual. The assessees did not have a case that any of their contentions were not considered by the Tribunal or that the findings of fact arrived at by the Tribunal were perverse. (AY. 2002-03 to 2008-09)
O.G. Sunil v. Dy. CIT (2016) 383 ITR 617 (Ker.)(HC)

S. 260A : Appeal – High Court – Review petition – Held to be not maintainable [S. 80IB(10)] 2310
The assessee has filed Review Petition in SC challenging the provisions of the Municipal Corporation Act which was overlooked though specifically pointed out during the final hearing of the main appeal. Dismissing the Petition, Hon'ble SC held that neither the provisions of S.300 of the Municipal Corporation Act which have been relied upon by the Review Petition in the present Petitions nor the decision of the SC in *Sundaram Pillai V. V. R. Pattabiraman AIR 1985 SC 582* will be of any avail. Therefore no case of review was made out. (AY. 2008-09)
Global Realty & Ors. v. CIT (2016) 134 DTR 334 / 286 CTR 216 (MP)(HC)

S. 260A : Appeal – High Court – Additional question of law which is not raised either by AO or before the Tribunal and even not mentioned in the appeal memo [S. 4, S. 260A] 2311
Dismissing the appeal of revenue the Court held that the additional question of law raised by the revenue's counsel that the assessee has adopted colourable device to evade tax was never raised by the AO or before the Tribunal. In fact, the AO had confirmed

the demand only on ground that though issue is decided by High Court, it is still pending in the Apex Court on a question of law and not pending on issue of fact viz. adoption of colourable device. The High Court dismissing the revenue's appeal held that the revenue must understand that Tribunal being the final fact finding authority, there was no reason to interfere with the order of the Tribunal and revisit the documents or issues not part of record before them or even remotely referred to in the appeal memo. (AY. 2008-09)
CIT v. Kanga & Co. (2016) 133 DTR 257 (Bom.)(HC)

2312 **S. 260A : Appeal – High Court – Commission – Findings of fact – Court will not disturb [S. 37(1)]**
Whether entire commission taxable in assessee's hands and in which year is findings recorded by Tribunal is findings of fact. Court will not disturb. (AY. 1991-92)
Ranjeet Singh v. CIT (2016) 382 ITR 409 / 238 Taxman 552 (P&H)(HC)

2313 **S. 260A : Appeal – High Court – Binding nature – Reluctance of AOs to comply with binding Court judgments leads to negative reactions amongst business entities doing business in India and hurts National pride and image. Hereafter non-compliance with orders would visit officials with individual penalties, including forfeiture of salaries. A copy of order be sent to the Secretary in the Ministry of Finance, Government of India and the Chairman, Central Board of Excise and Customs**
We are mindful of the fact that the judgment and order of this Court was delivered much after the impugned order. The impugned order is dated 29th January, 2016, whereas the Division Bench in the petitioner's case is dated 22nd February, 2016. But, we expected the officers to save precious time of this Court in not requiring it to pass a detailed order and judgment by withdrawing the impugned condition/clause. That is not forthcoming as we find that officers after officers are reluctant to take decisions for the consequences might be drastic for them. No officer is acting independently and following judgments of this Court, but waiting for the superiors to give them a nod. Even the superiors are reluctant given the status of the assessee and the quantum of the demand or the refund claim. We are sure that some day we would be required to step in and order action against such officers who refuse to comply with the Court judgments and which are binding on them as they fear drastic consequences or unless their superiors have given them the green signal. If there is such reluctance, then, we do not find any enthusiasm much less encouragement for business entities to do business in India or with Indian business entitles. Such negative reactions / responses hurt eventually the National pride and image. It is time that the officers inculcate in them a habit of following and implementing judicial orders which bind them and unmindful of the response of their superiors. That would generate the right support from all, including those who come forward to pay taxes and sometimes voluntarily. Hereafter if such orders are not withdrawn despite binding Division Bench judgments of this Court that would visit the officials with individual penalties, including forfeiture of their salaries until they take a corrective action. If any approval or nod is required from superiors that should also be granted expeditiously and while obeying the court orders, the officers can always reserve the Revenue's rights to challenge them in appropriate

legal proceedings. A copy of order be sent to the Secretary in the Ministry of Finance, Government of India and the Chairman, Central Board of Excise and Customs. We are constrained to observe as above simply because repeated suggestions to Mr. Jetley so as to persuade the officers to withdraw the orders impugned in the petition of their own did not meet any favourable response. (WP No. 2855 of 2016, dt. 28.03.2016)
Larsen & Tourbo Limited v. UOI (Bom.)(HC), www.itatonline.org

S. 260A : Appeal – High Court – Transfer Pricing – High Court irked at fact that Dept. is unaware of which of its matters are admitted/dismissed. Chief CIT directed to streamline the procedure for filing appeal before the High Court – Pr. Chief Commissioner has assured that in the website of department a separate section called legal cell will be included and all information regarding appeals admitted and dismissed will be made available to the assesses [S. 92C] 2314

When the matter came up for hearing the Hon'ble Court observed that in few of the matters the appeal of the revenue on the above issue were dismissed after considering the detailed arguments of the assessee and the revenue. The said orders of the Bombay High Court were also accepted by the revenue. The Hon'ble court also observed that similar matter was decided in favour of the assessee by the Delhi High Court. However, in one of the matter the issue was admitted by the Bombay High Court by an *ex parte* order which was not brought to the notice of the Hon'ble High Court. To avoid such an inconsistent stand of the revenue, the Hon'ble Court directed the Principal Chief Commissioner to stream line the procedure to be followed for filing an appeal to the High Court and to bring transparency. In pursuance to the said direction of the Hon'ble High Court, Principal Chief Commissioner of Income Tax filed an affidavit before the Court on 5/5/2016, wherein he has informed that he has constituted the committee of Chief Commissioners on 3/5/2016 (Refer copy enclosed). Principal Chief Commissioner in his affidavit stated that website www.incometaxgovin it has been decided to add a legal corner on the website where all questions of law admitted, dismissed by the Hon'ble Bombay High Court will be hosted. The access to the website will be provided to all concerned for easy reference where the questions of law would be bunched section wise. Expert Committee will meet every week and decision pronounced by the Bombay High Court will be discussed and appropriate action will be taken (Refer Affidavit). Hon'ble High Court also agreed with the suggestion of Dr. K. Shivaram, Sr. Advocate that the legal corner on the website should also indicate whether the question of law formulated by the Revenue was rejected and the same has been accepted by the Income Tax Dept. The counsel for the revenue stated that on instruction from the Principal Chief Commissioner the website will be functional by 15/6/2016. (ITA No. 2287 of 2013, dt. 06.05.2016)
CIT v. TCL India Holding Pvt. Ltd. (Bom.)(HC); www.itatonline.org

2315 **S. 260A : Appeal – High Court – Strictures passed against department for casual and careless representation despite huge revenue implications. Dept directed to take remedial measures such as updating the website, appointment of meritorious advocates, proper evaluation of work done by the advocates, ensuring even distribution of work amongst advocates etc. Prevailing practice of evaluating competence of advocates on basis of "cases won or lost" deplored – The Registry is directed to send a copy of this order on the Chairman, Central Board of Direct Taxes (CBDT) and the Principal Commissioner of Income Tax [S. 92C]**

Strictures passed against department for casual and careless representation despite huge revenue implications. Dept. directed to take remedial measures such as updating the website, appointment of meritorious advocates, proper evaluation of work done by the advocates, ensuring even distribution of work amongst advocates etc. Prevailing practice of evaluating competence of advocates on basis of "cases won or lost" deplored. The Registry is directed to send a copy of this order on the Chairman, Central Board of Direct Taxes (CBDT) and the Principal Commissioner of Income Tax. (ITA No. 2287 of 2013, dt. 12.07.2016)

CIT v. TCL India Holding Pvt. Ltd. (2016) / 241 Taxman 138 / 138 DTR 319 / 288 CTR 34 (Bom.)(HC)

2316 **S. 260A : Appeal – High Court – Revenue should be deprecated for filing frivolous appeal. When a question of law is already covered by earlier orders of the Court, the Court may constrained to impose cost on AO & CIT**

The Revenue had raised various questions of law which were either covered by earlier orders of Tribunal in assessee's own case and are accepted by Revenue by not filing an appeal to HC; or which already been concluded by Supreme Court against the Revenue. In such a scenario, the HC held that a question of law which is already settled and accepted by Revenue in earlier years in assessee's own case, cannot be again challenged before the Court. However, the Revenue can challenge the ground on a different valid point provided the same is mentioned in the memo of appeal or is filed before the hearing by way of an affidavit. Otherwise, the Court may be constrained to impose costs on the AO concerned and CIT heading the Commissionerate. (AY. 2003-04)

CIT v. Goodlas Nerolac Paints Ltd. (2016) 386 ITR 108 / 131 DTR 57 / 284 CTR 266 (Bom.)(HC)

2317 **S. 260A : Appeal – High Court – Question not raised before Tribunal cannot be raised before Court**

Question not raised before Tribunal cannot be raised before Court. (AY. 2000-01)

CIT v. Air India Ltd. (2016) 383 ITR 284 / 237 Taxman 639 / 131 DTR 81 / 289 CTR 287 (Bom.)(HC)

2318 **S. 260A : Appeal – High Court – Plea urged for first time in appeal before High Court is not permissible [S. 10(3), 45, 56]**

The Court held that the Department could not be permitted to shift its stand from one forum to another. Under these circumstances, the court was not prepared to permit the Department to urge a new plea for the first time in the High Court. (AY. 1993-94, 1994-95)

Girish Bansal v. UOI (2016) 384 ITR 161 (Delhi)(HC)

Gynendra Bansal v. UOI (2016) 384 ITR 161 (Delhi)(HC)

S. 260A : Appeal – High Court – Substantial question of law raised for the first time which is based on records and does not require any investigation of any facts can be admitted in appeal before the High Court [S. 143(2), 292BB] 2319

The issue before the HC was that whether the AO was justified passing an assessment order without serving a notice u/s. 143(2) within the stipulated period as prescribed under the Act. The HC held that the jurisdiction of AO starts only if the notice u/s. 143(2) is issued within the prescribed time. It has nothing to do with service of the notice which is contemplated u/s. 292BB. Therefore, the order of the Tribunal, First appellate authority and the assessment order cannot be sustained and are to be quashed. Further, the assessee had raised the aforesaid question for the first time before the HC to which the Revenue raised objection for admission. The HC held that a substantial question of law which is based on records and does not require any investigation of any facts can be entertained in appeal before the HC even if the same is not taken before the lower authorities. (AY. 1997-98)

U P Hotels Ltd. v. CIT (2016) 131 DTR 99 / 283 CTR 417 (All.)(HC)

S. 260A : Appeal – High Court – Delay of 1,271 days – No reasonable explanation for delay – Delay could not be condoned 2320

Held, dismissing the appeals, that the court was not satisfied with the reasons offered for the extraordinary delay of 1,271 days and the delay of 1,876 days in filing the appeals. The delay could not be condoned.

CIT v. Arvinder Singh (2016) 380 ITR 179 (Delhi)(HC)

CIT v. Elegant Travels P. Ltd. (2016) 380 ITR 179 (Delhi)(HC)

S. 260A : Appeal – High Court – Substantial questions of law – No finding whether during AY whether there was separate inter college – Substantial questions of law arose [S. 2(7), 2(24), 2(31), 10(23C)(vi)] 2321

The Tribunal and the Commissioner (Appeals) had not examined whether during the AYs, there was any separate inter college inasmuch as it was for the first time that approval was granted to run an inter college on July 14, 2012. While reversing the order of the Assessing Officer, this factual aspect was not dealt with. All the issues had to be looked into along with the definition of the word "assessee" u/s. 2(7), the definition of the word "person" u/s. 2(31), the definition of the word "income" u/s. 10 as contained in section 2(24). It was in this background that the claim of exemption as sought u/s. 10(23C)(iiiad) would also have to be seen. Therefore, substantial questions of law arose for consideration on the facts and legal issues. (AY. 2010-11, 2011-12)

CIT(E) v. Chironji Lal Virendra Pal Saraswati Shaiksha parishad (2016) 380 ITR 265 (All.) (HC)

S. 263. Revision of orders prejudicial to revenue

2322 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Even if AO applies mind and decides not to assess expenditure as unexplained u/s. 69C because the assessee withdrew the claim for deduction, the CIT is entitled to revise the assessment on the ground that the matter needed further investigation – Revision on issue not mentioned in the notice is permissible, however he must be heard at each stage – Order is not erroneous merely because another view is possible [S. 69C]**

Court held that there can be no doubt that so long as the view taken by the Assessing Officer is a possible view the same ought not to be interfered with by the Commissioner under Section 263 of the Act merely on the ground that there is another possible view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from. However, the above is not the situation in the present case in view of the reasons stated by the learned Commissioner of Income Tax on the basis of which the said authority felt that the matter needed further investigation, a view with which we wholly agree. Making a claim which would *prima facie* disclose that the expenses in respect of which deduction has been claimed has been incurred and thereafter abandoning/withdrawing the same gives rise to the necessity of further enquiry in the interest of the Revenue. The notice issued under Section 69C of the Act could not have been simply dropped on the ground that the claim has been withdrawn. We, therefore, are of the opinion that the learned Commissioner of Income Tax was perfectly justified in coming to his conclusions insofar as the issue No. (iii) is concerned and in passing the impugned order on that basis. The learned Tribunal as well as the High Court, therefore, ought not to have interfered with the said conclusion. Court also held that so long as the view taken by the Assessing Officer is possible view it ought not to be interfered with by the Commissioner under section 263 of the Act, merely on the ground that there is another view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisionary authority. This is a course of action that must be desisted from. (AY. 2001-02)

CIT v. Amitabh Bachchan (2016) 384 ITR 200 / 135 DTR 73 / 286 CTR 113 / 240 Taxman 221 (SC)

2323 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – AO taking one of two possible views – Order is not erroneous even if there was loss to revenue [S. 80HHC, 80-IB]**

The AO after considering the matter in detail had passed an assessment order by applying his mind. There was a divergence of views taken by different High Courts. Hence, the Tribunal was justified in setting aside the order of the Commissioner passed under section 263. (AY. 2001-02)

CIT v. Rashid Exports Industries (2016) 389 ITR 293 / 66 Taxmann.Com 38 (All.)(HC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Co-operative society – Bank interest – Surplus funds with bank not being attributable to business carried on by society, cannot be deducted under section 80P(2)(a)(i) – Revision was held to be justified [S. 80P(2)(a)(i)] 2324

The assessee had claimed deduction under section 80P and not specifically under section 80P(2)(a)(i). The assessee had also not shown any bifurcation of the income derived from providing credit facilities to its members and the interest earned by depositing surplus funds with the bank. In response to the notice under section 263, the assessee had contended that the reason for treating the interest income received from deposits as business income was that the funds of the business were kept in interest earning account with facility to withdraw the fund as and when necessary to earn interest for and on behalf of its members and that it was one of its activities as provided in section 80P(2)(a) and that the gains of business attributable to such activity were exempted from taxable income. The contention of the assessee that the Commissioner had not held that the interest derived from the deposits in the bank was income from other sources did not merit consideration for the reason that it was for the AO, pursuant to the order under section 263 to examine the nature of the income and tax it accordingly. Having regard to the stand adopted by the assessee in response to the notice under section 263, it could not be said that the Commissioner had travelled beyond the scope of the notice under section 263, inasmuch as, he had only dealt with the contention raised by the assessee. The Appellate Tribunal was justified in upholding the invocation of powers under section 263 by the Commissioner and that the order did not suffer from any legal infirmity. (AY. 2009-10, 2010-11)

State Bank of India v. CIT (2016) 389 ITR 578 / 241 Taxman 163 / 290 CTR 129 (Guj.) (HC)

Editorial : The Supreme Court has granted special leave to the assessee to appeal against this judgment: State Bank of India v. CIT (2016) 389 ITR (2016) 389 ITR 3 (St.)]

S. 263: Commissioner – Revision of orders prejudicial to revenue – Court denied to hear the issue of revisional power of CIT as it was not going to affect tax liability of assessee [S. 146(3)] 2325

Delhi High Court following the order in *CIT v. Asha Primlani (Smt.) ITA No. 532 of 1996 dt 6-9-2007* has held that by virtue of amendment in section 263 by Taxation Laws (Amendment) Act, 1984, Commissioner could exercise powers under section 263 in respect of an order passed by inspecting Assistant Commissioner only with effect from 1-10-1994. Accordingly the question was answered in favour of assessee. On appeal by revenue the assessee argued that question had become academic as tax liability of assessee had been decided in favour of assessee in earlier and subsequent assessment years, hence, even if question would be decided in favour of revenue, it would have nil effective relief. Revenue argued that question might be decided inasmuch as it might still be a live issue in other cases. Court held that the revenue had to satisfy Court that said question was a live issue in other adjudications after which cases would be decided on merits (AY. 1978-79, 1979-80)

CIT v. Mitsui & Co. Ltd. (2016) 238 Taxman 575 (SC)

Editorial : Order in Mitsui & Co. Ltd. v. CIT (2008) 167 Taxman 179 (Delhi)(HC)

2326 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Loss not proved by assessee by adducing evidence – Setting aside of order by Appellate Tribunal without considering relevant material facts was held to be perverse**

Allowing the appeal of the assessee the Court held that the Appellate Tribunal had not applied its mind and had not considered all the relevant materials and that its conclusion in setting aside the order of the Commissioner was perverse. The Appellate Tribunal had evidently failed to make a distinction between an inference and a presumption. Even in the case of a trial when the question arose as to whether or not a fact had been proved, the question had to be answered on the basis as to whether the evidence adduced probabilised the claim or contention of the plaintiff or the defendant, as the case might be. The Tribunal had failed to notice the facts which were not in dispute and that the inference drawn by the Commissioner was not based either on presumptions or surmises or suspicions. It was reasonable to infer that an attempt might have been made to reduce the income by showing fictitious loss. (AY. 2007-08)

PCIT v. Indian Finance Ltd. (2016) 389 ITR 242 (Cal.)(HC)

2327 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – AO taking one of two possible views – Conflict of view in High Courts – Order of AO not erroneous – Revision of order was held to be not valid [S. 80HHC, 80-IB, 80-IA(9)]**

Dismissing the appeal of the revenue, the Court held that; the AO after considering the matter in detail had passed an assessment order by applying his mind. The AO had allowed the deduction under sections 80HHC and 80-IB to the extent of the amount of profits and gains as contemplated under section 80-IA(9). The question as to whether the deduction under section 80HHC was to be computed after reducing the deduction under section 80-IB from the profits and gains was a legal consideration. The AO granted deduction under sections 80HHC and 80-IB taking the same figure of profits. On the other hand, the Department's case was that the deduction under section 80HHC was required to be computed after reducing the amount of deduction under section 80-IB from profits and gains. On this score, there was a divergence of views taken by different High Courts. Hence, the Tribunal was justified in setting aside the order of the Commissioner passed under section 263. (AY. 2001-02)

CIT v. Asian Handicrafts (2016) 389 ITR 293 / 66 taxmann.com 38 (All.)(HC)

2328 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Deduction was allowed without enquiry – Revision was held to be justified – Order served a few days after limitation, order is not barred by limitation [S. 80-IB]**

Dismissing the appeal of assessee the Court held that Assessing Officer granting special deduction without enquiry. Order erroneous and prejudicial to Revenue hence revision order was held to be justified. Court also held that it had been categorically recorded by the Tribunal that the order under section 263 in the case of the assessee was passed on March 20, 2013 which was required to be passed up to March 31, 2013. Thus, the order was within the period of limitation. The order was dispatched on April 4, 2013 and received by the assessee on April 6, 2013. The order was not barred by limitation. (AY. 2009-10)

A.S. Precision Machines P. Ltd. v. CIT (2016) 388 ITR 440 / (2017) 146 DTR 161 / 293 CTR 340 (P&H)(HC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Limitation – Reassessment in respect of items other than item sought to be revised by Commissioner – Period of limitation begins from original assessment – Not from date of reassessment in which item was not dealt with [S. 143(3), 147, 148] 2329

Allowing the petition the Court held that; the reassessment order was not for review or reassessment of the entire case but only in respect of a particular item. In all other respects, the original assessment order was maintained, and addition made by reassessment order dated March 26, 2015 was added in income assessed in the original assessment order. Though the notice under section 263(1) of the Act referred to the reassessment order, in fact it referred to a discrepancy in the regular assessment order dated October 31, 2011, wherein the incentive of value added tax from Maharashtra Government received by the assessee was allowed to be deducted. This incentive had no concern with the reassessment proceedings in the order dated March 3, 2015. Since the notice issued by the Principal Commissioner was in reference to a discrepancy in the original assessment order dated October 31, 2011 and not the reassessment order dated March 26, 2015, the limitation would run from the date of the regular order of assessment and therefore, the notice was barred by limitation prescribed under section 263(2) of Act, 1961. (AY. 2007-08)

L G Electronics India P. Ltd. v. P CIT (2016) 388 ITR 135 / 290 CTR 283 / 143 DTR 105/ (2017) 79 taxmann.com 418 (All.)(HC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Capital gains – Stock-in-trade converted in to investment – Indexation – Revision was held to be valid [S. 2(42A), 45] 2330

Dismissing the appeal the Court held that the assessee-company was engaged in the business of trading in cement, paper, AC sheets, pipes, etc. Till March 31, 1993 certain shares were held as stock-in-trade and were converted into investment by a resolution dated March 31, 1993. In the previous year relevant to the assessment year 1994-95, the assessee sold these shares and claimed that the shares were investment during the assessment year 1994-95 and the profits arising from the sale were capital gains, on which indexing benefit was allowable. The Assessing Officer allowed the indexation benefit not from the date of conversion but from the date of purchase, which resulted in long-term capital loss. The Commissioner set aside the order acting under section 263, which was confirmed by the Tribunal was held to be valid. (AY 1994-95)

Cambay Investment Corporation Ltd. v. DCIT (2016) 388 ITR 366 / 242 Taxman 13 (Guj.) (HC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Expenditure out of undisclosed business receipts is allowable – Revision was held to be not justified [S. 69C] 2331

Dismissing the appeal the Court held that the Tribunal had not erred in its view particularly considering the fact that the Commissioner had limited powers of revision under section 263 of the Income-tax Act, 1961. Even in a case of unaccounted receipts of a businessman, it was only the profit element embedded in the business which could be taxed and not the entire amount. If the assessee could have pointed out that even

on unaccounted receipts, expenditure had been incurred for the purpose of business, it would have been only the reasonable profit on such receipts which should have been taxed. (AY. 2006-07)
CIT v. Babulal K. Daga (2016) 387 ITR 114 (Guj.)(HC)

2332 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Export Oriented Undertaking – Assessing Officer adopting one of two plausible views – Revision was held to be not proper [S. 10B]**
Dismissing the appeal of the revenue, the Court held that the Commissioner could not have assumed jurisdiction under section 263 of the Income-tax Act, 1961. The view taken by the Assessing Officer allowing the set off was one of the possible views and in such a case, the Commissioner could not have assumed jurisdiction under section 263 of the Act. The order of the Tribunal was proper. (AY. 2003-04)
CIT v. D.C. Mills P. Ltd. (2016) 387 ITR 64 (Ker.)(HC)

2333 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Assessment order was passed after enquiry hence the order was not prejudicial to Revenue therefore revision was not valid**
Dismissing the appeal of revenue, the Court held that the twin tests required to be satisfied for exercising the power under section 263 of the Act are: (a) the order to be revised (assessment order) is erroneous, (b) it is prejudicial to the interests of the Revenue. Held, that the Commissioner had proceeded to initiate proceedings under section 263 of the Act only on the ground that the Assessing Officer had not assigned any reasons for accepting the valuation of the work-in-progress declared by the assessee. In accordance with the materials placed before the Tribunal in the records pertaining to the assessment year in question, a detailed examination was made by the Tribunal and the Tribunal was of the view that the Assessing Officer had applied his mind before accepting the figure declared by the assessee in the work-in-progress report. Such an order could not be held to be erroneous and prejudicial to the interests of the Revenue. It was not a case of "lack of inquiry". Further inquiry ordered by the Commissioner would amount to a fishing inquiry in the matter already concluded. The profit declared by the assessee worked out to more than 8 per cent that was normally adopted and accepted by the Department. However, in the computation of work-in-progress made by the Appellate Commissioner, the profit margin worked out to more than 31.8 per cent which was practicably not acceptable. Accordingly, on this count also, the order passed by the Commissioner was untenable. The Tribunal was right in setting aside the order of revision. (AY. 2006-07)
CIT v. Saravana Developers (2016) 387 ITR 239 / 289 CTR 550 / 68 taxmann.com 148 (Karn.)(HC)

2334 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Survey – Assessment order after considering material on record and documentary evidence obtained by Additional Director of Income Tax (Inv.) – Order of revision was held to be not valid**
Dismissing the appeal of revenue, the Court held that at no point of time was it made clear to the assessee as to the points that he had to meet. Thus it could not be said

that a reasonable opportunity was granted to the assessee by the Commissioner during the course of proceedings under section 263. Even on the merits the Assessing Officer before passing his order had taken into account two vital documents, namely, the survey report and valuer's report, and after discussing the two documents he had passed the order which showed the application of mind by him. The Tribunal also noted that when the documentary evidence under reference had been obtained by no less an authority than the Additional Director (Inv.) and when such a report had been passed on to the Assessing Officer he was bound to adopt it and such action of the Assessing Officer could not be said to be erroneous even if the order may be prejudicial to the interests of the Revenue. The Tribunal was justified in cancelling the order of revision. (AY 2002-03)
CIT v. Satish Kumar Keshri (2016) 387 ITR 447 (Patna)(HC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Administrative expenses – Revision was held to be not valid [S. 80-IB] 2335
Tribunal held that, the deduction was allowed in the earlier year and the Commissioner has not stated any reason for denying the deduction hence the order of revision was quashed. Dismissing the appeal of Revenue the Court held that the Department was unable to show any error in the findings recorded by the Tribunal. (AY. 2004-05)
CIT v. Superman Knitters (P) Ltd. (2016) 387 ITR 494 / 69 taxmann.com 181 (P&H)(HC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Wrong allowance – Failure by Assessing Officer to include sum assessed in original assessment, revision was held to be proper 2336
Dismissing the appeal the Court held that the Appellate Tribunal had legally and validly affirmed the revision order of the Commissioner. No error or perversity was demonstrated in the order of the Commissioner and the Appellate Tribunal. The Assessing Officer had gone beyond the remand order passed by the Appellate Tribunal. (AY. 2004-05)
B. K. Jain v. CIT (2016) 387 ITR 605 (P&H)(HC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Held, mere fact that the AO did not make any reference to the issues in the assessment order cannot make the order erroneous when the issues were indeed looked into – Held, AO made enquiries and was satisfied with the replies of the assessee, order of revision was held to be invalid [S. 68] 2337
ITAT held that the AO made enquiries about the issues involved and which have been noted by the CIT. The assessee made submissions by placing all relevant documents before the AO. It further held that the mere fact that the AO did not make any reference to the impugned issues in the assessment order cannot make the order erroneous when the issues were indeed looked into. On the above findings, the High Court held that the findings were rendered on facts and which cannot be held to be perverse. (AY. 2007-08)
CIT v. Reliance Communication Ltd. (2016) 240 Taxman 655 (Bom.)(HC)
Editorial : SLP of revenue was dismissed, CIT v. Reliance Communication Ltd. (2017) 244 Taxman 55 (SC).

2338 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Entire amount received on transfer of development rights cannot be taxed as the same is subject to performance of certain obligation to environment clearance – Warranty expenses – Allowed after raising query – Allowed after application of mind – Revision was held to be not justified [S. 37(1)]**

Dismissing the appeal of the revenue, the Court held that AO held that the entire amount received on transfer of development rights cannot be taxed as the same is subject to performance of certain obligation relating to environment clearance. AO held that only part amount taxable and balance treated as deposit. AO also allowed warranty expenses after calling for relevant details. CIT set aside the assessment u/s. 263. Tribunal allowed the appeal of assessee on appeal the Court held that on the first issue, AO has taken a view which is not based on incorrect assumption of facts or law. On second issue, AO had raised a query and after considering the material allowed the deduction. Assessing Officer has applied his mind on both the issues revision was held to be not justified. (AY. 2007-08)

CIT v. Gera Developments (P.) Ltd. (2016) 387 ITR 691 / 240 Taxman 467 (Bom.)(HC)

2339 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Assessing Officer has already made addition concerning the same expenditure – Revision to make addition on better premises or on different application of legal principle was held to be not justified [S. 145]**

On appeal by the assessee the Court held that whereas against addition proposed by Commissioner in notice issued under section 263 Assessing Officer had already made much greater addition concerning same expenditure, Commissioner could not exercise power under section 263 to make addition on better premises with better reasoning or on different application of legal principles. (AY. 2008-09 to 2012-13)

JMC Projects (India) Ltd. v. PCIT (2015) 67 taxmann.com 258 / 136 DTR 279 (Guj.)(HC)

2340 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Action initiated by the commissioner is not sustainable in a case where the AO had made specific enquiries by raising queries and had thereafter accepted the stand of the assessee [S. 68]**

During the concerned years, the assessee had received certain gifts. In the course of assessment proceedings, the AO verified the identity, genuineness and creditworthiness of the donors. On verification, the AO accepted the gifts received by the assessee. Thereafter, CIT initiated proceedings under section 263 and set aside the orders of the AO and further directed that in case the gifts were not found to be genuine, then the Assessing Officer was at liberty to invoke Section 68. High Court held that it was settled that if during the assessment proceedings, queries were raised and the assessee responded to the same, then even if an Assessment order does not mention the same, it does not mean that the Assessing Officer has not applied his mind to the issues. High Court held that in the present case, assessee had given evidence of the communications received from the donors of the gifts along with the statement of their Bank accounts and that the AO was satisfied about the identities of the donors, the source from where these funds had come and also the creditworthiness/capacity of the donor. Therefore, once the AO was satisfied with regard to the same, there was no further requirement

on the part of the AO to disclose his satisfaction in the Assessment Order. High Court also rejected the argument that the donor had not been examined by the AO. High Court observed that it was not necessary in every case that all the evidence produced had to be tested by cross examination of the person giving the evidence. It is only in cases where the evidence produced gives rise to suspicion that further scrutiny is called for. If there is nothing on record to indicate that the evidence produced is not reliable and the AO was satisfied with the same, then it is not open to the CIT to exercise his powers of revision without the CIT recording how and why the order is erroneous due to not examining the donors. HC further held that it was not necessary that the AO should have verified the source of the source and even otherwise this would be a case of an inadequate enquiry and not a 'no enquiry'. HC held that the proceeding initiated by the CIT under section 263 was not sustainable. (AY. 2007-08, 2008-09)
CIT v. Nirav Modi (2016) 138 DTR 81 / 241 Taxman 255 / (2017) 390 ITR 292 / 291 CTR 245 (Bom.)(HC)
Editorial : SLP of the revenue was dismissed; CIT v. Nirav Modi (2016) 389 ITR 42 / (2017) 244 Taxman 194 (SC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Export Oriented undertakings – Where Development Commissioner granted approval as a 100% Export Oriented Undertaking which was ratified by the Board, assessee entitled to claim exemption [S. 10B] 2341
The assessee earned revenue from developing software for foreign clients. In the return of income, the assessee claimed deduction u/s. 10B of the Act which was accepted by the Assessing Officer in the scrutiny assessment u/s. 143(3) of the Act. The CIT invoked section 263 of the Act and held that the approval granted to assessee was as an "Export Oriented Unit" and not as an "Undertaking" as envisaged u/s. 10B of the Act. Thus, deduction u/s. 10B of the Act allowed by the AO is erroneous as well as prejudicial to the interest of the revenue. On appeal, the Tribunal reversed the findings of the CIT and restored the benefit u/s. 10B of the Act to the assessee. On appeal, the High Court held that the assessee's unit was granted approval as a 100% EOU by a letter of permission which was ratified in second meeting of the Board for Approval. Thus, the assessee was entitled for deduction u/s. 10B of the Act. The findings of the Commissioner are erroneous in holding that the assessee is a "Unit" under SEZ and not an "Undertaking" for claiming deduction u/s. 10B of the Act. (AY. 2010-11)
PCIT v. Zealous Web Technologies (2016) 239 Taxman 224 (Guj.)(HC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Method of accounting – Solicitor following cash system of accounting – Advance deposits received from clients – Treated as liability in accounts and adjusted towards fees and expenditure incurred on behalf of client in subsequent years – No loss of revenue – Revision to bring deposits shown in balance – Sheet to tax was held to be not proper 2342
Dismissing the appeal of revenue the Court held that the deposits were treated by the assessee as a capital receipt and the deposits were adjusted in the subsequent years against the expenditure incurred for or on behalf of the client from whom the deposit was received. Such expenditure also included the fees of the assessee himself. It was at

that stage that the money was earned by him. Before that, he was holding the money as an agent or as a fiduciary of his client. The Appellate Tribunal was right in taking the view that it did. (AY. 2005-06)
CIT v. Bijoy Kumar Jain (2016) 385 ITR 339 / 240 Taxman 438 / 139 DTR 283 (Cal.)(HC)

2343 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Assessing Officer treating income from sale of carbon credits as capital receipt – Order not erroneous – Commissioner could not set aside order [S. 4, 28(i)]**
The requirement for exercise of power under section 263 is that the order passed by the lower authority should not only be erroneous, but should also be prejudicial to the interests of the Revenue.
Held, that earning of carbon credit was not the business of the assessee nor was it generated as a by-product on account of business activity of power generation, but it was earned on account of concern for environment. Carbon credit was generated on account of employment of good and viable practices by the assessee. The Tribunal had rightly held that it was a capital receipt. The Tribunal was justified in setting aside the order of the revision. (AY. 2009-10)
CIT v. Subhash Kabini Power Corporation Ltd. (2016) 385 ITR 592 / 240 Taxman 514/ 287 CTR 147 (Karn.)(HC)
Editorial: Order in Subhash Kabini Power Corporation Ltd. v. CIT (2015) 37 ITR 106 (Trib.) (Bang.) is affirmed.

2344 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – An Assessment order which has been revised under section 264 cannot again be considered for revision under section 263 of the Act**
The assessee applied for registration under section 12A of the Act on 27.03.2006 which was rejected by CIT. The Tribunal allowed the appeal of the assessee and directed the CIT to grant the registration under section 12A w.e.f. 1st April, 2003. The order of the Tribunal was given effect to by passing an order dated 27th July, 2009. However, the assessment order on 27th December, 2009 passed under section for A.Y. 2007-08 was passed without granting the benefit of section 11. Assessee filed the application against assessment order under section 264 which was allowed by the CIT directing the AO to recompute the income. The AO passed an order giving effect to CIT's order recomputing the income of the assessee *vide* order dated 27th May, 2011. On 22nd March, 2012, the CIT passed an order under section 263 revising the assessment order passed on 27th December, 2009. On appeal by the assessee, the Tribunal reversed the order of CIT. On appeal to the High Court it was held that the assessment order passed on 27th July, 2009 has merged with the order of CIT passed under section 264 which was also given effect to *vide* order dated 27th May, 2011. Therefore, the original assessment did not even exist in the eyes of law. Hence, the CIT did not have the jurisdiction to revise the order under section 263 of the Act. (AY. 2007-08)
CIT v. New Mangalore Port Trust (2016) 382 ITR 434 / 238 Taxman 397 / 283 CTR 342 (Karn.)(HC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Transfer of case – Once order of transfer duly published and communicated Commissioner becomes *functus officio* – Issuance of notice thereafter by Commissioner without jurisdiction [S. 124, 127] 2345

Held, (i) that the actual transfer of files may have taken place on July 29, 2013 but a notice under section 143(2) by the Assessing Officer of the circle to which jurisdiction was transferred was issued on March 18, 2013. The jurisdiction in this case had been transferred by the order dated September 3, 2012 by the Commissioner himself. Once that was done he lost *seisin* over the matter. The Commissioner became *functus officio* prior to March 18, 2013 because the Assessing Officer had assumed jurisdiction without which the notice dated March 18, 2013 under section 143(2) could not have been issued. The order of transfer was duly published and thereafter acted upon by the Assessing Officer to whose circle jurisdiction had been transferred. The issuance of the notice dated March 18, 2013 under section 263 and the consequent order dated March 26, 2013 passed under section 263 were without jurisdiction and a nullity. (AY. 2008-09)
Ramshila Enterprises P. Ltd. v. PCIT (2016) 383 ITR 546 / 239 Taxman 17 (Cal.)(HC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Held, AO disallowed interest expenditure in accordance with Rule 8D hence view adopted by AO a plausible view – Order not erroneous [S. 14A, 35D] 2346

The assessee company had incurred expense on Initial Public Offer and claimed deduction u/s. 35D, which was allowed by the AO during the assessment proceedings. AO disallowed certain interest expenditure under rule 8D(2)(ii). CIT invoked section 263 on two grounds viz. deduction of expense on Initial Public Offer should not be allowed on ground that the assessee was not an industrial undertaking and secondly entire interest expenditure incurred by assessee was attributable to earning of exempt income and should be disallowed u/s. 14A. High Court relying upon the case of *Dy. CIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 356 ITR 460 / 215 Taxman 72 / 33 taxmann.com 117 (Guj.)* held that when a claim u/s. 35D has been granted by the AO in respect of previous years, such claim cannot be disallowed subsequently without disturbing the decision in the initial year. In respect of 14A disallowance, High Court held that AO himself computed disallowance of interest expenditure u/s. 14A read with rule 8D. In both the issues, the view adopted by the AO was a plausible view and therefore, it cannot be said that the assessment order was erroneous so as to warrant exercise of powers u/s. 263. (AY. 2009-10)
PCIT v. Deep Industries Ltd. (2016) 238 Taxman 198 (Guj.)(HC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – CIT directed AO to redo capital gain computation on the market value on surrender of tenancy rights by assessee – Order of Commissioner was held to be not justified where the Assessing Officer has adopted one of the possible views [S. 45, 48] 2347

Assessee declared capital gains at ₹ 1,76,88,000 plus 20 lakhs on surrender of tenancy rights by adopting full value of consideration. The AO computed capital gains at ₹ 2,30,14,568 plus 20 lakhs. Assessee filed an appeal against the assessment order which was allowed by the CIT(A), Tribunal dismissed the Revenue's appeal and Revenue's

appeal in High Court is pending disposal. Meanwhile, the CIT invoked powers under section 263 and directed the AO to recompute capital gain by adopting the market value of tenancy rights. However, the Tribunal held that no provision under the Act permits to adopt market value as full value of consideration when Assessee has received built up area in exchange of tenancy rights. It further held that if AO adopted one of the two possible views and FVOC is the cost incurred by the developer, then CIT would not be justified in invoking powers under section 263. High Court affirmed the order of Tribunal and dismissed the Revenues appeal. (AY. 2005-06)
CIT v. Khivraj Motors (2016) 133 DTR 142 (Karn.)(HC)

2348 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Cash credits – Share capital – Even if the AO has conducted an inquiry into the taxability of share capital receipts CIT is entitled to revise if the AO has not applied his mind to important aspects [S. 68]**
In *Subhlakshmi Vanijya Pvt. Ltd. v. CIT (2015) 155 ITD 171 (Kol.)(Trib.) Vaibhavlaxmi Financial Advisory Pvt. Ltd. v. CIT and Rajmandir Estates Pvt. Ltd. vs. CIT* the Tribunal upheld the exercise of revisionary powers u/s. 263 by the CIT on the ground that though the AO had conducted necessary enquiries, he had not applied his mind properly to the evidence on record. The assessee filed an appeal in the High Court, dismissing the appeal the Court held that we have indicated above the pieces of evidence which go to show that the Commissioner had reasons to entertain the belief that this was or could be a case of money laundering which went unnoticed because the Assessing Officer did not hold requisite investigation except for calling for the records. The evidence which we have tabulated above and the *prima facie* inference drawn by us is deducible from the documents also submitted before the Assessing Officer. The fact that the Assessing Officer did not apply his mind to those pieces of evidence would be evident from the assessment order itself. The persons behind the assessee company and the persons behind the subscribing companies were not interrogated which was essential to unearth the truth. The question for consideration is whether in the presence of materials discussed above the Commissioner was justified in treating the assessment order erroneous and prejudicial to the interest of the revenue. That question in the facts and circumstances has to be answered in the affirmative. Whether receipt of share capital was a taxable event prior to 1st April, 2013 before introduction of Clause (VII-b) to the sub-section 2 of Section 56 of the Income-tax Act; whether the concept of arm's length pricing in a domestic transaction before introduction of Sections 92A and 92BA of the Income-tax Act was there at the relevant point of time are not questions which arise for determination in this case. (AY. 2009-10)
Rajmandir Estates (P) Ltd. v. PCIT (2016) 386 ITR 162 / 240 Taxman 306 / 287 CTR 512 / 136 DTR 345 (Cal.)(HC)
Editorial : SLP of assessee is dismissed, Rajmandir Estates (P) Ltd. v. PCIT (2017) 242 Taxman 127 (SC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Book profit – As the loss suffered on transfer of business was rightly debited to the P&L A/c as per AS 13, it cannot be added back to the Book Profits – Revision order was held to be bad in law [S. 115JB] 2349

The assessee debited an amount of ₹ 919.52 lakhs to the Profit and Loss account in accordance with a scheme of arrangement for the transfer of its investment division to Daisy Commercials Pvt. Ltd. (hereinafter referred to as 'DCPL'). According to the sanctioned scheme, the assessee transferred its investment division worth ₹ 23.16 crores to DCPL. The shareholders of the assessee company were issued shares of the value of ₹ 13.96 crores in DCPL. The assessee reduced its share capital by ₹ 13.96 crores. The difference between the investment value of ₹ 23.16 crores and the share capital reduction of ₹ 13.96 cores, that is, ₹ 9.20 crores was debited to the Profit & Loss account for the year ended March 31, 2006. This was allowed by the AO in computing the book profits. The CIT revised the assessment u/s. 263 and held that not adding back the aforesaid amount of ₹ 919.52 lakhs in computing the book profit u/s. 115JB of the Act made the assessment order erroneous and prejudicial to the interests of the revenue. The Tribunal accepted the claim of the assessee. On appeal by the department to the High Court HELD dismissing the appeal:

(i) What is required of us is to examine the legality of exercise of power under Section 263 of the Act by the CIT. It is a fact that the assessee incurred loss of a sum of ₹ 9.20 crores by resorting to transfer of its investment division to Daisy Commercials Private Ltd. The loss was debited to the profit and loss account. The assessment was under Section 115JB of the Act. The Assessing Officer did not question the act of debiting loss arising out of the transfer to the P/L account. The CIT was of the opinion that the loss could not have been debited to the P/L account and the amount was required to be added back for computation of book profit under Section 115JB.

(ii) The Accounting Standards laid down by the Institute however provide for recognition of the profit or loss arising out of investment in the profit and loss account. Reference in this regard may be made to Clauses 21 and 25 of Accounting Standard 13. The disclosure made in the financial statements is in pursuance of the requirement of Clause 25 quoted above and is also in pursuance of Clause 2(b) of Part II of Schedule VI to the Companies Act, 1956 which is not to be construed as any qualification indicating any inaccuracy in the accounts. There was, thus no mistake on the part of the assessee in debiting the loss to the profit and loss account. Once it is realised that the assessee had correctly debited the profit and loss account for the loss arising out of the transfer of investment division, there remains no difficulty in realising that the CIT proceeded on a wrong premise which was responsible for exercise of jurisdiction under Section 263 which he would not have done if he had realised the correct position. (AY. 2006-07)

CIT v. Binani Cement Ltd. (2016) 384 ITR 457 / 136 DTR 177 / 239 Taxman 29 / 289 CTR 181 (Cal.)(HC)

2350 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Amounts not deductible – Disallowance for short-deduction TDS default (i.e. deduction u/s. 194H instead of u/s. 194H) [S. 40(a)(ia), 194C, 194H]**

The CIT passed an order u/s. 263 on the ground that the Assessing Officer has not disallowed the expenditure under Section 40a(ia) of the Act as per the audit report submitted by the statutory auditors in Form 3CD wherein it was specifically made clear that the assessee has not considered CBDT Circular No. 715 in respect of Section 194C of the Act pertaining to deduction of TDS on advertisement contract with M/s TLG India Pvt. Ltd. After hearing the parties, the Commissioner set aside the assessment order holding that the provisions of Section 40a(ia) of the Act is applicable. Being aggrieved by the said order, the assessee preferred appeal before the Tribunal. The Tribunal having considered the explanation furnished by the assessee before the Assessing Officer which forms part of the assessment records, has come to a conclusion that the assessee has deducted TDS under Section 194H of the Act and the provisions of Section 194C of the Act are not applicable to the present case. On law, it followed the Judgment of the Calcutta High Court reported in S. K. Tekriwal (2014) 361 ITR 432 (Cal). As regards the binding nature of the CBDT Circular, the Tribunal has followed the Judgment of the Apex Court in Hindustan Aeronautics Limited reported in 243 ITR 808. The Tribunal has also followed a co-ordinate Bench decision of this Court in Dhaanya Seeds Private Limited reported in ITA No. 1523/Bang/2012 dated 27.09.2013. Thus, Tribunal having considered the case on facts and law, has come to a conclusion that the Commissioner had no jurisdiction to invoke the provisions of Section 263 of the Act as the twin conditions which are mandatorily required to be satisfied for invoking the provisions of Section 263 of the Act i.e., (i) order to be revised is erroneous and (ii) prejudicial to the interest of the revenue are not satisfied. On appeal by the department to the High Court HELD dismissing the appeal:

We have carefully considered the arguments addressed by both the parties and perused the material on record in the light of the Judgments referred to by the Tribunal in arriving at the conclusion. An identical question regarding Section 40(a)(ia) of the Act was considered by the Calcutta High Court in S. K. Tekriwal (2014) 361 ITR 432 (Cal) and the findings given by the Calcutta High Court has been followed by the Tribunal. Similarly, as regards the binding nature of the CBDT, the Tribunal has followed the Judgment of the Apex Court in HAL (supra). In view of both the decisions cited supra, no substantial questions of law arises for our determination in this appeal. (ITA No. 342 of 2015, dt. 16.02.2016) (AY. 2007-08)

CIT v. Hewlett-Packard India Sales Pvt. Ltd. (2016) 382 ITR 496 (Karn.)(HC)

2351 **S. 263 : Commissioner – Revision of orders prejudicial to Revenue – Lease rental – Capital or revenue – Revision was is not justified as the Commissioner failed to record as to how and in what manner order was erroneous and prejudicial to revenue**

The Assessee Company had claimed a deduction on account of lease rental paid for motor car taken on finance lease and the same was allowed in the assessment. The Commissioner being of the view that the lease rentals were required to be treated as capital expenditure, thus directed the Assessing Officer to examine the same.

Tribunal was of the view that the Assessing Officer (while passing the order under section 143(3) of the Act) had requisite details and evidences and on being satisfied

of such details and evidences, he had allowed the claim to the assessee. Therefore the assessment order passed by the Assessing Officer was not erroneous and prejudicial to the revenue. Aggrieved by the order, the revenue preferred an appeal before the High Court.

The High Court followed the earlier year orders, wherein DRP had ruled in the favour of the assessee and had allowed deductions on account of lease rental payment. High Court also noted that the Commissioner had simply directed the Assessing Officer to examine the matter without recording as to why the order passed by the Assessing Officer was prejudicial to the interest of the revenue and erroneous.

High Court held that the Assessing Officer had adopted one of the courses permissible by law and the factors relevant for exercise of power under section 263 were absent and the order passed does not record how and in what manner the assessment order passed by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue. Accordingly High Court dismissed the revenue's appeal. (AY. 2007-08)

CIT v. Philips India Ltd. (2016) 237 Taxman 538 (Cal.)(HC)

Editorial: SLP is granted to the revenue, CIT v. Philips India Ltd. (2017) 245 Taxman 44 (SC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Order passed without complying with the direction of Tribunal would erroneous and prejudicial to interests of Revenue. Therefore, CIT has power to exercise revisional powers to set aside the assessment [S. 254(1)] 2352

The Tribunal had remanded matter to the AO after issuing certain directions. However, the AO passed the order without complying with the directions of the Tribunal. Thereafter, the CIT exercised revisional powers u/s. 263 in setting aside the assessment order and remanded it to AO.

Appeal was filed before the High Court challenging the jurisdiction of CIT u/s. 263. The High Court held that assessment order passed without complying with the directions of the Tribunal (remand order) is erroneous and prejudicial to the interest of Revenue and thus CIT has power to revise the assessment order u/s. 263. (AY. 1990-91 to 1994-95)

U.P. Forest Corporation v. CIT (2015) 235 Taxman 270 / (2016) 131 DTR 274 / 284 CTR 311 (All.)(HC)

Editorial: SLP of assessee was admitted, U.P. Forest Corporation v. CIT (2016) 240 Taxman 3 (SC)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Transfer – Mere agreement for transfer of shares does not cause effective transfer of shares unless it is accompanied with delivery of share certificate and duly signed and stamped share transfer form. An agreement to transfer share merely gives an enforceable right to the parties [S. 2(47), 54EC, 54F, Companies Act, 1956, S. 108] 2353

Allowing the appeal of the assessee the Tribunal held that a mere agreement for transfer of shares does not cause effective transfer of shares unless it is accompanied with delivery of share certificate and duly signed and stamped share transfer form. An agreement to transfer share merely gives an enforceable right to the parties, considering the CBDT Circular No. 704 dated 28.04.1995, order of Commissioner was set aside. (AY. 2010-11)

Y. V. Ramana v. CIT (2016) 183 TTJ 337 / (2017) 145 DTR 202 (Vizag.)(Trib.)

2354 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Revision – Revision is held to be valid on the basis of proposal by the Assessing Officer if other conditions are satisfied**

Tribunal held that Revision is held to be valid on the basis of proposal by the Assessing Officer if other conditions are satisfied. (AY. 2004-05)

Stewarts & Lloyds of India Ltd. v. CIT (2016) 158 ITD 456 / 178 TTJ 188 (Kol.)(Trib.)

2355 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Order passed by Assessing Officer accepting sale consideration declared by assessee resulted in escapement of capital gains tax and, thus, impugned revisional order was to be upheld [S. 45, 48]**

Tribunal held that on facts, the assessment order passed by Assessing Officer accepting sale consideration declared by assessee resulted in escapement of capital gains tax and, thus, impugned revisional order was to be upheld. (AY. 2012-13)

Kumar Rajaram v. ITO (2016) 157 ITD 772 / 178 TTJ 168 (Chennai)(Trib.)

2356 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – No query with regard to application of Section 50C of Act was ever raised by AO in any manner – Revision was held to be justified [S. 50C]**

No query with regard to application of Section 50C of Act was ever raised by AO in any manner. No inquiry was made by CIT(A) with respect to application or examination of provisions of Section 50C of Act. Commissioner had requisite powers and jurisdiction to examine application of Section 50C of Act which were omitted to be applied by the AO. (AY. 2004-05)

Vithal Nagar Co-operative Housing Society Ltd. and Ors. v. CIT (2016) 52 ITR 21 / (2017) 185 TTJ 780 (Mum.)(Trib.)

2357 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Commissioner could not cause roving inquiry into assessment and re-examine the statement of affairs which were not seized material [S. 153A]**

Allowing the appeal of the assessee the Tribunal held that Commissioner could not cause roving inquiry into assessment and re-examine the statement of affairs which were not seized material. (AY. 2012-13)

V. R. Venkatachalam v. ACIT (2016) 48 ITR 13 (Chennai)(Trib.)

2358 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – AO found no violation of S. 40A(3) on three occasions, revision on the basis of audit objection is impermissible [S. 40A(3)]**

Allowing the appeal of the assessee, the Tribunal held that the issue of violation of the provisions of section 40A(3) was examined three times that is (i) during the assessment proceedings, (ii) after assessment proceedings, and (iii) during initiation of reassessment proceedings and he had not found any violation of such provisions. Such decision of the AO cannot be held as erroneous and prejudicial to the Revenue merely because that no elaborate finding has been recorded in the order of the AO in this regard. Therefore, order u/s. 263 was set aside. (AY. 2010-11)

Sartaj Singh v. PCIT (2016) 48 ITR 604 (Amritsar)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Deduction at source – Interest other than interest on securities – Reimbursement of commission to holding company – Reimbursement would not come under purview of interest so as to make assessee liable to deduct tax at source u/s. 194A, revision was held to be bad on law [S. 2(28A), 194A] 2359

Allowing the appeal of the assessee, the Tribunal held that since there was no money borrowed or debt incurred, therefore provisions of sections 2(28A) and 194A do not apply. Payment made to NCL is not "income by way of interest". The impugned receipt would be in the nature of reimbursement of expenses incurred by it. Therefore the order passed by the Assessing Officer is one of the possible views. Even on merit one cannot find that bank guarantee commission does not come under the purview of interest so as to make liable to deduction of tax at source u/s. 194A. Accordingly the order of Commissioner was set aside. (AY. 2010-11, 2011-12)

Neo Sports Broadcast (P.) Ltd. v. CIT (2016) 159 ITD 136 / 181 TTJ 417 (Mum.)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Deduction at source – Commission on sale of lottery tickets – There was no principal-agent relationship between parties, payment in question could not be regarded as 'commission' requiring deduction of tax at source [S. 40(a)(ia), 194G, 194H] 2360

During year, assessee made payments to various stockists by way of prize winning money attributable to unsold lottery tickets. Commissioner held that the assessee was liable to deduct tax at source u/s. 194G while making aforesaid payments since there was failure on the part of the assessee, to do so, the payments were liable to be disallowed u/s. 40(a)(ia). On appeal allowing the appeal the Tribunal held that there was no principal-agent relationship between parties, payment in question could not be regarded as 'commission' requiring deduction of tax at source. Therefore, impugned order passed by authorities below was set aside. (AY. 2010-11)

Future Distributors v. PCIT (2016) 160 ITD 574 / 181 TTJ 1 / 50 ITR 515 (Kol.)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Proposal by AO and lack of proper enquiry – Revision was held to be not valid 2361

The Tribunal held that since the proposal came from the AO and the CIT initiated revision proceedings merely on the basis of such proposal, the revision is not valid.

The Tribunal further held that it may be a case of inadequate enquiry but not a case of no enquiry and therefore CIT was not justified in invoking his revisionary jurisdiction under section 263. (AY. 2010-11)

Shantai Exim Ltd. v. CIT (2016) 178 TTJ 451 / 136 DTR 313 (Ahd.)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Lack of proper enquiry – Revision was held to be not valid 2362

The Tribunal held that the AO has completed the assessment after accepting the submissions of assessee that bank deposits reflected turnover from retail business. It is clear from the aforesaid fact that the AO passed orders after due application of mind. Therefore, action under section 263 was not warranted. (AY. 2007-08, 2008-09)

Vikrant Mehra v. ITO (2016) 178 TTJ 53 (UO) / 48 ITR 382 (Asr.)(Trib.)

2363 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Order was passed on the basis of audit objection – Revision proceedings was held to be bad in law [S. 40A(3)]**

Order passed by AO was not erroneous and was not prejudicial to interest of Revenue. Proceedings u/s. 263 were initiated on basis of audit objections as was noted by CIT(A) in his order. Punjab & Haryana High Court in case of *CIT v. Sohana Woollen Mills* had held that mere audit objections, and merely because different view could be taken were not enough to hold that order of AO was erroneous or prejudicial to interest of Revenue. Order passed by CIT was set aside. Assessee's Appeal allowed. (AY. 2010-11)

Sartaj Singh v. PCIT (2016) 48 ITR 604 / 179 TTJ 17 (UO)(Asr.)(Trib.)

2364 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Explanation 2 declaratory in nature – Lack of enquiry by the AO – Revision valid**

The Commissioner noticed from the assessment records that the assessee claimed deduction for expenditure in respect of provision on account of warranty, sales tax, excise and liquidated damages. He took the view that no expenditure in the nature of contingent expenditure or provision for expenditure can be allowed under section 28 or section 37 unless the assessee followed the mercantile system of accounting and the liability claimed on accrual basis had crystallised during the previous year, that the expenditure claimed was nothing but provision for expenditure and that the Assessing Officer had failed to make relevant and meaningful enquiry into whether the liability relating to warranty, sales tax, excise and liquidated damages had crystallised to the extent deduction had been claimed in the return. The Commissioner set aside the assessment on the ground that the Assessing Officer had acted in a routine and perfunctory manner and failed to carry out the relevant and necessary inquiries and examination as warranted by the facts of the case and made an assessment order which was erroneous and prejudicial to the interests of the Revenue. The Tribunal held that the amendment to section 263 by the Finance Act, 2015, by insertion of Explanation 2 to section 263 of the Income Tax Act, 1961, is declaratory and clarificatory in nature. It, *inter alia*, provides that if the Assessing Officer passes an order without making inquiries or verifications which he should have made or the order is passed allowing any relief without inquiring into the claim, the order shall be deemed to be erroneous and prejudicial to the interests of the Revenue. (AY. 2007-08)

Crompton Greaves Ltd. v. CIT (2016) 46 ITR 465 / 140 DTR 153 / 177 TTJ 1 (Mum.)(Trib.)

Editorial: Miscellaneous Application is filed, which is pending for hearing

2365 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – AO made detailed enquiry at assessment stage for cash deposit by R against property – CIT found enquiry inadequate and issued notice after audit objection was raised – Revision not permissible**

The AO called for an explanation of the assessee with regard to cash deposited in his bank account. During the assessment proceedings, the assessee furnished copies of bank account, cash book, Statement of R from whom advance had been received against property which even contained explanation about source of income of R to advance cash to assessee and agreement copy. The Commissioner issued notice under Section 263 and noted that the agreement was not registered and further statement of R

was not subjected to cross examination and thereafter took the view that there was lack of application of mind by AO and for want of proper enquiry directed him to make fresh assessment. On appeal to Tribunal, it was held that AO had examined the issue in detail and proper enquiries were made. If there was inadequate enquiry, that would not by itself give occasion to Commissioner to pass order under Section 263. The Commissioner issued notice after the audit objection was raised and was not taken further action against the assessee. Such a course was not sustainable in law. (AY. 2009-10)
Vikram Kaswan v. CIT (2016) 47 ITR 322 (Chd.)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Amalgamation of companies – No provision for communication of factum of amalgamation to Commissioner – Initiation of revision proceedings against amalgamating company after date of amalgamation – Not valid 2366

The High Court approved the merger of HEPL with the assessee with effect from April 1, 2011. The Commissioner issued notice under Section 263 on December 24, 2014 in the name of HEPL and passed an order in the same name. The assessee contended that the order was passed in the name of non-existing company and fact of amalgamation was brought to the notice of AO by letter dated July 23, 2013. On appeal to Tribunal, it was held that there was no provision in the Act to communicate the factum of amalgamation to the Commissioner. The assessee had already informed the AO. Before taking up any action under Section 263, the Commissioner had to pursue records and the records would include the communication made by the assessee to the AO intimating about the fact of amalgamation. Hence, initiation of proceedings under Section 263 against HEPL after its amalgamation with the assessee was void *ab-initio*. (AY. 2006-07)
Milestone Tradelinks P. Ltd. v. ITO (2016) 47 ITR 606 (Ahd.)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – If the assessee had filed all the requisite details with the AO at the time of assessment, then revision by CIT is not possible due to mere change of opinion 2367

The AO allowed exemption u/s. 10(23C) to the assessee, a charitable society, and treated it to be registered u/s. 12AA and the receipts were considered to be below ₹ 1 crore. The CIT initiated proceedings u/s. 263 on the basis that the assessee was not registered u/s. 12AA before the completion of assessment and the consolidated receipts of the trust were more than ₹ 1 crore since it had not included scholarship receipts to its total receipts. Further, the CIT observed that depreciation was claimed on capital expenditure which was allowed in the year of purchase of assets as application. The ITAT quashed the revision of order by CIT since the assessee had filed all the requisite details with the AO, at the time of assessment, who had allowed the claim of the assessee. The revision by the CIT was merely due to a change of opinion which was not allowable. Various courts have held in favour of the assessee with respect to the claim of depreciation on capital expenditure and the AO had specifically looked into the aggregate receipts of the Assessee. (AY. 2010-11)
Baberwad Shiksha Samiti v. CIT (E) (2016) 47 ITR 218 / 134 DTR 65 / 177 TTJ 380 (Jaipur)(Trib.)

2368 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Additional ground – Addition not challenged in original assessment cannot be challenged in appeal against order pursuant to revision order u/s. 263**

The assessee claimed deduction of ₹ 9,65,903 towards prior period expenses for the assessment year 2006-07. Since the expenses did not relate to the assessment year 2006-07, the claim was disallowed by the Assessing Officer while passing the original assessment order under section 143(3) of the Income-tax Act, 1961. This assessment year was a subject matter of revision under section 263 and the Assessing Officer was directed to consider the allowability of depreciation on the improvement made towards leasehold properties. Consequent to the revision order passed under section 263, the Assessing Officer completed the assessment under section 143(3) read with section 263. On appeal challenging the disallowance of prior period expenses, the Tribunal held that the addition did not emanate from the order passed under section 143(3) read with section 263. Since the assessee failed to challenge the addition in the original assessment, it could not challenge the addition in appeal against the order of revision, as this was not the subject matter of the order passed under section 263. (AY. 2006-07)

Accel Frontline Ltd. v. DCIT (2016) 46 ITR 138 (Chennai)(Trib.)

2369 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Amalgamation of companies – As the amalgamation company ceases to exist, revision order on the amalgamating company is bad in law**

The fact of merger of Bond Co. Ltd. with the assessee with effect from April 1, 2013, was duly informed to the Assessing Officer by letter dated November 24, 2014. However, the Commissioner under section 263 of the Income-tax Act, 1961, passed a revisional order in the name of Bond Co. Ltd. on March 10, 2015. The Tribunal held that Bond Co. Ltd. had amalgamated with the assessee by order of the Calcutta High Court on May 16, 2014, and pursuant to the amalgamation, Bond Co. Ltd., had lost its identity and existence. The reply letter dated January 27, 2015, before the Commissioner in response to showcause notice showed that the assessee had specifically brought to the notice of the Commissioner that Bond Co. Ltd. had amalgamated with the assessee. Hence, the assessee had duly discharged its onus of intimating the Department about the fact of merger of Bond Co. Ltd. In these circumstances, the Commissioner ought to have taken cognizance of the fact and should have issued a fresh showcause notice in the name of the assessee and proceeded to pass the fresh order in the name of the assessee. Pursuant to the amalgamation, the amalgamating company lost its existence. Section 292BB could not be applied in the facts because it could be made applicable only to assessment or reassessment proceedings and not to revision proceedings as contemplated under section 263. Moreover, the provisions of section 292BB would not come to the rescue of the Revenue when there was a basic fault in the assumption of jurisdiction itself by the Commissioner issuing the show cause notice and passing the order on the nonexistent entity. When there is a jurisdictional defect, it does not become curable. (AY. 2010-11)

Emerald Co. Ltd. v. ITO (2016) 46 ITR 619 / 176 TTJ 276 / 133 DTR 177 (Kol.)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Capital gains – Income from house property – Receipt of one time premium on allotment of tenancy rights perpetually to tenants is chargeable to tax as capital gains and not as income from house property – Revision of order was held to be not justified [S. 22, 45, 54EC] 2370

Assessee received one time premium for grant of tenancy rights in a property. Tenancy was perpetual and assessee did not have power to evict tenant till rents were paid. Assessee invested said amount in Rural Electrification Corporation Bond and claimed exemption u/s. 54EC which was allowed by AO. The Commissioner, u/s. 263, held that said amount was chargeable as income from house property and, therefore, exemption u/s. 54EC was not admissible. The Honourable ITAT observed that property constitute's a bundle of rights and transfer by way of allotment of perpetual tenancy with right of occupancy and enjoyment of property perpetually in favour of tenant is also transfer of one of the right out of bundle of rights which property carries with it and shall be chargeable to tax u/s. 55(2)(a), read with section 45 as income from capital gains. Therefore view of A.O. was correct which was duly supported by provisions of Act, therefore, order passed by Commissioner u/s. 263 was unsustainable in law. (AY. 2009-10)

Sujaysingh P. Bobade (HUF) v. ITO (2016) 158 ITD 125 / 140 DTR 132 / 180 TTJ 631 (Mum.)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Notice issued by CIT on the ground that sufficient enquiry has not been made – Unjustified 2371

The assessee firm engaged in the business of developing and constructing housing projects and sale of plots. During the course of assessment proceedings, the assessee produced its books of account, bank account, sale bills, purchase bills and vouchers of expenses etc. which were test checked. The assessee has also filed details of capital introduced by the partners and other details called for which have been verified and placed on record. During the year the assessee has claimed deduction under Section 80IB(10) of the Act and details of the same have been filed. Since the assessee has fulfilled all the conditions laid down under Section 80IB(10) of the Act, the deduction under Section 80IB(10) is allowed. In this regard the assessee has filed separate trading account of sale of plots and bungalow at Butibori, Sale of shop at Besa and sale of bungalows at Besa covered under Section 80IB(10) of the Act. However, CIT issued notice under Section 263 of the Act on the ground that the AO has allowed the deduction under Section 80IB(10) without proper verification and without making necessary enquiries. The assessee being aggrieved filed an appeal before the Hon'ble Appellate Tribunal. The Appellate Tribunal was pleased to quash the notice issued under Section 263 of the Act by observing that the AO has made the necessary enquiry by issuing questionnaire to the assessee and obtaining the details as he desired necessary. Now the learned CIT was of the opinion that the details obtained by the assessee were not sufficient. In our considered opinion this approach of the learned CIT in invoking the jurisdiction under Section 263 of the I.T. Act is not sustainable. (AY. 2006-07)

Harihar Housing Agency v. CIT (2016) 177 TTJ 242 / 134 DTR 107 (Nag.)(Trib.)

2372 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Order of AO brief and cryptic – Brief order could not be said to be erroneous and prejudicial to interest of Revenue**

AO required the assessee to submit certain record regarding the purchaser/seller alongwith complete postal address and was satisfied with the record produced before him and explanation given to him. ITAT held that the CIT had wrongly presumed that the Assessing officer had not properly examined the issue. The order of the Assessing officer may be brief and cryptic but that by itself is not sufficient reason to brand the assessment order as erroneous and prejudicial to the interest of Revenue. It is well settled law that writing an order in details may be a legal requirement but the order not fulfilling this requirements cannot be said to be erroneous and prejudicial to the interest of revenue. The AO had made proper and desired enquires before passing the order. (AY. 2010-11)

Ved Prakash Contractors v. CIT (2016) 175 TTJ 19 (UO) (Chd.)(Trib.)

2373 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Deduction of tax at source – Commission or brokerage etc. [S. 194H]**

Where Assessing Officer while completing assessment did not make any enquiry relating to non-deduction of tax at source in respect of discount/commission paid to vendors against pre-paid recharge vouchers, Commissioner was justified in setting aside said assessment in exercise of his revisional power. (AY. 2006-07 to 2010-11)

Vodafone South Ltd. v. CIT (TDS) (2015) 155 ITD 109 / 174 TTJ 246 / (2016) 131 DTR 92 (Chd.)(Trib.)

2374 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – In challenging the validity of a section 263 revision order, the validity of the underlying section 143(3) assessment order which is sought to be revised can be examined even if the said assessment order has not been challenged and has become final. If the assessment order is passed on a non-existent entity, the revision order is void [S. 292B]**

Allowing the appeal of assessee the Tribunal held that if the impugned assessment order passed u/s. 143(3) was illegal or nullity in the eyes of law, then, whether the CIT had a valid jurisdiction to pass the impugned order u/s. 263 to revise the *non est* assessment order. The original assessment order passed u/s. 143(3) dt. 24-10-2013 was null & void in the eyes of law as the same was passed upon a non-existing entity and, therefore, the CIT could not have assumed jurisdiction under the law to make revision of a *non est* order and, therefore, the impugned order passed u/s. 263 by the CIT is also nullity in the eyes of law and therefore the same is hereby quashed. (ITA No. 688/Mum/2016, dt. 10.06.2016) (AY. 2011-12)

Westlife Development Ltd. v. Pr. CIT (Mum.)(Trib.); www.itatonline.org

2375 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – There is doubt whether Explanation 2(a) to Section 263, inserted by FA 2015 w.e.f. 01.04.2015 has retrospective effect. The said Explanation does not override the law that the CIT cannot fault an assessment order without conducting his own inquiry or verification to establish that the assessment order is not sustainable in law**

Allowing the appeal the Tribunal held that there is doubt whether Explanation 2(a) to Section 263, inserted by FA 2015 w.e.f. 01.04.2015 has retrospective effect. The said

Explanation does not override the law that the CIT cannot fault an assessment order without conducting his own inquiry or verification to establish that the assessment order is not sustainable in law.(ITA No. 2690, 2691/Mum/2016, dt. 06.05.2016) (AY. 2008-09)
Narayan Tatu Rane v. ITO (Mum.)(Trib.), www.itatonline.org

S. 263 : Commissioner – Revision of orders prejudicial to revenue – As issue of whether TDS should be u/s. 194C or 194H is subject to two views, revision is not possible [S. 194C, 194H] 2376

Allowing the appeal of assessee the Tribunal held that in the original assessment proceedings, the AO had analysed the payment in detail and then concluded that the provisions of section 194C are applicable. Also, not two but three views were possible viz. (i) TDS u/s. 194H which was discussed by the AO in original order; (ii) TDS u/s. 194C which was upheld by AO; and (iii) section 194A now sought to be taken by CIT. Since three views were possible, revision was not permissible. Furthermore, even on merits, it was held that view of the CIT was not correct because there was no money borrowed or debt incurred, and hence, payment made to NCL was not "income by way of interest". (AY. 2010-11, 2011-12)
Neo Sports Broadcast Pvt.Ltd. v. CIT (2016) 142 DTR 329 (Mum.)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Share application – Revision cannot be initiated to conduct roving inquiries whether share application money share premium constitute undisclosed income 2377

Allowing the appeal, the Tribunal held that in the present case although the AO has mentioned regarding the submissions of documents and discussion carried out but still the CIT has mentioned while passing the order u/s. 263 of the Act that the order of AO is erroneous and prejudicial to the interest of revenue. In this respect we would further like to mention that the order of AO in the present case may be brief but that by itself is not a sufficient reason to held the order of assessment as erroneous and prejudicial to the interest of the revenue. The scope of interference u/s. 263 is not to set aside merely unfavaourable orders and bring to tax some more money to the treasury nor is the section meant to get at sheer escapement of revenue which is taken care of by other provisions in the Act. Power under section 263 cannot be exercised for starting fishing and roving enquiries. In the garb of exercising power under Section 263, the Commissioner cannot initiate proceedings with a view to starting fishing and roving enquires in matters or orders which are already concluded. (ITA No. 2794&2795/Mum/2014 dt. 23.03.2016) (AY. 2004-05)
Rachana Finance & Investments Pvt. Ltd. v. CIT (Mum.)(Trib.); www.itatonline.org

S. 263 : Commissioner – Revision of order prejudicial to revenue – An order of revision which does not show independent application of mind by the CIT is against the spirit of the Act and liable to be set aside [S. 143(3)] 2378

Allowing the appeal of assessee the Tribunal held that; (i) As per the provisions of section 263 it is the Commissioner of Income Tax who has to examine the records and thereafter form an independent opinion that the order passed by the Assessing Officer is erroneous in so far as it prejudicial to the interest of revenue. In the present case we

find that the Commissioner of Income Tax has not exercised his independent judgment for invoking revisional powers. The Commissioner of Income Tax has to pass a speaking order highlighting deficiencies in the assessment order with reasons.
(ii) A perusal of the impugned order shows, that the Commissioner of Income Tax in the instant case has merely reproduced the deficiencies pointed out by the Dy. Commissioner of Income Tax in the assessment order. The Commissioner of Income Tax has not given the reasons as to how the findings of the Assessing Officer are erroneous in so far as prejudicial to the interest of revenue. The contention of the assessee is that all the relevant documents were placed on record by the assessee during the course of assessment proceedings. The Assessing Officer has passed the order after considering the same. The duty of the assessee is bring all the relevant documents before the Assessing Officer. The manner in which the order is to be passed is the prerogative of the Assessing Officer.
(iii) The order of the Assessing Officer may be brief and cryptic but that by itself is not sufficient reason to hold that the assessment order is erroneous and prejudicial to the interest of revenue. It is for the Commissioner to point out as to what error was committed by the Assessing Officer in taking a particular view. In the case in hand, the Commissioner of Income Tax has failed to point out error in the assessment order. For invoking revisionary powers the Commissioner of Income Tax has to exercise his own discretion and judgment. Here the Commissioner of Income Tax has invoked the provisions of section 263 at the mere suggestion of the Dy. Commissioner of Income Tax, without exercising his own discretion and judgment. In view of the fact that the Commissioner of Income Tax has invoked the provisions of section 263 without applying his own independent judgment and merely at the behest of proposal forwarded by the Dy. Commissioner of Income Tax is against the spirit of Act. Thus, the impugned order is liable to be set aside.(ITA No. 1223/PN/2013, dt. 21.12.2015) (AY. 2008-09)
Span Overseas Ltd. v. CIT (Mum.)(Trib.); www.itatonline.org

2379 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Order passed on a non-existing entity – Consent of assessee will not give jurisdiction to Commissioner to revises the order – Order was held to be bad in law**
Allowing the appeal of assessee the Tribunal held that Order passed on a non-existing entity – Consent of assessee will not give jurisdiction to Commissioner to revise the order – Order was held to be bad in law. (ITA No. 1578/Ahd/2015, dt. 04.03.2016) (AY. 2006-07)
Milestone Tradelinks P. Ltd. v. ITO (Ahad.)(Trib.); www.itatonline.org

2380 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Solicitor received money from his client to meet out expenses incurred on behalf of client, solicitor remained liable to account by this money to his client, and, hence, it did not become income of assessee – Revision order was held to be not valid [S. 5, 145]**
Where assessee-solicitor received money from his client to meet out expenses incurred on behalf of client, solicitor remained liable to account by this money to his client, and,

hence, it did not become income of assessee. Revision proceedings was held to be not valid. (AY. 2005-06, 2007-08)
ACIT v. Pawan Kumar Jhunjhunwala (2016) 157 ITD 667 (Kol.)(Trib.)

S. 263: Commissioner – Revision of orders prejudicial to revenue –Investment from borrowed money – Revision was held to be not valid [S. 54F] 2381
Allowing the appeal of the assessee the Tribunal held that where assessee had fulfilled all conditions of investment of equivalent amount of capital gain in purchase of residential house qualifying for relief under section 54F, she would be entitled to exemption under section 54F for total investment irrespective of fact that part of such investment came from borrowed money. (AY. 2009-10)
Sumathi Gedupudi (Smt.) v. Add. CIT (2016) 156 ITD 419 / 177 TTJ 660 / 133 DTR 188 (Hyd.)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – VDIS certificate – Even inadequate, that would not, by itself, give occasion to Commissioner to pass revision order merely because he has a different opinion in matter [S. 69A] 2382
Tribunal held that where the assessee had filed VDIS certificate to show that jewellery found during search had been declared under VDIS and Assessing Officer accepted such certificate, there was no error in order of Assessing Officer so as to invoke revisional jurisdiction. If there was an enquiry, even inadequate, that would not, by itself, give occasion to Commissioner to pass order under section 263, merely because he has a different opinion in matter (AY. 2011-12)
Narain Singla v. Pc.CIT (2016) 156 ITD 275 (Chd.)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Detailed enquiry made during assessment proceedings and AO came to conclusion that no TDS is liable to be deducted – Merely, AO did mention about these investigations does not make order illegal – CIT cannot impose his view and hold order is erroneous [S. 40(a)ia), 271C] 2383
Held that CIT can assume jurisdiction u/s. 263 if CIT finds AO's order to be erroneous and prejudicial to interest of revenue simultaneously. If AO has taken one of the possible views then CIT cannot impose his view. But if AO makes enquires but fails to apply law properly then the order can be said to erroneous. Also, CIT has to show that the case is prejudicial to revenue. AO has raised the issue of non-deduction of TDS which were duly replied by assessee. Further, AO has conducted independent enquires from the suppliers of the material also. Hence, it is not a case of no enquiry. Also, it cannot be a case of inadequate enquiry as query raised by AO has been properly addressed and AO has also preferred to issue notices to concerned parties which were duly replied to AO. On this basis, no disallowance was made. Judging this case on the scale of no enquiry or inadequate enquiry would not serve any purpose. Fact that AO did not mention these investigations made by him in assessment order does not make his action illegal. Further, once provisions of sec. 40(a)(ia) are not applicable on facts, whatever was going through in the mind of AO at that time, it is a fact that he has reached to a correct conclusion. Thereby, order of AO cannot be erroneous. Initiating

Section 271C penalty proceedings cannot be a relevant factor to decide whether disallowance u/s. 40(a)(ia) was applicable or not. Thereby, order u/s. 263 cannot be erroneous and jurisdiction assumed by CIT is bad in law. (AY 2005-06)
Krypton Datamatics Ltd. v. DCIT (2016) 176 TTJ 11(UO) (Chd.)(Trib.)

2384 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Revision not possible if the AO had taken a view after due consideration of assessee's submissions [S. 143(3)]**
After the completion of assessment u/s 143(3), the CIT invoked the powers u/s. 263 and alleged that the AO did not complete the assessment in a proper manner. The ITAT held that the assessee had filed detailed submissions before the AO on all the issues mentioned by the CIT based on which the AO had taken a view. This view, though different from that of the CIT, cannot be taken as prejudicial to the revenue, especially when the view of the AO had been supported by the judgment of the Hon'ble Supreme Court. (AY. 2008-09, 2009-10)
Damsak Projects P. Ltd. v. DCIT (2016) 45 ITR 278 (Mum.)(Trib.)

2385 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Deemed Dividend – No incriminating materials found during search – No addition was made in assessment – Revision on premise of deemed dividend was held to be not justified [S. 2(22)(e)]**
Deemed dividend could be assessed only in the hands of shareholder and only when the loan is advanced by a company to such shareholder. The monies received by the assessee from the lending company constituted an intercorporate deposit and not a loan and hence the provisions of section 2(22)(e) are not applicable. Intercorporate deposits and loans are totally distinct and separate. The assessee was not a shareholder of GGPL in any of the AY for which the proceedings u/s. 263 had been initiated. Thus, the AO had rightly not made any additions towards deemed dividend in the proceedings completed u/s. 153C. (AY. 2007-08 to 2010-11)
Tanuj Holdings Pvt. Ltd. v. Dy. CIT (2016) 46 ITR 420 (Kol.)(Trib.)

2386 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Inadequate or lack of enquiry – Revision was held to be not justified [S. 54F]**
Where Assessing Officer examined an issue, Commissioner could not assume jurisdiction on same issue by stating that Assessing Officer had conducted inadequate enquiry or there was a lack of enquiry. (AY. 2009-10)
Vegesina Kamala v. ITO (2016) 157 ITD 457 (Visakha)(Trib.)

2387 **S. 263 : Commissioner – Revision of orders prejudicial to revenue – Assessment order passed in pursuance of time barred notice is not amenable to revision [S. 143(2)]**
Held that the notice u/s. 143(2) of the Act, was issued beyond time. The assessment order passed pursuant to the notice which was beyond time was not justified and all proceedings subsequent to the notice were of no consequence. Hence, the revision order passed u/s. 263 was to be quashed. (AY. 2007-08)
Krishan Kumar Saraf v. CIT (2016) 46 ITR 387 (Delhi)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – No power to decide issue adjudicated by appellate authorities – Original seized document relating to agreement for purchase of land already considered by appellate authorities against department – Copy of the same document not admissible in evidence in subsequent revision proceedings 2388

If a matter in issue has been considered in appeal and decided by the appellate authorities, the same issue could not be a subject matter of revision u/s. 263 of the Income-tax Act, 1961. The AO observed that according to the document seized during the search, the agreement was for the purchase of land by the assessee at the rate of ₹ 1,25,000/- per bigha whereas the rate of land under the agreement was ₹ 6,50,000 per bigha. The AO concluded that the assessee paid an amount of ₹ 23,62,500 for the purchase of the land leading to an addition u/s. 69B.

On appeal, the Tribunal held that the AO had examined the seized document at the assessment stage and his order has been set aside by the appellate authorities. Therefore, there was no question of considering his order to be erroneous in so far as prejudicial to the interests of the revenue. When the seized document itself was not relied upon by the appellate authorities, the copy of the same agreement as was received through independent sources would not make any difference in favour of the revenue. Therefore, the proceedings u/s. 263 were clearly beyond the competence of the principal commissioner and the whole proceedings were unjustified and unreasonable and liable to be set aside. (AY. 2007-08)

R. P. Import and Export Pvt. Ltd. v. CIT (2016) 46 ITR 97 (Chd.)(Trib.)

S. 263 : Commissioner – Revision of orders prejudicial to revenue – Failing to record reasons in assessment order for conclusion reached by AO on issues arising for consideration – Revision directing for fresh assessment was proper 2389

The assessee claimed depreciation on goodwill and operational expenses. The Principal Commissioner invoked the provisions of section 263 of the Act on the ground that the AO had not discussed and verified the claim of the assessee. On appeal, the assessee contended that the AO had raised specific enquiries during the course of assessment proceedings and accepted its claim and it was not necessary to discuss about the enquiries made by the AO in the assessment order.

Held that the AO had not discussed the issues that arose for consideration in the assessment order. The proceedings before the AO being judicial proceedings, he was expected to record his own reasons for the conclusion reached. Whether it was an administrative order or judicial order, the reasons for the conclusion or decision taken had to be recorded in the order itself. There was no infirmity in the order of the Principal Commissioner. The AO was directed to conduct an independent enquiry and pass a speaking order recording his own reasons without being influenced by any of the observations made by the Principal Commissioner. (AY. 2010-11)

Medall Health Care P. Ltd. v. CIT (2016) 46 ITR 36 (Chennai)(Trib.)

2390 **S. 263 : Commissioner – Revision of orders prejudicial to revenue Amortization of preliminary expenses – Allowability of claim attaining finality in assessment's own case for same AY by Tribunal – Question not open to further adjudication in revision proceedings [S. 35D]**

The assessee claimed deduction u/s. 35D of the Act, in respect of amortisation of expenditure incurred on the initial public offer of Equity shares. The claim of the assessee was allowed by the AO but the Commissioner u/s. 263 of the Act cancelled the assessment order on the ground that the assessee was not an industrial undertaking entitled to deduction u/s. 35D. The Tribunal confirmed the order of the Commissioner passed u/s. 263. The CIT(A) confirmed the order of AO on the ground that since the Tribunal had held that the assessee was not an industrial undertaking, the assessee was not entitled to deduction u/s. 35D of the Act.

On appeal held that after the order of the Tribunal in the assessee's own case, the issue of allowability of claim u/s. 35D was no more open for consideration. Hence, the High court would be the right forum to hear the legal grievances against the order passed u/s. 263. (AY. 2006-07)

Yes Bank Ltd v. ACIT (2016) 46 ITR 88 (Mum.)(Trib.)

2391 **S. 263 : Commissioner – Revision of order prejudicial to the revenue – Principle of Mutuality – Beneficiaries of assessee trust general public – Principle of mutuality not applicable – Revision was held to be justified [S. 12AA]**

The assessee trust was not registered u/s.12AA of the Act, but was established by three individuals and was administered by three trustees. The object of the assessee was to perform pooj as for the benefit of the mankind. For the relevant previous year, the assessee claimed exemption on the principle of mutuality. The AO allowed the claim of the assessee under the concept of mutuality. The Commissioner (Exemptions) in exercise of powers u/s. 263 of the Act found that the beneficiaries of the assessee were the general public without restriction of case, religion and colour and therefore, the income could not be exempted under the concept of mutuality.

On appeal, the Tribunal held that beneficiaries of the assessee were the entire mankind and individual beneficiaries could not be identified. Since the beneficiaries could not be identified and the assessee was administered only by three trustees, the contributors might not have any role in the administration. Therefore, there was no question of applying the concept of mutuality and the Commissioner (E) was justified in denying the exemption. (AY. 2010-11)

Sri Sai Padhuga Trust v. ITO(E) (2016) 45 ITR 633 (Chennai)(Trib.)

S. 264. Revision of other orders

2392 **S. 264 : Commissioner – Revision of other orders – Mistake in tax assessment, even if due to assessee's mistake, could be corrected in exercise of Commissioner's revisional powers [S. 17(2), 115WA, 143(3)]**

The assessee was employed as a General Manager by ONGC, India. ONGC reimbursed conveyance maintenance and repair expenditure (CMRE) and uniform allowance expenditure to the assessee. The Assessing Officer added on 20 per cent of CMRE and

100 per cent on the uniform reimbursement expenses in the income of the assessee. On revision petition before the Commissioner, the assessee argued that the employer ONGC had treated the benefit as fringe benefit under section 115WA and had paid tax accordingly, which was accepted by the Assessing Officer. Thus, the assessee could not be asked to pay tax again because it would amount to double taxation. The Commissioner rejected the revision petition on the ground that the Commissioner in similar cases had confirmed similar disallowance. On petition before the High Court; allowing the petition the Court held that mistake in tax assessment, even if due to assessee's mistake, could be corrected in exercise of Commissioner's revisional powers. Thus, in the result, impugned order dated 22-9-2011 passed by the Commissioner is set aside. The disallowance of 20 per cent of the CMRE benefit and 100 per cent of the uniform allowance made in case of the petitioner by the Assessing Officer is reversed. (AY. 2007-08)

Kamlesh K. Singhal General Manager (MM) v. CIT (2016) 389 ITR 247 / 243 Taxman 250 (Guj.)(HC)

S. 264 : Commissioner – Revision of other orders – Assessment – Order of Commissioner dismissing the revision petition was held to be valid [Art. 226] 2393

Dismissing the writ petition, the Court held that the assessee had failed to produce sufficient material either before the Assessing Officer or the Commissioner in the revision proceedings on the basis whereof a finding of fact could have been returned in favour of the assessee. The factual matrix was required to be established by producing material evidence in that regard before the assessing authority or the revisional authority. The assessee was unable to give any one good or sufficient reason which prevented him to produce material evidence in support of his version either before the Assessing Officer or the Commissioner. The assessee could not be allowed de novo trial under the garb of this submission. In such a situation, in the absence of any material on record which could substantiate the claim of the assessee, the petition under article 226 could not be entertained. Moreover, it was evident that disputed questions of fact were involved. It would, thus, not be appropriate in writ jurisdiction to adjudicate them. The writ petition was not maintainable.

Charanjit Singh v. CBDT (2016) 388 ITR 469 (P&H)(HC)

S. 264 : Commissioner – Revision of other orders – Charge of income-tax – AOP – Principle of *res judicata* would not apply to income tax matters. However, where there is no change in the factual position or the law, the views expressed in one year are binding for the subsequent years – On facts the order of Commissioner rejecting the revision application was set aside [S. 4, 67A, 86, 143(1), 167B] 2394

Allowing the petition against the order under section 264 dismissing revision application filed in respect of an intimation u/s. 143(1) of the Act. Remanding the matter back to the AO, Hon'ble Judge held that Revision against intimation u/s. 143(1) assessing the AOP u/s. 167B was wrongly rejected by CIT in view of the fact that right from AY. 2005-06, shares of members of the AOP were accepted to be definite and each member was assessed on his share of income and there was no change of facts. Since the Revenue tried to justify impugned order on the basis of the Section 67A & 86 which were not

discussed in the impugned order, matter was remanded to CIT for consideration afresh. The question before the HC was whether an income can be taxed in the hands of AOP as against the past practice of the Revenue in taxing the same in the hands of members of such AOP. The HC, referring to the decision of Apex Court in the case of *Radhasoami Satsang v. CIT [193 ITR 321 (SC)* and *Bharat Sanchar Nigam Ltd. v. UOI [(2006) 282 ITR 273 (SC)]* held that though the principle of res judicata is not applicable to tax matters as cause of action for each assessment year is different/distinct, however, in a case where there is no change in the factual position or the law, the view expressed in one year is binding for the subsequent years based on the principle of consistency. The HC further held that in the present case, the revenue has to prove that the facts of this year are different from earlier years to tax the income in the hands of AOP. Accordingly, the matter was set-aside to the files of Commissioner to examine afresh. (AY. 2011-12)
Madhukar C. Ashar v. UOI (2016) 239 Taxman 367 / 139 DTR 268 (Bom.)(HC)

2395 **S. 264 : Commissioner – Revision of other orders – Rectification of mistake – Capital gains – Intimation u/s. 143(1) is an order for the purposes of section 264 – Non-payment of prescribed fee prior to institution of the revision proceedings, which was paid during the pendency of the proceedings, cannot be a ground for rejection of the application u/s. 264 [S. 143(1), 154]**

Assessee in his return of income, offered to tax gains arising from sale of shares as short term capital gain. Subsequently, the assessee filed an application u/s. 154 before the AO contending that the capital gains on transfer of shares were actually long term capital gains exempt from tax u/s. 10(38). AO rejected the application. Assessee filed an application to the CIT u/s. 264, which was rejected by him on the ground that the assessee had not paid prescribed fee along with application u/s. 264 and secondly, the intimation u/s. 143(1) could not be regarded as an order for purpose of section 264. High Court held that, from reading of the provisions of section 264, it cannot be said that the non-payment of the prescribed fee prior to the institution of the application for revision would be fatal. Since, the assessee had paid the fees during the pendency of the proceedings, therefore, the illegality was held to be cured. High Court also held that section 264 uses the expression 'any order', which would imply that the section does not limit the power to correct errors committed by the subordinate authorities but could even be exercised where errors are committed by assessees. Further, it was also held that intimation u/s. 143(1) can be regarded as an order for the purpose of section 264. It was also held that CIT failed to appreciate that the assessee was not only impugning the intimation u/s. 143(1) but also the rejection of the application u/s. 154. Accordingly, the order of CIT was set aside and the matter was remanded back to him. (AY. 2008-09)
Vijay Gupta v. CIT (2016) 386 ITR 643 / 238 Taxman 505 / 137 DTR 401 (2017) 291 CTR 517 (Delhi)(HC)

S. 268A. Filing of appeal or application for reference by income-tax authority

S. 268A : Appeal – Application – Reference – New monetary threshold limit is also applicable to pending cases 2396
The High Court held that the Circular No. 21/2015, dated 10-12-2015 and instruction no 5 /2014 dated 10-07 2014 would apply retrospectively to all pending appeals.
CIT v. Manbhar Devi Meena (Smt.) (2016) 240 Taxman 235 (Raj.)(HC)

S. 268A : Appeal – High Court – Tax effect – Tax effect has to be determined on basis of aggregate tax effect in appeal and not only on basis of value of tax effect of question on which appeal is admitted [S. 260A] 2397
Court held that filing of appeal or reference by income-tax authority (Circular No. 21/2015 dated 10-02-2015 (2015) 379 ITR 107 (St.) has to be determined on basis of aggregate tax effect in appeal and not only on basis of value of tax effect of question on which appeal is admitted. (AY. 1998-99)
CIT v. Nahar Export Ltd. (2016) 389 ITR 33 / 76 taxmann.com 146 (P&H)(HC)

S. 268A : Appeal – Instructions – No appeals were to be filed to Supreme Court where tax effect was less than ₹ 10 lakhs 2398
As per Instruction No. 2/2005 dated 24.10.2005 of the CBDT, no appeals were to be filed where the tax effect was less than ₹ 10 lakhs. Further, as the Department had not filed appeal even before High Court in a similar case, the matter was dismissed with the question of law left open. (AY. 1991-92)
CIT v. Hemraj Mahabir Prasad Ltd. (2016) 382 ITR 170 / 237 taxman 379 / 286 CTR 112 / 134 DTR 192 (SC)

S. 268A : Appeal – High Court – Monetary limit for filing appeal and reference – Though the low tax effect circular No. 21/2015 dated 10.12.2015 does not refer to references filed u/s. 256(1), it has to be held to apply to references as well in view of the objective of the CBDT to focus only on large tax effect matters [S. 256(1), 260A] 2399
Dismissing the reference of revenue as unanswered, the Court held that the need for the CBDT to issue the 15th December 2015 circular and to clarify that it would apply retrospectively to govern even pending appeals arose on account of the enormous increase in the number of appeals being filed by the revenue over the years. To give figures of this Court in the year 1995, the total number of references filed in this Court were in the aggregate 504 i.e., both at the instance of the revenue and the assessee. In 2001, the total number of appeals filed under section 260A of the Act in this Court in the aggregate were 648 and 546 of these were filed by the revenue. In 2009, the total number of appeals filed under section 260A of the Act in the aggregate was 4,266, out of which, that filed by the revenue were 3,790. However, it may be pointed out that in 2015, the total number of appeals filed under section 260A of the Act in the aggregate was 2,384, out of which, that filed by the revenue were 1,834. Thus, the revenue has now become circumspect in filing appeals as they seem to filter orders of the Tribunal which requires challenge. However, many of the indiscriminate appeals filed by the revenue, are awaiting disposal. It thus appears that appeals are being filed by the

revenue from almost every order of the Tribunal adverse to it, without taking into account the tax effect involved with the fear that in other cases where tax effect is more, the non-filing of an appeal may be used against the department as having accepted the position in law. It is in that view that the circular of 2015 clarifies that non filing of appeal in view of low tax effect will not be used against the revenue in other appeals. Therefore the CBDT to ensure that there is uniformity in respect of filing of appeals has fixed threshold limits which would do away with the discretion of the officer to file and pursue the appeal remedy where the tax effect is less than the minimum amounts specified. It is noteworthy that the circular specifically provides that where the tax effect is higher than that specified in the circular then the filing of appeal in such cases is to be decided on the merits of the case. Therefore, to enable the revenue to focus on matters where the tax implication is above ₹ 20 lakhs only such matters should be agitated in appeal before the High Court according to the circular. This policy of non filing and of not pressing and/or withdrawing admitted appeals having tax effect of less than ₹ 20 lakhs has been specifically declared to be retrospective by the circular dated 10th December, 2015. There is no reason why the circular should not apply to pending References where the tax effect is less than ₹ 20 lakhs as the objective of the circular would stand fulfilled on its application even to pending references more particularly bearing in mind that there are 1,149 number of references still awaiting disposal by this Court and a large number of them would have tax effect of less than ₹ 20 lakhs. In the above view, we hold that as admittedly, the tax effect is less than ₹ 20 lakhs in the present Reference Application at the instance of the revenue, the same is being returned unanswered. However, we make it clear that the question of law as raised for our opinion is left open be considered in an appropriate case.

CIT v. Sunny Sounds P. Ltd. (2016) 381 ITR 443 / 237 Taxman 295 / 283 CTR 158 / 130 DTR 265 (Bom.)(HC)

2400 **S. 268A : Reference – Filing of appeal or application for reference by income tax authority – Determination of monetary limit, instructions were operative retrospectively to pending appeals**

Dismissing the appeals of the revenue, the Tribunal held that monetary limit, instructions were operative retrospectively to pending appeals. (AY. 2002-03)

ACIT v. Pragati Vanijya Ltd. (2016) 48 ITR 77 (Delhi)(Trib.)

2401 **S. 268A : Appeal – Tax effect is less than ₹ 4 lakhs appeal of revenue was not maintainable**

Where tax effect in appeal filed by revenue was less than ₹ 4 lakhs, in view of provisions of section 268A inserted by Finance Act, 2008, read with Instruction No. 5/14, dated 10-7-2014, appeal so filed was not maintainable. (AY. 2008-09)

Dy. CIT v. Amit Paccraft (2015) 68 SOT 213 (URO) (Delhi)(Trib.)

CHAPTER XX-B
REQUIREMENT AS TO MODE OF ACCEPTANCE, PAYMENT OR REPAYMENT IN CERTAIN CASES TO COUNTERACT EVASION OF TAX

S. 269SS. Mode of taking or accepting certain loans, deposits and specified sum

S. 269SS : Acceptance of loans and deposits – Share application money – *Bona fide* belief – Deletion of penalty was held to be justified [S. 271D] 2402

During year, assessee-company had accepted share application money in cash from various persons. Assessing Officer was of view that money received was of nature of deposit in hands of assessee and hence it had violated provisions of section 269SS. He, therefore, levied penalty under section 271D. Both Commissioner (Appeals) and Tribunal deleted penalty holding that assessee had a *bona fide* belief that share application money was neither loans or deposits. High Court held that assessee was under *bona fide* impression that money received was only towards allotment of shares and it was not a loan or deposit; therefore, in view of decision of Madras High Court in case of *CIT v. Rugmini Ram Raghav Spinners (P.) Ltd. (2008) 304 ITR 417*, no substantial question of law arose for consideration. (AY. 2002-03 to 2004-05)

CIT v. Object Frontier Software (P.) Ltd. (2016) 75 taxmann.com 169 (Mad.)(HC)

Editorial : SLP is granted to the revenue, CIT v. Object Frontier Software (P.) Ltd. (2016) 243 Taxman 239 (SC)

S. 269SS : Acceptance of loans and deposits – Otherwise than by account payee cheque or account payee bank draft – Mere fact that said amount was utilised directly towards payment of construction activities would not alter character of deposit, penalty was held leviable [S. 271D] 2403

Allowing the appeal of the revenue, the Court held that there was a direct nexus of the money having flown from 'R' in the books of account of the assessee, may be towards payment of constructional activities of the assessee but it did not alter the character of deposit. Accordingly, it held that the payment was definitely in the nature of loan or deposit. The argument as to ignorance of law was rejected on the ground that company was assisted by Chartered Accountant and Company Secretary from the beginning. The argument of the assessee that the amount in any case had to be paid to petty labourers and contractors in a remote place where the company has been established was rejected being beyond the purview of the question being raised by the revenue. It was held that the same mode could have been adopted by the assessee by taking the amount from 'R' by account payee cheques and withdrawing the same after having received from 'R' by cheques. Accordingly, the Court reversed the order of the ITAT and upheld the penalty. (AY. 1992-93, 1993-94)

CIT v. Chandra Cement Ltd. (2016) 143 DTR 41 / (2017) 291 CTR 581 / (2017) 393 ITR 324 (Raj.)(HC)

2404 **S. 269SS : Acceptance of loans and deposits – Otherwise than by account payee cheque or account payee bank draft – Received cash for more than ₹ 20,000 for investment on behalf of his agriculturalist friend and source of money was explained, penalty was not leviable [S. 68, 271D, 273B]**

Allowing the appeal of the assessee the Tribunal held that the amount in question had not been treated as cash credits u/s. 68. The assessee explained that said amount was received from his friend for making investments on his behalf. Transaction in question was genuine and *bona fide* and, therefore, penalty was not liable. (AY. 2008-09)

Mohanjeet Singh v. JCIT (2016) 159 ITD 582 (Chd.)(Trib.)

2405 **S. 269SS : Acceptance of loans and deposits – Otherwise than by account payee cheque or account payee bank draft – Share application money to meet urgent and immediate requirement of business, hence levy of penalty was held to be not justified [S. 271D, 273B]**

Allowing the appeal of assessee the Tribunal held that the assessee had sufficiently proved that share application money was taken in cash from a director to meet urgent and immediate requirement of business and there was a reasonable cause to take 'loan' or deposit otherwise than by account payee cheque or account payee bank draft, penalty could not have been levied. (AY. 2006-07)

Valley Extraction (P.) Ltd. v. Jt. CIT (2016) 158 ITD 976 (Chd.)(Trib.)

2406 **S. 269SS : Acceptance of loans and deposits – Otherwise than by account payee cheque or account payee bank draft – Audit report highlighting violations – Imposition of penalty justified [S. 271D]**

The assessee was in the business of dealing in shares and securities and also receiving loans and advancing loans. It received cash loans of ₹ 73.8 lakhs from L in contravention of the provisions of section 269SS of the Act. The AO held that the assessee in accepting the cash loans from L to the tune of ₹ 48.6 lakhs exceeding ₹ 20,000 had violated the provisions of section 269SS and, hence, penalty u/s. 271D was leviable, and levied penalty of ₹ 48.6 lakhs u/s. 271D. This was confirmed by the CIT (A).

Held that the cash loans were utilised mainly by the assessee for advancing money to sister concerns for which no reasonable cause was shown. The sister concern of the assessee could have itself borrowed loan from L directly instead of routing the money through the assessee. The assessee had taken the plea that these loans were genuine. The provisions of section 269SS are strict provisions making the taxpayer liable for penalty for taking loan or deposit of ₹ 20,000 or more in cash. Thus, it was not only loan transaction which should be genuine but the taxpayer should come forward with reasonable cause as provided u/s. 273B to get out of clutches of section 269SS r.w.s. 271D. Thus, both the conditions are to be cumulatively satisfied by the taxpayer. (AY. 2005-06)

Pankaj Investments v. ACIT (2016) 46 ITR 345 (Mum.)(Trib.)

CHAPTER XX-C
PURCHASE BY CENTRAL GOVERNMENT OF IMMOVABLE PROPERTIES IN CERTAIN CASES OF TRANSFER

S. 269UA. Definitions

S. 269UA : Purchase of immovable property by Central Government – Understatement of consideration – Land held under lease from Municipality – Comparable instance of sale taken of property in adjustment and commercial property – Order for pre-emptive purchase was vitiated [S. 269UD] 2407

Allowing the appeal the Court held that the Authority had wrongly compared the commercial premises which shows notice was visited by gross violation of mind. Authority also erred in holding that V had transferred property to the extent of 78 per cent to U and the consideration for was ₹ 1,00,40,000 was not in respect of built up area but on the other hand clearly stated to be for transfer of subject land. Thus the order of Appropriate Authority thus suffered from gross perversity. The Court also held that the High Court had failed to render a finding on the relevance of the comparable sale instances, particularly, why a sale instance in an adjusting locality had been considered valid instead of sale instance in the same locality. Accordingly the order of High Court was reversed.

Unitech Ltd. and Another v. UOI (2016) 381 ITR 456 / 133 DTR 2 / 237 Taxman 361 / 285 CTR 162 (SC)

Editorial : Decision in Vidarbha Engineering Industries v. UOI (2004) 271 ITR 229 (Bom.) (HC) is reversed.

S. 269UC. Restrictions on transfer of immoveable property

S. 269UC : Purchase by Central Government of immovable properties – Restrictions on transfer – Declaration filed under Kar Vivad Samadhan Scheme during pendency of appeal from block assessment – Certificate issued in terms of Scheme in favour of vendor granting immunity from prosecution – No legal obligation on part of vendor and purchasers to file Form 37-I – Prosecution for failure to file Form 37-I in respect of sale under section 269UC is not maintainable [S. 276AB, R. 48L, Form No. 37I] 2408

The first respondent, the owner of certain property, sold it in six portions to the other respondents under six separate sale deeds executed in during March, 1995, transferring to each a one-sixth undivided share in the property for a sale price of ₹ 9 lakhs each, the total sale consideration being ₹ 54 lakhs. Thereafter, a search was conducted under section 132 of the in the residence of the vendor and based on documents seized, the Department took the view that the sale value of the property sold by the vendor was nearly ₹ 130 lakhs and had been grossly undervalued at ₹ 54 lakhs to evade payment of tax. The AO made a block assessment for the period 1987-88 to 1996-97 of the total undisclosed income at ₹ 96,38,355 and arrived at the tax due at 60% The vendor appealed against the assessment. During the pendency of the appeal before the Appellate Tribunal, she filed a declaration under the Kar Vivad Samadhan Scheme, 1998 and the designated authority under the Scheme issued a certificate determining the amount payable by her towards full and final settlement of the tax arrears for the

block period April 1, 1986 to October 3, 1996 quantifying the arrears as ₹ 47,83,018 and the vendor also paid the tax due at ₹ 31,88,675. On receipt of such payment, the designated authority under the scheme issued an immunity certificate in favour of the vendor. Eight months later, the Department initiated prosecution against the vendor and the purchasers for the offence punishable under sections 269UC and 276AB, on the ground that they failed to file the statement in form 37-I in respect of the sale transaction effected between them and thereby they had contravened the provisions of section 269UC, which was an offence punishable under section 276AB. The vendor filed a writ petition upon which the court directed the trial court to permit the vendor to file an application to drop the proceedings initiated against her on the ground that she had been granted immunity by the Department under the scheme. Before the Trial Court, the purchasers filed separate petitions. The Trial Court discharged the vendor as well as the purchasers from the purview of prosecution. On a revision petition by the Department: Held, dismissing the petitions, (i) that from the certificate issued under the Scheme, it was clear that the vendor paid the tax for the block period April 1, 1986 to October 3, 1996. The declaration made by the vendor under section 89 of the Finance (No. 2) Act, 1998, included the sale of the property in favour of the purchasers and covered the value of the property assessed by the Department. Only after analysing the declaration made by the vendor, was the dispute settled. When the vendor made such declaration and paid the tax arrears, the prosecution launched against her and the purchasers was unnecessary.

(ii) That the obligation on the part of the vendor and purchasers to file form 37-I would arise only when the consideration for the transfer was above ₹ 10 lakhs as contemplated under section 269UC. Since each of the sale deeds was executed for a value of ₹ 9 lakhs, there was no legal obligation on the part of the vendor and purchasers to file form 37-I. Further, the declaration made by the vendor granted immunity from prosecution, which included immunity from proceedings under section 269UC of the Act for failure to file Form 37-I. (BP. 1987-88 to 1996-97)

Rajagopal (R.) Member-I, Appropriate Authority v. N. Sasikala (Smt.) (2015) 64 taxmann. com 254 / (2016) 381 ITR 79 / 139 DTR 70 (Mad.)(HC)

Rajagopal (R.) Member-I, Appropriate Authority v. S. Ramayama (Smt.) (2015) 64 taxmann.com 254 (2016) 381 ITR 79 (Mad.)(HC)

Rajagopal (R.) Member-I, Appropriate Authority v. V. N. Sudhagaran and Another. (2015) 64 taxmann.com 254 / (2016) 381 ITR 79 (Mad.)(HC)

S. 269UD. Order by appropriate authority for purchase by Central Governrment of immoveable property

2409 **S. 269UD : Purchase by Central Government of immovable properties – Order – Plot held on lease – Development agreement entered into with assessee in respect of said plot – Form 37-I submitted u/s. 269UC – Consideration declared in the form was ₹ 100.40 lakh – Appropriated authority of the view that consideration understated by 15% based on sale instance in an adjoining locality – Assessee pointed out sale instance in the same locality – Appropriate Authority rejected the sale instance – Order passed u/s. 269UD for compulsory pre-emptive purchase – Held, transfer of**

development right of the land by lessee did not amount to sale under Chapter XXC – Further, held order preferring sale instance in adjoining locality over that in same locality invalid [S. 269UA, 269UC]

One 'V' Engineers held 3 plots of land on lease. It entered into a development agreement with the assessee in respect of the said land. The assessee submitted a statement in Form 37-I u/s. 269UC wherein the consideration for the transfer was declared at ₹ 100.40 lakh towards the cost of construction of the share of 'V' Engineers. The Appropriate Authority, relying on the sale instance in the adjoining locality stated that the sale consideration was understated by more than 15%. The assessee, in rebuttal, gave a sale instance in the same locality. However, the Appropriate Authority, rejected the latter sale instance and passed an order u/s. 269UD for compulsory pre-emptive purchase of the land. Supreme Court held that, since 'V' Engineers were not the owners of the land and were mere lessee, therefore there could not have been any valid exchange or transfer of the land. Further, it was held that the transaction was not in the nature of sale, lease or a license. Further, held that acceptance of sale instance in adjoining locality over that in the same locality was not proper.

Unitech Ltd. v. UOI (2016) 381 ITR 456 / 237 Taxman 361 / 285 CTR 162 / 133 DTR 2 (SC)

S. 269UD : Purchase by Central Government of immoveable properties – Bidder cannot insist on confirmation of sale in his favour – Terms and conditions of auction giving right to Commissioner to reject bid and refund earnest money deposited – Direction to return earnest money with interest 2410

Held, that the reasons given by the Department for rejecting the petitioner's bid were (a) that the sale was never confirmed on account of the interim order by the Court, (b) the bidders requested for refund of the earnest money with interest at 12% by their letter dated October 11, 2004, (c) the Court did not confirm the sale although the Department had asked it to confirm the sale but enquired whether the Department was agreeable to re-auction the property, (d) re-auction was required to discover the current market price and (e) under the terms and conditions of auction sale, the earnest money ought to be refunded to the bidders. The reasons were valid. There was no confirmation of sale in favour of the petitioners and the petitioners could not insist on confirmation of the sale in their favour having participated in the auction despite being aware of the interim order. Considering the location of the property, it was only through a re-auction that the correct current market price could be determined. It would not be justified to deprive the Department of realising the best possible price for the property. The only relief that could be granted to the petitioners was to direct the Department to return the earnest money to the petitioners forthwith. [The Department was directed to refund the earnest money deposited by the petitioners with interest at 12% per annum from February 15, 1995 till the date of refund.]

Anand Mehta v. UOI (2016) 385 ITR 379 (Delhi)(HC)

CHAPTER XX1
PENALTIES IMPOSABLE

S. 271. Failure to furnish returns, comply with notices, concealment of income, etc.

2411 **S. 271(1)(c) : Penalty – Concealment – SLP admitted against the decision of the Madras High Court wherein it was held that the levy of penalty was justified as the assessee had made excess claim of depreciation on machinery [S. 271(1)(c), 32]**
The Honourable Apex Court admitted the Special Leave Petition filed against the decision of the Honourable Madras High Court in the case of *CIT v. Sundaram Finance Ltd. (2013) 353 ITR 375 / 216 Taxman 60 (Mag.)(Mad.)*, wherein it was held that the penalty is leviable in respect of the excess of depreciation on machinery made by the assessee and the same was accepted by the assessee only after it was discovered by the Department. (AY. 1999-00)
Sundaram Finance Ltd. v. CIT (2016) 240 Taxman 297 (SC)

2412 **S. 271(1)(c) : Penalty – Concealment – Disallowance of deductions – Penalty cannot be imposed**
The assessee had claimed certain deductions which were disallowed and addition had been made to its income. On the basis of this penalty proceedings under section 271(1)(c) were initiated for the assessment years 1993-94, 1994-95 and 1995-96. Penalty was imposed but it was cancelled by the Tribunal. On appeal: Held, dismissing the appeal, that there was no finding that there were any concealment of any particulars of income or that the assessee had furnished inaccurate particulars of income to attract section 271(1)(c). Secondly the AO had levied penalty ignoring the explanation submitted by the assessee. The cancellation of penalty was therefore justified. (AY. 1993-94, 1994-95, 1995-96)
CIT v. Samurai Techno Trading P. Ltd. (2016) 389 ITR 357 (Ker.)(HC)

2413 **S. 271(1)(c) : Penalty – Concealment – Search and seizure – Voluntary disclosure and surrender of income by assesse – Assessee's statement in course of search, specification of manner in which income derived, payment of tax with interest, if any, on undisclosed income – Facts involved requiring adjudication in light of Supreme Court ruling – Tribunal was directed to decide the matter afresh [S. 132(4)]**
Held, that a perusal of the order showed that the order passed by the Tribunal required the facts to be re-adjudicated by the Tribunal in the light of the interpretation given by the Supreme Court in *Asst. CIT v. Gebilal Kanhaialal, HUF*. As the final fact finding authority, it was required to deal with all aspects of the facts and law before recording its conclusions based therein. The Tribunal had only recorded that the income declared by the assessee would not provide immunity to him from imposition of penalty under section 271(1)(c) unless the conditions mentioned in the statement under section 132(4) and the conditions laid down in clause (2) of Explanation 5 to section 271 were fulfilled and that the authorities were fully justified that the assessee was not entitled to the immunity and imposing penalty. Therefore, the Tribunal was directed to decide the matter afresh setting aside the orders passed. (AY. 1994-95)
Surender Paul v. CIT (2016) 389 ITR 58 (P&H)(HC)

S. 271(1)(c) : Penalty – Concealment – Notice did not specify under which limb of section 271(1)(c) penalty proceedings had been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income hence levy of penalty was held to be bad in law [S. 274] 2414

Tribunal, relying on decision of Division Bench of Karnataka High Court rendered in case of *CIT v. Manjunatha Cotton & Ginning Factory (2013) 359 ITR 565 (Karn.)(HC)* allowed appeal of assessee holding that notice issued by Assessing Officer under section 274 read with section 271(1)(c) was bad in law, as it did not specify under which limb of section 271(1)(c) penalty proceedings had been initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income. High Court dismissed the appeal of the revenue on the ground that there was no substantial question of law arising for determination. (AY. 2009-10)

CIT v. SSA'S Emerald Meadows. (2016) 73 taxmann.com 241 (Karn.)(HC)

Editorial : SLP of revenue was dismissed. CIT v. SSA'S Emerald Meadows (2016) 242 Taxman 180 (SC)

S. 271(1)(c) : Penalty – Concealment – Disallowance of expenses – No concealment of income,penalty cannot be levied [S. 40(a)(ia)] 2415

Held, that an addition to income was made on account of disallowance of expenditure under section 40(a)(ia). The assessee had made a claim to deduction in the return of income. No finding had been recorded by the authorities below that the claim made by the assessee was mala fide. It had been categorically recorded by the Tribunal after examining the entire material on record that the Commissioner (Appeals) had rightly cancelled the penalty against the assessee. It was further recorded that the assessee made a bona fide claim to deduction of the expenditure and even though it was not acceptable to the Department it would not lead to the conclusion that the assessee had concealed the particulars of income or filed inaccurate particulars of income. The Tribunal was justified in cancelling the penalty under section 271(1)(c). *CIT v. Zoom Communication P. Ltd. (2010) 327 ITR 510 (Delhi)* distinguished. (AY. 2006-07)

PCIT v. Torque Pharmaceuticals P. Ltd. (2016) 389 ITR 46 (P&H)(HC)

S. 271(1)(c) : Penalty – Concealment – Penalty cannot be levied in a case where the assessee has relied on legal opinion of a professional and there is no tax impact i.e. the loss disallowed in year one is allowed set-off in a later year 2416

Dismissing the appeal of revenue, the Court held that the decision of the Tribunal that the respondent ought not to be made liable for penalty cannot be said to be perverse or absurd. The Tribunal noted that the respondent had claimed the set off of its business income of ₹ 1.85 crores against the brought forward business losses of the earlier years on the basis of a legal opinion received from a leading firm of Chartered Accountants. The Tribunal found nothing clandestine in the manner in which the opinion was sought. In any event, even our attention was not invited to anything which suggests any *mala fides* either in the obtaining of the opinion or otherwise. Further, the loss was allowed to be carried forward in the assessment year, namely, assessment year 2002-03. *Inter alia,* in these circumstances, the Tribunal found as a matter of fact that the letter dated 13.12.2006 was voluntary and not merely because a notice had been issued under section 143(2) of the Act. This is a perception on the basis of the facts of the case

and warrants no interference. In these circumstances including in view of the fact that there is no financial implication on account of the change in the basis of the claim, no substantial question of law arises in this case. (ITA No. 347-2015, dt. 30.11.2016) (AY. 2004-05)
PCIT v. Atotech India Ltd. (P & H)(HC); www.itatonline.org

2417 **S. 271(1)(c) : Penalty – Concealment – Business connection – *Bona fide* claim that refund of taxes was held to be not taxable – Levy of penalty was held to be not justified [S. 9(1)(i)]**
On revenue's appeal to the High Court the Court held that the two authorities have concurrently came to a finding of fact that the conduct of the respondent assessee was bona fide and its claim that amount received from its affiliated companies on account of C-ICT and Corporate Services is not taxable was based on an interpretation of DTAA. It is a settled position of law that where the issue is debatable then mere making of a claim on the basis of a particular interpretation would not lead to an imposition of penalty. Bearing in mind that for the earlier assessment years the respondent assessee claimed and had been granted refund of taxes deducted at source by the affiliated companies in respect of the payment received by it for Corporate Services and C-ICT Services would also establish that the claim made by the respondent assessee that the income received is not chargeable to tax was a bona fide claim. On facts there is a concurrent finding of there being no concealment of income or furnishing an inaccurate claim of income. In view of the above concurrent finding of fact by the Commissioner (Appeals) and the Tribunal, the proposed question does not give rise to any substantial question of law and, accordingly, appeal was dismissed. (AY. 2006-07)
DIT v. Koninklijke-DSM-NV (2016) 243 Taxman 115 (Bom.)(HC)

2418 **S. 271(1)(c) : Penalty – Concealment – Deletion of penalty on ground of deletion of addition by Tribunal – Additions restored by court – Commissioner (Appeals) to decide on issue of penalty – Matter remanded**
Allowing the appeal Court held that since the Commissioner (Appeals) set aside the penalties imposed by the Assessing Officer only on the ground that the Tribunal had deleted the addition, the issue of penalty was to be remanded to the Commissioner (Appeals) for decision afresh. Matter remanded. (AY. 2006-07)
CIT v. Aman Khera (2016) 387 ITR 33 / 288 CTR 381 / 76 taxmann.com 185 (Delhi)(HC)
CIT v. Jyoti Khera (2016) 387 ITR 33 / 288 CTR 381 / 76 taxmann.com 185 (Delhi)(HC)
CIT v. Raman Khera (2016) 387 ITR 33/ 288 CTR 381 / 76 taxmann.com 185 (Delhi)(HC)

2419 **S. 271(1)(c) : Penalty – Concealment – Survey – Disclosure of income – Revised return – Levy of penalty was held to be justified [S. 133A]**
Dismissing the appeal of the assesse the Court held that taking into consideration the material on record and voluminous documents found during the course of survey, the statements and offering of income during the course of survey, could not be said to be voluntary as it was a clear cut admission. It was only when faced with the statements as also the unrecorded/recorded documents found at the business premises that the assessee came forward with a surrender. In the penalty proceedings the assessee had not even attempted to establish its bona fides nor submitted any explanation worth

considering. This was a proved case of concealment of income and penalty was rightly imposed by the Assessing Officer and had rightly been upheld by both the appellate authorities. *MAK Data P. Ltd. v. CIT (2013) 358 ITR 593 (SC)* applied. (AY. 2006-07)
Grass Field Farms and Resorts P. Ltd. v. DCIT (2016) 388 ITR 395 / 141 DTR 205 / 289 CTR 312 / (2017) 79 taxmann.com 426 (Raj.)(HC)
Editorial : Grass Field Farms & Resorts (P) Ltd v. Dy. CIT (2016) 159 ITD 31 (TM)(Jaipur) (Trib.) is affirmed.

S. 271(1)(c) : Penalty – Concealment – Survey – Surrender of income – Only part of undisclosed income had been surrendered – Levy of penalty was held to be justified [S. 133A, 139] 2420
Dismissing the appeal of assesse the Court held that the Tribunal held that the surrender was not made voluntarily and the documents were found in this assessment year, still the assessee had not bothered to file any return, that even for assessment years 2004-05 and 2005-06, only part of the income was declared and that therefore the assessee had clearly concealed the particulars of his income which would attract penal consequences. Court held that the finding of the Tribunal had not been shown to be illegal or perverse. The imposition of penalty was valid. (AY. 2002-03)
B.K. Jain v. CIT (2016) 388 ITR 300 (P & H)(HC)

S. 271(1)(c) : Penalty – Concealment – Difference between income returned and income assessed – Penalty was quashed [S. 264] 2421
The revision application filed by the assessee under section 264 of the Act against the penalty was rejected. On a writ petition:
Held, allowing the petition, that penalty under section 271(1)(c) could not be imposed when there was no concealment of income or furnishing of inaccurate particulars of income. Merely because there was a difference between the income returned and the income assessed as a result of disallowance made by the Assessing Officer, it could not be said that the assessee had furnished inaccurate particulars of income. The outstanding expenses were not believed by the Assessing Officer but the outstanding debt was believed. The authority ought to have either believed both or disbelieved both outstanding expenses and outstanding debt. There was no finding to the effect that the details furnished by the assessee were incorrect or false. Therefore, the penalty imposed under section 271(1)(c) of the Act was to be quashed. (AY. 1996-97)
Jayeshbhai J. Shah v. CIT (2016) 388 ITR 293 (Guj.)(HC)

S. 271(1)(c) : Penalty – Concealment – Search prior to 1-6-2007 – Money, bullion, jewellery or other valuables not found during search – Addition on basis of materials collected during search – Addition can be made only to disclosed income – Penalty cannot be levied [S. 132, 153A, 271(1)(c), Expln. 5] 2422
Dismissing the appeal of revenue the Court held that there was no error in the order of the Tribunal deleting the penalty. The entire amount of ₹ 2.06 crores pertained to on-money receipts by the assessee. There was no money, bullion, jewellery or other valuable article or thing of such value found during the search and the additional income was based on materials collected during the search. Prior to June 1, 2007, applying Explanation 5 to section 271(1)(c) of the Income-tax Act, 1961, penalty could

not have been levied. Explanation 5 to section 271(1)(c) of the Income-tax Act, 1961, applies to a search carried out before June 1, 2007. In such a case, if the assessee is found to be the owner of any money, bullion, jewellery or other valuable article or thing and the assessee claims that such assets have been acquired by utilising his income for the previous year that ended before the date of the search but the return of income has not been filed before the said date or, if filed, such income has not been disclosed, then, notwithstanding that such income is declared by him in the return of income furnished after the date of the search, the assessee would be liable to levy of penalty, unless upon fulfilment of conditions contained in clauses (1) and (2) of the Explanation, the assessee can claim immunity. This Explanation 5 nowhere refers to any income based on any entry in any books of account or other documents or transactions. The Legislature for the period post June 1, 2007 has enacted Explanation 5A. In terms of Explanation 5A even in a case where during the search, the assessee is found to be the owner of any income based on any entry in the books of account or other documents or transactions, the penalty would attach, provided other requirements are fulfilled. (AY. 2005-06)
PCIT v. Jigesh Venilal Koralwala (2016) 387 ITR 177 / (2017) 147 DTR 172 / 294 CTR 124 (Guj.)(HC)

2423 **S. 271(1)(c) : Penalty – Concealment – Cessation of trading liability – Quantum addition was confirmed by Supreme Court – Creditors have denied that any amount was due to the assesse. On facts levy of penalty was held to be justified [S. 41(1)]**
Dismissing the appeal of the assesse, the Court held that in quantum proceedings which were taken up to the Supreme Court was dismissed. Court also observed that the Tribunal in quantum proceedings had recorded a fact that a creditor had denied that any amount was due to the assessee and one of them was also not found at the address given. On facts the Court held that not offering to tax the ceased liabilities would it self amount to furnishing inaccurate particulars of income leading to escapement of income from tax. Accordingly Tribunal was justified in sustaining penalty. (AY. 2005-06)
Palki Investment & Trading Co. (P) Ltd. v. ITO (2016) 139 DTR 57 / 288 CTR 473 / 71 taxmann.com 322 (Bom.)(HC)

2424 **S. 271(1)(c) : Penalty – Concealment – Survey – Levy of penalty was upheld rejecting assessee's contention that the income was not disclosed as the books of account were impounded and the correct income figure could not be determined [S. 133A]**
In the course of the quantum proceedings, additions were sustained on two counts – unaccounted collection receipts from the hospital and denial of claim of deduction of certain expenditure. Penalty proceedings were initiated thereafter. HC upheld the levy of penalty. HC rejected the assessee's explanation that its books of account for the relevant year were impounded by the revenue and therefore, the correct figures of income could not be furnished as per its return of income and further that the accounts could not be audited because of impounding of books. HC held that this explanation was rightly rejected by the AO as it was the assessee's duty to get its accounts audited and the time for audit had expired long before the survey. Further, the assessee could have applied for copies of extracts of the records impounded which was not done by the assessee. (AY. 2004-05)
Manural Huda Trust v. CIT (2016) 138 DTR 28 (Ker.)(HC)

S. 271(1)(c) : Penalty – Concealment – Cessation of trading liability – Quantum addition was confirmed by Supreme Court – On facts levy of penalty was held to be justified [S. 41(1)] 2425

Dismissing the appeal the Court held that in quantum proceedings which were taken upto the SC, the Tribunal had recorded a fact that a creditor had denied that any amount was due to the assessee and one of them was also not found at the address given, further, an attempt was made to escape offering of ceased liability as income obliged to do u/s. 41(1), Tribunal was justified in sustaining penalty. (AY. 2005-06)

Palki Investment & Trading Co. (P) Ltd. v. ITO (2016) 139 DTR 57 / 288 CTR 473 / 71 taxmann.com 322 (Bom.)(HC)

S. 271(1)(c) : Penalty – Concealment – Business expenditure – Assessee accepting order and revising subsequent returns – Not a case of concealment of income or furnishing inaccurate particulars thereof – Levy of penalty not warranted 2426

The assessee had paid a sum on account of compensation for mining ores for a period of five years which it claimed as revenue expenditure in one year. The AO was of the view that the expenditure was allowable over a period of five years which was the period during which the mining was to be conducted. The assessee accepted that order and accordingly revised the subsequent returns. Held it was not possible to hold that the assessee furnished inadequate particulars or concealed its income and penalty could not be levied. (AY. 2005-06)

CIT v. Thakur Prasad Sao and Sons (P) Ltd. (2016) 386 ITR 448 (Cal.)(HC)

S. 271(1)(c) : Penalty – Concealment – Merely submitting an incorrect claim in law for expenditure would not amount to furnishing inaccurate particulars of income so as to attract penalty [S. 40(a)(ia)] 2427

The assessee was engaged in the business of construction. During assessment proceedings, the AO noticed that in some cases, the tax deducted at source ('TDS') from certain parties to whom labour payments were made, were not deposited into Government account as per the provisions of section 200(1) of the Act. The AO disallowed such payments under section 40(a)(ia) of the Act and also levied penalty under section 271(1)(c) of the Act for furnishing inaccurate particulars of income. In appeal CIT(A) deleted the penalty. On appeal by revenue the Tribunal held that the assessee had suppressed the actual particulars of income by not making disallowance under section 40(a)(ia) of the Act and restored the penalty order passed by the AO. Aggrieved, assessee filed an appeal before the High Court. Allowing the appeal of assesse the Court held that words 'inaccurate particulars' in section 271(1)(c) must mean details supplied in return – which are not accurate, not exact or correct or not according to truth or erroneous – merely submitting an incorrect claim in law for expenditure would not amount to furnishing inaccurate particulars of income so as to attract penalty under section 271(1)(c). (AY. 2006-07)

Nayan C. Shah v. ITO (2016) 386 ITR 304 / 240 Taxman 115 (Guj.)(HC)

2428 **S. 271(1)(c) : Penalty – Concealment – Claim of assessee not found to be *mala fide* – No error in cancelling penalty imposed**

Dismissing the appeal of the revenue, the Court held that there should be concealment of income of the assessee or the assessee must have furnished inaccurate particulars of his income. The claim made by the assessee had not been shown to suffer from these conditions. In the absence of any finding recorded by the Commissioner (Appeals) or the Tribunal with regard to the claim of the assessee that it was *mala fide*, there was no error in cancelling the penalty imposed by the AO. (AY. 2007-08)

CIT v. Rana Sugar Ltd. (2016) 386 ITR 316 (P&H)(HC)

2429 **S. 271(1)(c) : Penalty – Concealment – Received interest with refund amount – Did not include in profit and loss account but disclosed same in notes to accounts – Could not be said that Assessee had furnished inaccurate particulars [S. 4]**

The assessee received interest with the amount of income tax refund arising from orders passed by the CIT(A) for the assessment years 1993-94 to 1996-97. The revenue appealed against the order of the CIT(A) before the Tribunal. Since the matter was subjudice, the assessee did not include the income arising out of the aforesaid amount of interest in his profit and loss account but disclosed the same in the notes to the accounts. The AO rejected the assessee's action and subsequently initiated penalty proceedings both for the concealment of income as well as furnishing of inaccurate particulars of income.

The High Court held that the AO himself admitted that the assessee had disclosed the said interest income. Disclosure and concealment cannot co-exist. When a finding is recorded that disclosure was indeed made then the conclusion as regards concealment is bad. Furthermore it cannot also be said that the assessee had furnished inaccurate particulars of income. This is so because there was no material on record to indicate that the particulars furnished by the assessee were factually incorrect. Hence it was held that penalty under section 271(1)(c) cannot be levied on the assesee. The revenue's appeal was dismissed. (AY. 2004-05)

CIT v. Pilani Investments & Industries Corporation Limited (2016) 383 ITR 635 / 238 Taxman 384 / 284 CTR 272 / 131 DTR 321 (Cal.)(HC)

2430 **S. 271(1)(c) : Penalty – Concealment – Unexplained expenditure – Payment of commission – Held, assessee failed to establish the genuineness of payments – Adverse inference against the assessee for failing to cross-examine would equally apply to the penalty proceedings – Penalty sustained [S. 69C]**

Assessee claimed deduction of payment of certain commission to three companies which was accepted in the original assessment. Thereafter, a search was conducted on the entities to whom commission was paid by the assessee and during the search, 'M', managing director of the said three payee companies admitted in a statement that the transactions with the assessee were hawala entries. In another statement 'M' stated that he was contacted by one 'J' being the agent between them and the assessee. Statement of 'M' was confirmed by 'J'. Thereafter the assessment of the assessee was reopened. During the reassessment proceedings, assessee was offered an opportunity to cross-examine 'M' but assessee expressed its inability to cross-examine 'M' at a short notice

of two working days and assessment was finalised. Tribunal restored the matter back to the AO for cross-examination of 'M' and 'J'. On the day fixed for cross-examination 'J' was present in the office of the AO but despite efforts made by the AO, 'M' could not be traced and produced for cross-examination. Assessee was asked to cross-examine 'J' but refused to cross-examine him on the ground of his being stranger to the transaction. According to the assessee, without first cross-examining 'M', no useful purpose would be served in cross-examining 'J'. AO finalised the assessment after making the addition and also levied penalty u/s. 271(1)(c). Tribunal upheld the quantum addition but deleted the penalty on the ground that since the High Court has admitted the question of law, therefore penalty could not be levied. In quantum appeal, High Court held that, *de hors* the evidence of 'M', the evidence of 'J' was, by itself, sufficient to draw an adverse inference against the assessee that the payments of the commission were fictitious and accordingly High Court upheld the addition. In so far as penalty was concerned High Court held that mere pendency of the quantum appeal could not have led the Tribunal to conclude that the issue was debatable. It was further held that assessee failed to discharge onus of proving the genuineness of the payments. High Court also held that the adverse inference against the assessee for failing to cross-examine 'J' would equally apply to the penalty proceedings and there was no necessity to again offer the assessee a further opportunity of cross-examining 'M' and 'J' in the penalty proceedings. Accordingly, the levy of penalty was upheld. (AY. 1981-82, 1983-84)
Roger Enterprises (P.) Ltd. v. CIT (2016) 382 ITR 639 / 238 Taxman 434 (Delhi)(HC)

S. 271(1)(c) : Penalty – Concealment – Validity of order – Order passed under section 271(1)(c) is invalid when the show-cause notice was issued for levy of penalty under section 271(1)(b) – Merely stating that penalty proceedings have been initiated would not satisfy the requirement of law [S. 271(1B)] 2431

The Assessing Officer levied penalty under section 271(1)(c) after issuing show-cause notice under section 271(1)(b) of the Act. The penalty was levied as a consequence of the disallowance of certain finance expenses claimed as revenue expenditure which was held to be capital in nature. It is held by the High Court that the levy of penalty under section 271(1)(c) is not valid for the reason that the show-cause notice was not issued for levy of penalty under section 271(1)(c) and that in the facts and circumstances of the case, a penalty under section 271(1)(c) is untenable as the disallowance was made based on the return of income filed by the assessee. It is also held that no proper satisfaction as mandated under section 271(1B) of the Act was not recorded by the Assessing Officer and therefore, levy of penalty is unjustified. (AY. 2001-02)
Safina Hotels Pvt. Ltd. v. CIT (2016) 237 Taxman 702 / 137 DTR 89 (Karn.)(HC)

S. 271(1)(c) : Penalty – Concealment – Bogus Liability – On confrontation of facts – Assessee Surrendered the liability subject to non-initiation of penalty – AO could not have given such assurance – Levy of penalty is held to be justified [S. 41(1), 260A] 2432

CIT(A) and Tribunal confirmed the addition. On appeal before High Court it was held that no substantial question of law arose since on inability to provide confirmations, surrender by mentioning to avoid further litigation and to have mental peace does not make out that the assessee had offered the same amount subject to non-initiation of

penalty. Further held that the AO could not have assured the assessee of non-initiation of penalty proceedings as both are independent proceedings. Also held that no perversity is seen as it was finding of fact that liability was bogus as on enquiry AO noticed that liability squared up through self-bearer cheques and in cash. Levy of penalty was held to be justified. (AY. 2007-08)
Girraj Mehta v. CIT (2016) 382 ITR 385 / 133 DTR 182 / 285 CTR 205 (Raj.)(HC)

2433 **S. 271(1)(c) : Penalty – Concealment – Quantum appeal is admitted by High Court on substantial question of law hence addition itself becomes debatable, hence the levy of penalty was held to be not justified [S. 54, 54F, 260A]**
The assessee claimed deduction under section 54 against sale of commercial building which was denied by AO not being residential house. Alternate claim of 54F was also denied as at the time of inspection the residential house acquired was also demolished and site was used for construction of hospital. The disallowance was upheld upto Tribunal and quantum appeal was admitted by High Court on substantial question of law. The AO levied penalty under section 271(1)(c) for concealment which was upheld by CIT(A). On further appeal Tribunal reversed the orders and cancelled the penalty. On revenue appeal, the High Court upheld the decision of Tribunal holding that where penalty is imposed in respect of an addition where High Court has admitted appeal as substantial question of law, then sustainability of the addition itself becomes debatable and therefore penalty cannot be imposed. (AY. 2008-09)
CIT v. Harsha N. Biliangady (Dr.) (2015) 379 ITR 529 / (2016) 133 DTR 223 (Karn.)(HC)

2434 **S. 271(1)(c) : Penalty – Concealment – Disclosing all particulars of income and claiming deduction based on certificate issued by chartered accountant – Deletion of penalty was held to be justified [S. 80IC]**
The assessee-firm engaged in the business of manufacturing of biscuits, cookies and other bakery products filed a nil return for the AY 2009-10 on September 30, 2009, claiming deduction under section 80-IC of the Act. The Assessing Officer disallowed the deduction amount. Penalty proceedings under section 271(1)(c) were also initiated for filing inaccurate particulars of income and an order imposing penalty was passed. The Commissioner (Appeals) upheld the order imposing penalty. The Appellate Tribunal deleted the penalty. On appeal : Held, dismissing the appeal, that the judgment of the Supreme Court in the case of *Liberty India v. CIT (2009) 317 ITR 218 (SC)* (which held against the assessee) was rendered on August 31, 2009 but was published for the first time only on September 17, 2009. It had been categorically recorded by the Tribunal that there was very little gap between the publication of the decision of the Supreme Court in Liberty India's case and the filing of the return by the assessee. At the time of filing the return the issue was debatable and penalty could not have been levied. Further the Tribunal had found that the assessee had disclosed all the particulars of the income and had not concealed anything. Once proper disclosure was made penalty was not attracted. The return was filed on the basis of the certificate issued by the chartered accountant though under mistake, and the assessee could take the benefit on the basis of *bona fide* belief. The view adopted by the Appellate Tribunal was a plausible view based on appreciation of material on record and, therefore the order did not warrant any interference by the Court. The Department was unable to show any perversity or

illegality in the order. No substantial question of law arose for consideration. (AY. 2009-10)
PCIT v. S.S. Food Industries (2016) 382 ITR 388 (P &H)(HC)
Editorial : S. S. Foods Industries v. ACIT (2015) 38 ITR 90 (Chd.)(Trib.) is affirmed.

S. 271(1)(c) : Penalty – Concealment – Bogus Purchases – If the assessment order in the quantum proceedings is altered by an appellate authority in a significant way, the very basis of initiation of the penalty proceedings is rendered non-existent and the AO cannot continue the penalty proceedings on the basis of the same notice 2435

Relying on the decision of the Calcutta High Court in *CIT v. Ananda Bazar Patrika Pvt. Ltd. (1979) 116 ITR 416 (Cal.)*, the ITAT held that "once the basis for initiation of penalty proceedings was altered or modified by the first appellate authority, the Assessing Officer has no jurisdiction thereafter to proceed on the basis of the findings of the first appellate authority". On further appeal by the department HELD by the High Court dismissing the appeal:
Once the assessment order of the AO in the quantum proceedings was altered by the CIT(A) in a significant way, the very basis of initiation of the penalty proceedings was rendered non-existent. The AO could not have thereafter continued the penalty proceedings on the basis of the same notice. Also, the Court concurs with the CIT(A) and the ITAT that once the finding of the AO on bogus purchases was set aside, it could not be said that there was any concealment of facts or furnishing of inaccurate particulars by the assessee that warranted the imposition of penalty under section 271(1)(c) of the Act. (ITA No. 313/2016, dt. 13.05.2016) (AY. 2007-08)
Pr. CIT v. Fortune Technocomps (P) Ltd. (Delhi)(HC); www.itatonline.org

S. 271(1)(c) : Penalty – Concealment – Disallowance of claim, effect of – Business loss was shown in e-return, software automatically reflected loss returned as carry forward loss – The assessee had in subsequent assessment year had not claimed carry forward loss was evidence of fact that there was no intent to furnish inaccurate particulars of income 2436

The assessee filed its return of income claiming deduction of certain expenditure which resulted in business loss. The Assessing Officer disallowed the expenditure as the business had not commenced and added the same to the income of the assessee. The AO disallowed the carry forward loss as claimed in the return of income as it was filed beyond the due date. The AO also passed a penalty order under section 271(1)(c) on ground that assessee had deliberately furnished inaccurate particulars of income relating to carry forward loss.
The CIT(A) as well as the Tribunal set aside the penalty order holding that even when assessee declared net loss in its e-return, it was automatically reflected as carry forward loss. It was also found that return of income filed for the subsequent assessment year prior to the order of the subject assessment year also indicated that the assessee had not claimed any set off or loss carried forward from the earlier assessment years.
The High Court dismissed the Revenue's appeal holding that, the CIT(A) and the Tribunal have concurrently reached a finding of fact that the assessee had not claimed any carry forward loss either in the return which it has filed for the subject assessment

year or in the subsequent assessment years. In the subject assessment year, once a loss was shown in the e-return, the software *suo motu* reflected the loss returned as carry forward loss. The assessee has not fed in the entry of carried forward loss while filing its return of income in the e-return. The fact that assessee had in the subsequent assessment year not claimed carry forward loss was evidence of the fact that there was no intent to furnish inaccurate particulars of income or conceal income. In any case, both the Commissioner (Appeals) as well as the Tribunal had concurrently reached a finding of fact that there was no intent on the part of the assessee to evade tax. This finding is not shown to be arbitrary. Therefore, the Tribunal was justified in setting aside impugned penalty order. (AY. 2008-09)
CIT v. First Data (India) (P.) Ltd. (2016) 384 ITR 260 / 237 Taxman 543 (Bom.)(HC)

2437 **S. 271(1)(c) : Penalty – Concealment – Foreign gifts – Factum of gifts mentioned in note in return – When explanation called for further particulars not furnished on account of sour relationship – Tribunal cancelling penalty**
Held, the concealment, as such, in the facts and circumstances, was missing, as admittedly, it was not that the amount was detected subsequently but the factum of the gifts from the brother and sister had been mentioned in the note in the return. The explanation was later on called for and further particulars could not be furnished on account of sour relationship and the fact that the assessee was not in touch with her brother who had allegedly shifted from Canada, thereafter. In such circumstances, the discretion which had been exercised by the Tribunal, in setting aside the penalty, could not be said to be perverse or suffering from such illegality as would warrant interference. (AY. 2009-10)
CIT v. Sunila Sharma (2016) 380 ITR 462 (P&H)(HC)

2438 **S. 271(1)(c) : Penalty – Concealment – Survey – Capital gains on sale of shares – Penalty is not leviable on income declared during survey and offered in return – A mere change of head of income from capital gains to business income does not attract penalty. [S. 10 (38)]**
Dismissing the appeal of revenue the Court held that we finding that the Commissioner of Income Tax(A) during the penalty proceedings had again examined the issue whether the claim of capital gain made in the regular return of income to the extent of ₹ 1.62 crores with the particulars in support of the same. On examination, the CIT(A) reaches a *prima facie* conclusion that the income could be regarded as long term capital gain. Once the aforesaid conclusion has been reached coupled with two further facts viz. the authorities have rendered a finding of fact that the respondent-assessee had not concealed its income nor filed inaccurate particulars attributable to capital gains in its regular return of income, the view taken to delete the penalty is a possible view. In the present fact, the view taken by the CIT(A) as well as the Tribunal is a reasonable and possible view. Nothing has been shown to us to hold that the findings of the CIT(A) and Tribunal was perverse and/or arbitrary warranting any interference by this Court. It may be pointed out that even in the Memo of Appeal, it is not urged by the Revenue that the finding of the CIT (A) and Tribunal are in any manner perverse. The reliance by the revenue upon the decision of the Apex Court in *Mak Data P. Ltd v. CIT (2013)*

358 ITR 593 (SC) to contend that the justification of having deleted and accepted the amount of ₹ 1.62 crores as business income, to buy peace is not available. (AY. 2006-07)
CIT v. Hiralal Doshi (2016) 383 ITR 19 (Bom.)(HC)

S. 271(1)(c) : Penalty – Concealment – The non-specification in the notice as to whether penalty is proposed for concealment or for furnishing of inaccurate particulars reflects non-application of mind and renders it void. The fact that the assessee participated in the penalty proceedings does not render the penalty as valid [S. 274, 292B, 292BB] 2439

Allowing the appeal the Tribunal held that non-specification in the notice as to whether penalty is proposed for concealment or for furnishing of inaccurate particulars reflects non-application of mind and renders it void. The fact that the assessee participated in the penalty proceedings does not render the penalty as valid. (ITA No. 2187 & 1789/ Mum/2014, dt. 21.12.2016) (AY. 2009-10)
Dr. Sarita Milind Davare v. ACIT (2017) 184 TTJ 184 TTJ 9 (UO)(Mum.)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Addition made by changing assessment year would not result either in concealment of particulars of income or furnishing of inaccurate particulars of income 2440

The addition made by changing the assessment year will not result either in concealment of particulars of income or furnishing of inaccurate particulars of income. Addition made by the Assessing Officer on estimated basis would not give rise to penalty u/s. 271(1)(c) of the Act. (AY. 1999-2000, 2003-04, 2004-05)
Hindustan Organic Chemical Ltd. v. ACIT (2016) 48 ITR 646 646 (Mum.)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Quantum addition was deleted – Penalty would not survive 2441

The Appellate Tribunal held that the disallowances made by AO. were deleted by the Appellate Tribunal. Hence, there was no basis to continue with the penalty proceedings.
ACIT v. Tata Industries Ltd. (2016) 51 ITR 101 (Mum.)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Satisfaction – The exercise of power to record satisfaction that the person has concealed its income or furnished inaccurate particulars of income has to be exercised in assessment proceedings itself, CIT(A) in appellate proceedings has no jurisdiction to record satisfaction and levy penalty [S. 133A, 251] 2442

Assessee's assessment having been completed by the AO, who had not recorded any satisfaction for initiating penalty under section 271(1)(c) with regard to the additional income offered by the assessee pursuant to the survey action under section 133A, CIT(A) had no jurisdiction to initiate the penalty proceedings and thereafter also complete the same in respect of the said additional income while disposing of the appeal against levy of penalty under section 271(1)(c) in respect of other additions. (AY. 2003-04).
Ajit Ramchandra Jadhav v. ACIT (2016) 178 TTJ 204 / 135 DTR 1 (Pune)(Trib.)

2443 **S. 271(1)(c) : Penalty – Concealment – Capital gains – Confirmation in quantum proceedings – Levy of penalty was held to be not justified**

Dismissing the appeal of the revenue the Tribunal held that element of guesswork could not be ruled out and quantum of income determined was certainly not beyond shadow of doubts. Finally, the tribunal concluded stating that as conclusion in respect of any concealment of income or furnishing of inaccurate particulars of income on part of Assessee was uncertain, penalty could not be levied. (AY. 2004-05, 2005-06)

ACIT v. G. M. Finance & Trading Co., (2016) 135 DTR 57 / 176 TTJ 638 (Mum.)(Trib.)

2444 **S. 271(1)(c) : Penalty – Concealment – Search and seizure – Initiation proceedings was held to be bad in law, penalty if any leviable it may be section 271AAA(1) [S. 132, 271AAA(1)]**

Allowing the appeal of the assessee, the Tribunal held that; the assessee during search and seizure proceedings admitted that undisclosed income had been accrued to him along with his three brothers in their individual capacity by way of trading in various commodities and real estates and all such facts got duly corroborated from seized material. Penalty if at all leviable, it should be levied under section 271AAA(1) and not under section 271(1)(c) as had categorically been provided in section 271AAA(3). Intention of legislative in incorporating provisions contained under section 271AA was to provide general amnesty in search and seizure cases. Case of Assessee undisputedly falls under section 271AAA and could not be dealt with u/s. 271(1)(c) by any stretch of imagination even. Very initiation of penalty proceedings against Assessee under section 271(1)(c) were vitiated in view of amended provisions of law as additional income was disclosed by Assessee on basis of search operation conducted. So initiation of penalty proceedings as well as penalty orders and impugned order passed by CIT(A) were not sustainable in eyes of law, penalty imposed was deleted. (AY. 2008-09)

Ashwani Kumar Arora v. ACIT (2016) 50 ITR 37 (Delhi)(Trib.)

2445 **S. 271(1)(c) : Penalty – Concealment – Legal representatives – Liability to pay "any sum" that deceased would be liable to pay – "any sum" does not include penalty levied on deceased assessee [S. 159]**

The assessee expired in 2010, in the period between completion of assessment in 2008 and passing of penalty order in 2011. The Tribunal held that "any sum" referred in section 159(1) does not include penalty proceedings on the legal representatives u/s. 159(2). Penalty proceedings are different and distinct in nature than tax, as the former are levied for contumacious conduct of the wrong-doer. Penalty imposed on legal heir not justified. (AY. 2006-07)

Srikrishan Agarwal v. Dy. CIT (2016) 48 ITR 548 (Jaipur)(Trib.)

2446 **S. 271(1)(c) : Penalty – Concealment – Share application money claimed as bad debt – Levy of penalty was deleted [S. 36(1)(iii), 37(1)]**

Allowing the appeal the Tribunal held that; The genuineness of payment of share application money had not been disputed at any stage, thus, the automatic levy of penalty cannot be sustained only due to disallowance of expenditure in corresponding assessment proceedings. The determination of tax liability and levy of penalty are two different events under the Act and the AO is duty bound under it to make out a case

for levy of penalty independent of assessment proceedings. Making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. (AY. 2008-09)
Qpro Infotech Ltd. v. DCIT (2016) 49 ITR 41 (Mum.)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars, no penalty can be imposed [S. 80-IB(10)] 2447
Dismissing the appeal of the revenue, the Tribunal held that there was no denial of the fact that the project was completed on the basis of plans approved by the competent authority. So far as the issue of area exceeding 1,000 square feet was concerned, the assessee explained that the flats were bought independent of each other and at the later stage the buyers or occupants got them combined. While adjudicating the quantum addition the explanation of the assessee was accepted by the Commissioner (Appeals). Making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. In order to attract the penalty provision under section 271(1)(c) either there should be concealment of income or furnishing of inaccurate particulars. (AY. 2016-17)
ITO v. Kapil Ashok Bajaj (2016) 49 ITR 44 (Mum.)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Omission to add back provision of bad debts and loss on account of sale of fixed assets in income return, levy of penalty was held to be not justified 2448
Allowing the appeal of the assessee the Tribunal held that omission to add back provision of bad debts and loss on account of sale of fixed assets in income return, levy of penalty was held to be not justified. (AY. 2003-04)
Hewitt Associates (India) P. Ltd. v. Dy. CIT (2016) 49 ITR 53 (Delhi)(Trib.)

S. 271(1)(c) : Penalty – Concealment – capital or revenue – Payment to tenants – Levy of penalty was held to be justified [S. 37(1)] 2449
The assessee company had paid sum of money to the tenants to vacate occupied premises of hotel building. The assessee claimed deduction as revenue expenditure. AO disallowed the said expenditure as capital in nature, which was confirmed by Tribunal. The AO imposed penalty for claiming the same as business expenditure. CIT(A) and ITAT confirmed the penalty. (AY. 2003-04)
Hotel Steelwell (P.) Ltd. v. DCIT (2016) 161 ITD 767 (Delhi)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Search and seizure – On facts penalty was held to be justified [S. 153A] 2450
The assessee at the time of filing of return of income in terms of section 153A of the Act, admitted some unexplained receipts for the assessment years. The AO levied penalty which was up held by the CIT(A).
On appeal it was held that merely because the assessees have not challenged the additions does not mean that it is a benevolent act of buying peace. The facts clearly spell out that the assessees were left with no alternative but to accept the undisclosed transactions and income. In these peculiar facts, the levy of penalty was held to be justified. (AY. 2007-08, 2009-10)
Chandubhai Ambalal Prajapati v. ACIT (2016) 50 ITR 74 (Ahd.)(Trib.)

2451 **S. 271(1)(c) : Penalty – Concealment – Penalty cannot be imposed if the AO does not specify whether the penalty is for "concealment of income" or for "furnishing inaccurate particulars"**

Allowing the appeal of assessee the Tribunal held that penalty cannot be imposed if the AO does not specify whether the penalty is for "concealment of income" or for "furnishing inaccurate particulars". Penalty cannot be imposed in respect of income surrendered by the assessee if the AO does not link the income to incriminating documents. (ITA No. 7034 to 7038/Del/2014, dt. 19.09.2016) (AY. 2006-07 to 2010-11)

M. G. Contractors Pvt. Ltd. v. DCIT (Delhi)(Trib); www.itatonline.org

2452 **S. 271(1)(c) : Penalty – Concealment – Mere omission to compute capital gains – Levy of penalty was held to be not justified [S. 45]**

Dismissing the appeal of the revenue the Tribunal held that mere omission to compute capital gains. Levy of penalty was held to be not justified. (AY. 2008-09)

ITO v. Market committee Sirsa (2016) 179 TTJ 29 (UO)(Chd.)(Trib.)

2453 **S. 271(1)(c) : Penalty – Concealment – Difference in pricing methodology adopted by assessee and AO, levy of penalty was held to be not justified**

Allowing the appeal the Tribunal held that addition having been made due to difference in the pricing methodology adopted by AO for determining the expected profits from international transaction and not on account of inaccuracy, discrepancy or concealment found in information furnished by the assessee for determining ALP of the international transaction, it cannot be held that the computation of the price charged in the international transaction made as per section 92C lacked in good faith or due diligence and, therefore, assessee is not liable for penalty under section 271(1)(c) r/w Expl. 7 thereto. The Tribunal noted that it is not open to for the AO to hold assessee guilty under section 271(1)(c) in one year and not in preceding two years under identical circumstances. (AY. 2008-09)

Cherokee India (P) Ltd. v. Dy. CIT (2016) 179 TTJ 9 2/ 136 DTR 353 (Mum.)(Trib.)

2454 **S. 271(1)(c) : Penalty – Concealment – Additional income declared in statement not disclosed in return – Levy of penalty was held to be not justified**

The Tribunal held that no money, bullion jewelery or any other valuable article was found during the course of search. Therefore, Expl. to section 271(1)(c) cannot be involved in this case. Merely because addition has been sustained in quantum proceedings, the same cannot be a ground for levy of penalty under section 271(1)(c). This is not a fit case for levy of penalty under section 271(1)(c). (AY. 1990-91)

ITO v. Talwalkar Bhalerao & Mate (2016) 178 TTJ 1 (UO)(Pune)(Trib.)

2455 **S. 271(1)(c) : Penalty – Concealment – Addition as deemed dividend – Levy of penalty was held to be not justified**

The Tribunal held that the assessee at the time of quantum addition as well as the time of penalty proceedings has reiterated that the advances are in the course of regular business. It is a running account, said advances later on repaid. This issue is debatable as various courts have held that business transaction is not covered under section 2(22)(e) of the Act. The transactions were made for the purpose of business and

commercial expediency is *bona fide*. Penalty imposed by AO & confirmed by CIT(A) are not justified, accordingly penalty is deleted in all the cases.
Trimurty Buildcon (P) Ltd. v. Dy. CIT (2016) 178 TTJ 373 / 135 DTR 161 / 47 DTR 50 (Jaipur.)(Trib.)
Trimurty Famrs & Retreats v. Dy. CIT (2016) 178 TTJ 373 / 135 DTR 161 (Jaipur)(Trib.)
Geeta Mishra (Smt.) v. Dy. CIT (2016) 178 TTJ 373 / 135 DTR 161 (Jaipur)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Computation of ALP – Levy of penalty was held to be not justified [S. 92C] 2456
The Tribunal held that the assessee has satisfied all the requisite conditions as stipulated in the exception crafted in Expln. 7. Therefore, mere fact that the TPO has determined nil ALP of the international transactions cannot be a reason to impose penalty under section 271(1)(c). (AY. 2010-11)
Mitsui Prime Advanced Composites India (P) Ltd. v. Dy. CIT (2016) 178 TTJ 490 / 136 DTR 282 (Delhi)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Pre-amended Explanation 5A to Section 271(1)(c) applies to non-filer assessees where a ROI is not filed before search and undisclosed income is not offered in the ROI. The amended provision of Explanation 5A, which is applicable to both filers and non-filers of returns, does not apply to searches conducted pre 13.08.2009. Penalty levied u/s. 271(1)(c) to cases which are covered by section 271AAA is void [S. 132(4), 153A, 271AAA] 2457
Allowing the appeal of the assessee the Tribunal held that pre-amended Explanation 5A to section 271(1)(c) applies to non-filer assessees where a ROI is not filed before search and undisclosed income is not offered in the ROI. The amended provision of Explanation 5A, which is applicable to both filers and non-filers of returns, does not apply to searches conducted pre 13.08.2009. Penalty levied u/s. 271(1)(c) to cases which are covered by s. 271AAA is void. (ITA Nos. 189 to 192/Vizag/2014, dt. 16.09.2016)(AY. 2005-06 to 2008-09)
Nukala Ramakrishna Eluru v. DCIT (Vizag)(Trib.); www.itatonline.org

S. 271(1)(c) : Penalty – Concealment – Income-tax provisions are highly complicated – Difficult for a layman to understand the same – Even seasoned tax professionals have difficulty in comprehending these provisions – Making a claim for deduction u/s. 80-IA which had numerous conditions is a complicated affair – Cannot attract penalty [S. 80-IA] 2458
The assessee had made a claim u/s. 80-IA of the Act. Along with the return of income the assessee had filed report from a Chartered Accountant in Form No. 10CCB as required u/s. 80-IA(7) of the Act. The claim was made on the advice of the auditors. A perusal of the audit report demonstrates that the auditors of the assessee also believed that the assessee was eligible for deduction u/s. 80-IA of the Act. It was a conscious claim made by the assessee supported by an audit report. The assessee had also made an application to STPI for setting up the infrastructure facilities under the STPI Scheme. The AO disallowed the claim u/s. 80-IA for various reasons such as assessee was not engaged in the business of developing, operating and maintaining the infrastructure facilities as specified in Section 80-IA as it was merely providing certain

interiors, furniture, fixtures and generator back-up power services etc. for BPO/software companies. Further it held that the guarantee card issued to the assessee company for approval of 100% software export unit status had no connection with claim of deduction u/s. 80-IA and accordingly levied penalty u/s. 271(1)(c). On appeal to Tribunal, it held that the assessee acted under the guidance and advice of a chartered accountant. It was under a bona fide belief that it is entitled to the claim for deduction under the provisions of Section 80-IA of the Act. It further held that provisions of Act were highly complicated and difficult for layman to understand the same. Even seasoned tax professionals have difficulty in comprehending these provisions. Further making a clam for deduction under the provision of section 80-IA which had numerous conditions attached was a complicated affair. It could not be said that it was a case of furnishing of inaccurate particulars of income. (AY. 2004-05)
Oxford Softech P Ltd v. ITO (2016) 47 ITR 794 (Delhi)(Trib.)

2459 **S. 271(1)(c) : Penalty – Concealment – Department appeal – Tax effect less that limits prescribed**
All the appeals filed by the Department against deletion of penalty and pending before Tribunal, where the tax effect involved was not more than ₹ 10,00,000/- and hence not maintainable in view of Circular No.21 of 2015 dt. 10-12-2015. (AY. 1994-95)
DCIT v. Soma Textiles and Industries Ltd. (2016) 45 ITR 147 / 175 TTJ 1 / 129 DTR 12 (Ahd.)(Trib.)

2460 **S. 271(1)(c) : Penalty – Concealment – Unexplained investments – Failure by assessee to explain source of investment – Penalty justified**
The assessee failed to explain the source of investments for ₹ 200 crores in spite of several opportunities were provided during assessment and penalty proceedings. The AO added the said amount as unexplained investments under section 69 of the Act and initiated penalty proceedings. On appeal to Tribunal, it was held that there was no material to explain the source of investments of the assessee and therefore the authorities were justified in making addition and levying penalty. (AY 2005-06)
Sai Televisions Limited v. ITO (2016) 47 ITR 651 (Chennai)(Trib.)

2461 **S. 271(1)(c) : Penalty – Concealment – No penalty in case of debatable issue**
The AO made addition on account of excess claim of depreciation under technical upgradation fund scheme and disallowed capital subsidy. Penalty proceedings was initiated on the same. The ITAT deleted the penalty since the issue was debatable and all details were submitted by the assessee and there was neither any concealment nor was there any filing of inaccurate particulars of income. (AY. 2006-07)
ACIT v. SPL Industries Ltd. (2016) 47 ITR 204 (Delhi)(Trib.)

2462 **S. 271(1)(c) : Penalty – Concealment – Advances taken from sister – Concerns in course of regular business – Not deemed dividend – Penalty could not be imposed on debatable issue [S. 2(22)(e)]**
The assessee received loans from its sister concern. The assessee stated that the advances were taken in course of regular business. The AO added the amount as

deemed dividend under section 2(22)(e) of the Income tax Act, 1961 and initiated penalty proceedings under section 271(1)(c) for the assessee's failure to disclose income in its return. On appeal to Tribunal, it was held that the assessee had filed its return for all the years and disclosed the particulars of the shareholding pattern, advances taken and given by it in the return. The accumulated profit also had been disclosed. Further it observed that the assessee had filed its return under section 153A wherein also all the detailed facts and figures were disclosed. The business transactions was not covered by section 2(22)(e) and since the issue was debatable, penalty could not be imposed. (AY. 2002-03 to 2004-05, 2006-07 to 2008-09)

Trimurty Buildcon P. Ltd. v. DCIT (2016) 47 ITR 50 / 135 DTR 161 / 178 TTJ 373 (Jaipur) (Trib.)

Geeta Mishra (Smt.) v. DCIT (2016) 47 ITR 50 (Jaipur)(Trib.)

Abhishek Estate P. Ltd. v. DCIT (2016) 47 ITR 50 (Jaipur)(Trib.)

Trimurty Farms and Retreats v. DCIT (2016) 47 ITR 50 (Jaipur)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Mistake of online portal – *Bona fide* mistake – Levy of penalty was not justified 2463

Assessee offered a *bona fide* explanation stating that her salary was understated in her return due to mistake of online tax return filing portal and there was no deliberate attempt on part of assessee to conceal income, concealment penalty was not justified. (AY. 2011-12)

Richa Dubey (Mrs.) v. ITO (2016) 158 ITD 541 / 48 ITR 195 / 179 TTJ 78 / 137 DTR 65 (Mum)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Income deemed to accrue or arise in India – Salaries – Salary earned in USA exempted from tax as employee was held as resident of USA under tie-breaker Rule of DTAA – DTAA-India-USA [S. 9(1)(ii), Art. 4(2), 16(1)] 2464

Assessee an individual derived income from salary and other sources. Assessee was working in USA during period from 1-4-2010 to 1-7-2010 and assessee claimed exemption as per Article 16(1) of DTAA based on split residency position. Assessing Officer observed that since period of assessee's stay in India was more than 183 days, assessee being resident of India, his entire global income was to be subjected to tax in India and as such, assessee's claim for exemption under Article 16(1) was disallowed and added back to total income of Assesse. Consequently, penalty u/s. 271(1)(c) was levied. Based on determination of residential status as per tie-breaker analysis contained in Article 4(2), assessee was tie-breaking to USA from 1-4-2010 to 30-6-2010 and, thus, would be considered as resident of USA for said period. Since assessee had exercised his employment in USA during above period, he was entitled to claim exemption of salary in India as per Article 16(1). Assessee's conduct could not be said to be contumacious so as to warrant levy of concealment penalty. (AY. 2011-12)

Raman Chopra. v. Dy. CIT (2016) 158 ITD 904 / 48 ITR 164 (Delhi)(Trib.)

2465 **S. 271(1)(c) : Penalty – Concealment – Accrual of (Banks/NBFC, in case of) – Assessee – NBFC provided security in form of cash collateral for loans purchased by purchaser – Bank but did not book said amount as its income, levy of concealment penalty was justified [S. 5]**

Assessee, a Non-Banking Financial Company, was engaged in business of providing loans. It sold a portion of loans to purchaser-bank on Bilateral Buy Out Basis. As per agreement, assessee provided cash collateral for 2 per cent of loans by way of fixed deposits of which lien was made in favour of purchaser-bank. Such cash collateral had to be utilized by purchaser-bank to cover any shortfall in repayment of loans. Assessee did not treat such cash collateral as its income on ground that its case fell in capacity of contractor and money was retained for a certain period which should not be taxable until retention period was over. The AO. levied penalty for furnishing inaccurate particulars. Treatment given by assessee was incorrect and had no sanction of law and also not supported by any accounting standard and therefore claim of assessee was false and was of furnishing inaccurate particulars of income; therefore levy of penalty was justified. (AY. 2007-08)

Dy. CIT v. Madura Micro Finance Ltd. (2016) 157 ITD 918 (Chennai)(Trib.)

2466 **S. 271(1)(c) : Penalty – Concealment – Set-off of business loss – Change of share holdings- Levy of penalty was not justified [S. 79]**

Allowing the appeal of the assessee the Tribunal held that the provisions of section 79 are complex and highly technical. Though technically speaking there was violation of section 79 but it is not a case of concealment of income or filing inaccurate particulars on the part of assessee. The benefit of set off of losses was claimed by the assessee in the return as per the understanding of section 79. The appellate authorities upheld the stand of the AO. But that itself would not attract levy of penalty. The Tribunal also held that making disallowance and levy of penalty are two different events under the Income-tax law, and happening of an event does not automatically lead to another. (AY. 2008-09) (ITA No. 3871/Mum/2014 dt. 16-03-2016)

Just Lifestyle P. Ltd-. v. DCIT (Chamber's Journal 2016-April – P. 86 (Mum.)(Trib.)

2467 **S. 271(1)(c) : Penalty – Concealment – Set-off of speculation loss against salary income – *Bona fide* mistake – Levy of penalty was not justified**

Allowing the appeal of assessee the Tribunal held that the assessee had disclosed entire income from salary, income from other sources and income from business. However the AO has treated the share business as speculation loss on the basis of material furnished by the assessee himself. The AO has not gathered any material from outside sources. Hence the assessee cannot be held to have concealed particulars of income or furnished inaccurate particulars. (AY. 2004-05) (ITA No. 8814/Mum/2011 dt. 4-03-2016)

Ravi M. Arabatti v. ITO (2016) Chamber's Journal-April, P. 87

2468 **S. 271(1)(c) : Penalty – Concealment – Computation of ALP in good faith and with due diligence – Levy of penalty was held to be not justified**

The Tribunal held that the only conclusion that could be drawn in the peculiar facts and circumstances of the case is that the use of multiple year data was done with due

diligence and in good faith as till 2007. The issue was debatable and wherever there is debate on the issue and two views are possible the *bona fide* of an explanation in having followed one of the views cannot be a ground for penalty. Thus penalty cannot be imposed. (AY. 2006-07, 2007-08)
ACIT v. Boston Scientific India P. Ltd. (2016) 177 TTJ 729 / 137 DTR 153 / 49 ITR 435 (Delhi)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Surrender of income without any incriminating materials no penalty can be levied [S. 132(4), 153A] 2469
It is undisputed fact that during the course of search, no incriminating documents were found and seized. The assessee surrendered the additional income under section 132(4) at ₹ 15 lakhs and requested not to impose penalty u/s. 271(1)(c) of the IT Act. The AO imposed the penalty by invoking the Explanation 5A to section 271(1)(c) of the Act, which has been confirmed by ld. CIT (A) by considering the judgment of Hon'ble Supreme Court in the case of *MAK Data Pvt. Ltd. v. CIT (2013) 358 ITR 593 (SC).* But for imposing the penalty under Explanation 5A on the basis of statement recorded during the course of search, it is necessary to be found incriminating documents and is to be considered at the time of assessment framed under section 153A of the Act. The issue has been considered by various High Courts as well as by ITAT as relied upon by the assessee, which are squarely applicable to the case of the assessee. As no incriminating documents were found during the course of search, therefore, Explanation 5A to section 271(1)(c) is not applicable. Accordingly, we delete the penalty confirmed by ld. CIT(A). (ITA No. 296/JP/2014, dt. 06.05.2016) (AY. 2007-08)
Ajay trader v. DCIT (Jaipur)(Trib.); www.itatonline.org

S. 271(1)(c) : Penalty – Concealment – Levy of penalty u/s. 271(1)(c) on income disclosed in a search instead of u/s. 271AAA is not sustainable [S. 153A, 271AAA] 2470
(i) It is not in dispute that the assessee during the search and seizure proceedings categorically admitted that the undisclosed income of ₹ 36,02,828/- has been accrued to him along with his three brothers in their individual capacity by way of trading in various commodities and real estates and all these facts got duly corroborated from the seized material.
(ii) When aforesaid undisputed facts are examined in the light of the amended provisions contained under sub-section (2) and (3) of section 271AAA, the penalty in this case, if at all leviable, it should have been levied under section 271AAA(1) and not u/s. 271(1)(c) as has categorically been provided in sub-section (3) of section 271AAA. Intention of the legislative in incorporating the provisions contained u/s. 271AA Affective during the period 1st June, 2007 to 1st July, 2012 is to provide general amnesty in search and seizure cases, and the case of the assessee undisputedly falls u/s. 271AAA and cannot be dealt with u/s. 271(1)(c) by any stretch of imagination even.
(iii) So, we are of the considered view that the very initiation of the penalty proceedings against the assessee u/s. 271(1)(c) are vitiated in view of the amended provisions of law applicable effective from 1.6.2007 till 1.7.2012, as the additional income to the tune of ₹ 36,80,520/- was disclosed by the assessee on the basis of

search operation conducted on 10.02.2009. So, without going into the merits of the case, we are of the considered view that initiation of penalty proceedings as well as penalty orders and impugned order passed by the ld. CIT(A) are not sustainable in the eyes of law. (ITA No. 844/Del/2014, dt. 19.05.2016) (AY. 2008-09)

Ashwani Kumar Arora v. ACIT (Delhi)(Trib.); www.itatonline.org

2471 **S. 271(1)(c) : Penalty – Concealment – Rejection of books of account and estimate of income – Levy of penalty was held to be not justified [S. 144]**

Allowing the appeal of assessee Tribunal held that; where Assessing Officer framed assessment of assessee under section 144 and after rejecting account books adopted net profit rate of 8 per cent, which was reduced by Tribunal to 7 per cent, and in mean time Assessing Officer also levied penalty under section 271(1)(c), since assessee was an existing assessee and it did not file return for above assessment year and Assessing Officer and Tribunal adopted different estimates, no penalty under section 271(1)(c) was leviable upon assessee. (AY. 2007-08)

California Design & Construction INC India, Chandigarh v. ITO (2016) 156 ITD 919 (Chd.) (Trib.)

2472 **S. 271(1)(c) : Penalty – Concealment – Disallowance of claim of loss from share transaction – Levy of penalty was held to be not valid as despite the request broker was not summoned [S. 131]**

Authorities below having failed to consider the explanation and evidence adduced by the assessee in support of his claim of loss from share transactions and not summoned the broker by serving summons under section 131 despite such request by the assessee, penalty under section 271(1)(c) imposed by the AO simply by relying on the findings in the assessment order and the contents of the letter of the stock exchange intimating that the said broker was not registered without verifying the same is untenable. (AY. 2005-06)

Gordhan Das Gilara v. ACIT (2016) 130 DTR 67 / 175 TTJ 627 (Jaipur)(Trib.)

2473 **S. 271(1)(c) : Penalty – Concealment – Non-disclosure of receipts from sale of paintings by professional painter on *bona fide* belief – Levy of penalty was held to be not justified**

AO having not disputed the position that the paintings sold by the assessee a professional painter, were personal effects of the assessee and consequently the income from the sale of paintings were capital receipts not chargeable to tax, the plea of the assessee that the receipts from the sale of paintings were not offered to tax on the basis of bona fide belief is acceptable. Further, satisfaction for initiation of penalty proceedings is not discernible from the order of assessment penalty u/s. 271(1)(c) was not therefore sustainable. (AY. 2006-07)

Suvaprasanna Bhatacharya v. ACIT (2016) 130 DTR 49 / 175 TTJ 238 (Kol.)(Trib.)

2474 **S. 271(1)(c) : Penalty – Concealment – If show cause notice does not specify the concealment particulars – Levy of penalty was held to be bad in law**

Allowing the appeal of assesse the Tribunal held that for valid initiation of penalty proceedings it is essential that *prima facie,* the case may deserve the imposition of penalty should be discernible from the order passed and notice must specify as to

whether the assessee was quality of having 'furnished in accurate particulars of income' or having 'concealed particulars of such income. (AY. 2006-07)
Suvaprasanna Bhatacharya v. ACIT (2016) 130 DTR 49 / 175 TTJ 238 (Kol.)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Quantum appeal admitted – Capital gains on sale of land based on registered valuer's report – Subsequently modified in reassessment proceedings by AO and then by CIT(A) – There could be no concealment of income or furnishing of inaccurate particulars on part of assessee – No penalty when quantum appeal is admitted by High Court 2475

The assessee declared capital gain on sale of land in its return of income. The capital gain to the tune of ₹ 46,48,295 was determined based on registered valuer's report. The said return of income was accepted under section 143(3) of the Act. The assessment was subsequently reopened under section 148 and capital gain was recomputed to ₹ 3,36,63,125. The CIT(A) reduced the capital gains determined by AO to ₹ 2,23,95,570 which was confirmed by Tribunal. Penalty proceedings were initiated against the assessee. On appeal to Tribunal, it was held that there were 3 different opinions with respect to rates of land i.e., one adopted by AO in original assessment, two as formed by the AO in reassessment proceedings and three as adopted by CIT(A). The Tribunal approved the view of CIT(A) which was again subject to review before the High Court. Therefore it could not be said with certainty that there was concealment of income or furnishing of inaccurate particulars of income on the part of the assessee. Further the quantum appeal being admitted by High Court, it was apparent that the issue was debatable. Penalty under section 271(1)(c) could not be sustained. (AY. 2004-05, 2005-06)
ACIT v. G. M. Finance & Trading Co. (2016) 176 TTJ 638 / 135 DTR 57 (Mum.)(Trib.)

S. 271(1)(c) : Penalty – Concealment – No penalty in case addition does not have any effect of taxes to be paid and tax continues to be paid as per section 115JB [S. 94 (7), 115JB] 2476

The assessee had failed to give effect to section 94(7) and penalty was levied by the AO for filing inaccurate particulars of income. However, since the Assessee was paying tax as per the provisions of section 115JB, this did not have any effect on the tax liability as per normal provisions of the Act. The ITAT held that since the addition did not have any bearing on the tax to be paid, no penalty should be levied. (AY. 2005-06)
Compucom Software Ltd. v. DCIT (2016) 45 ITR 619 (Jaipur)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Furnishing of inaccurate particulars – Claim made by assessee held to be not sustainable in law – Penalty cannot be levied 2477

AO levied penalty on 5 additions namely 1) claim of depreciation under the block 'Buildings' 2) Loss on sale of current assets 3) Claim of bad debts 4) Investments written off and 5) Irrecoverable project expenses written off on the ground that assessee has furnished inaccurate particulars of income. The CIT(A) deleted the penalty. On appeal to Tribunal, it held that other than the claim made by the assessee with regard to 5 items, no fault has been found by the AO in the particulars of income submitted by the assessee in its return. Merely because the claim of the assessee was not sustainable in law, assessee cannot be construed to have furnished inaccurate particulars of income. (AY. 2007-08)
ACIT v. Best & Crompton Engg. Ltd. (2015) 43 ITR 600 / (2016) 176 TTJ 224 (Chennai) (Trib.)

2478 **S. 271(1)(c) : Penalty – Concealment – Surrender of income – Loss shown in return was assessed as Nil income – AO accepted the surrender without raising any objection – Reason given by assessee for making the surrender appears to be reasonable – Not case of revenue that assessee has not actually incurred loss – Levy of penalty was held to be not justified**

Held that AO has recorded that during assessment assessee was under the burden of heavy debt and was not involved in any business activities. Such finding of a fact was based on report of the inspector deputed to make enquires regarding the assessee. Due to difficult circumstances, assessee has expressed its inability to furnish details or information and as a consequence surrendered the loss. Assessee surrendered his loses to buy peace in view of the impossibility faced by him in furnishing adequate details to substantiate claim of loss. Reason given by assessee for making the alleged surrender appears to be plausible and reasonable from a common man's point of view. AO accepted the surrender without any objection or reservation and no infirmity has been pointed out by AO or CIT(A) in the explanation given by assessee for making the alleged surrender of losses. AO has not alleged that assessee has actually not earned the loses and by claiming the same has furnished inaccurate particulars of income. Surrender of income is without relying on any adverse material. No adverse material available on record, observations of AO and CIT(A) about concealment of income or furnishing of inaccurate particulars of income are not borne out from record and hence liable to be deleted. (AY. 2007-08)

Narindera Industries v. ACIT (2016) 176 TTJ 35 (UO)(Chd.)(Trib.)

2479 **S. 271(1)(c) : Penalty – Concealment – Penalty to be levied in case the explanation of the assessee is false and not *bona fide* though the quantum appeal is admitted before High Court [S. 80HHC]**

The deduction u/s. 80HHC claimed by the Assessee was not allowed by the AO on the ground that the export proceeds were not repatriated within 6 months from end of the year. The assessee alleged that it received post-facto approval from RBI. Against the adverse decision of the ITAT, the assessee's appeal was admitted by the High Court. Subsequently, penalty was levied by the AO. The levy of penalty was upheld by the ITAT on the ground that the approval from the RBI was an after-thought and was not applied for during the impugned year, hence the explanation of the assessee was false and was not *bona fide*. (AY 2003-04)

Emblem Fashion Wear Exports P. Ltd. v. ITO (2016) 45 ITR 358 (Mum.)(Trib.)

2480 **S. 271(1)(c) : Penalty – Concealment – Additional income was disclosed in the return-Levy of penalty was held to be not justified [S. 153A]**

Tribunal held that levy of penalty in respect of amount disclosed in the return of income was held to be not justified. (AY. 2003-04 to 2006-07)

Radhey Shyam Mittal v. Dy. CIT (2016) 175 TTJ 70 (UO)(SMC)(Jaipur)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Claim of assessee supported by Accounting Standard-7 – Not a case of concealment of particulars because information given by assessee in its return was found to be correct – Levy of penalty was held to be not justified 2481

Assessee claimed expenses on account of provision made for contract some of which were complete and others incomplete. The AO disallowed the provision since it was in the nature of unascertained liability and also imposed penalty u/s. 271(1)(c) of the Act. The CIT(A) confirmed this.

On appeal by the assessee, Tribunal held that the assessee claimed losses with regard to the incomplete work which was not allowed by the AO and the losses were added to the income of the assessee. It was not a case of furnishing inaccurate particulars of income. Making an incorrect claim in the return of income would not amount to concealment of particulars. The AO was not justified in levying penalty since the claim of assessee was supported by Accounting Standard-7 issued by ICAI. The penalty was to be deleted. (AY. 2003-04)

Uhde India P. Ltd. v. ACIT (2016) 45 ITR 177 (Mum.)(Trib.)

S. 271(1)(c) : Penalty – Concealment – If show-cause notice does not delete inappropriate words whereby it was not clear as to whether the default is concealing particulars of income or for furnishing inaccurate particulars of income, the levy of penalty is invalid 2482

The Tribunal quashed penalty proceedings initiated u/s. 271(1)(c) for AY 2007-08 as penalty show cause notice failed to specify default committed by assessee i.e., the AO did not delete inappropriate words/parts whereby it was not clear as to the default committed by assessee was for concealing particulars of income or for furnishing inaccurate particulars of income. (ITA No. 1746/Mum/2011, dt. 22.12.2015) (AY. 2007-08)

Sanghavi Savla Commodity Brokers Pvt. Ltd. v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 271(1)(c) : Penalty – Concealment – Disallowance of expenses and deductions – Penalty cannot be levied on all issues in a "wholesale" manner. The AO has to give findings for each issue separately [S. 80IB, 80HHC] 2483

Allowing the appeal of assessee the Tribunal held that Penalty cannot be levied on all issues in a "wholesale" manner. The AO has to give findings for each issue separately. He has to apply mind meticulously and carefully for each issue separately and establish precisely whether there was concealment of income or furnishing of inaccurate particulars of income. The assessee cannot be fastened with the liability of penalty without there being a clear or specific charge. Fixing a charge in a vague and casual manner is not permitted under the law. Fixing twin charges is also not permitted under the law. (AY. 2004-05)

Mangalam Drugs & Organics Ltd. v. DCIT (Mum.)(Trib.); www.itatonline.org

S. 271(1)(c) : Penalty – Concealment – Depreciation – House property – No penalty leviable on *bona fide* human error committed while filing return of income 2484

When the assessee was confronted with the depreciation being claimed on the property, the income from which had been returned under the head income from house property,

it immediately realised its mistake of computation of total income and agreed for the addition to its total income. The mistake was inadvertent, is evident from the fact that assessee had furnished return of income of ₹ 3,27,79,273/- and, therefore, there was no reason to make a false claim of a petty sum of ₹ 7,87,734/-. The property was appearing in the fixed assets schedule along with other properties, therefore, for all practical purposes, it was treated as a business asset and the depreciation was, accordingly, claimed in the books of account. This aspect is not disputed. It was only at the time of computation of income that the assessee should have made the addition to the profits as per P&L A/c because the income from this property was returned under the head income from house property. Under such circumstances it cannot be disputed that human error could have crept into while making the computation. Thus, it is evident that assessee did not misrepresent the facts at any stage of proceeding. (ITA No. 1590/Del/2014. dt. 03.03.2016) (AY. 2009-10)
B. L. International v. ACIT (Delhi)(Trib.); www.itatonline.org

S. 271AA: Penalty for failure to keep and maintain information and documents in respect of certain transactions .

2485 **S. 271AA : Penalty – Failure to keep and maintain books of account – Documents – International transaction – Transfer pricing – Delay was due to auditor was busy in marriage of his son, levy of penalty was held to be not justified**
Allowing the appeal of the assessee, the Tribunal held that the considering technicalities of Transfer Pricing as auditor has to explain and clarify on international transaction to Assessing Officer and in view of fact that there was no modification in ALP adopted by assessee in TP proceedings, reasons advanced by assessee looked genuine and, thus, there was no need to impose penalty under section 271AA as the delay was due to auditor was busy in marriage of his son, levy of penalty was held to be not justified. (AY. 2011-12)
Augustan Knitwear (P.) Ltd. v. ACIT (2016) 157 ITD 741 / 180 TTJ 134 (Chennai)(Trib.)

S. 271AAA. Penalty where search has been initiated

2486 **S. 271AAA : Penalty – Search initiated on or after 1st June, 2007 – Discloser of additional income and immunity from penalty [S. 132(4), 153A]**
The Tribunal held that the assessee having made disclosure of additional income in the statement under section 132(4) substantiating the reasons therefore, we offered the said income in the return filed under section 153A, the disclosure was made voluntarily by the assesse and, therefore it is entitled to immunity from levy of penalty under section 271AAA(2). Tribunal followed the decision of Supreme Court in the case of *Sudarshan Silk & Sarees v. CIT (2008) 300 ITR 205 (SC)*. (AY. 2009-10)
Dy. CIT v. Salasar Stock Broking Ltd. (2016) 181 TTJ 526 (Kol.)(Trib.)

S. 271AAA : Penalty – Search and seizure – Admitted undisclosed income and during search stated that income derived from business of financing and brokerage – Levy of penalty was held to be not justified [S. 132(4)] 2487

Search and seizure carried out at premises of assessee group in which incriminating evidence was gathered. Assessee admitted undisclosed income and during search also stated that income derived from business of financing and brokerage. Penalty was levied. CIT(A) deleted the penalty. Dismissing the appeal of the revenue the Tribunal held that deletion of penalty by CIT(A) was held to be justified. (AY. 2010-11)

DCIT v. Nirmal Kumar Agarwal (2016) 161 ITD 749 (Jaipur)(Trib.)

S. 271AAA : Penalty – Search initiated on or after 1st June, 2007 – Additional Income voluntarily offered to tax in the return consequent to a search and as per disclosure petition, entitles immunity from penalty u/s. 271AAA 2488

The assessee filed its return of income on September 25, 2009, declaring a total loss of ₹ 6,71,01,221. Pursuant to the search, notice under section 153A of the Act was served upon the assessee. The assessee filed the return of income in response to the notice issued under section 153A of the Act on May 31, 2010, declaring a total loss of ₹ 4,71,01,221 wherein the assessee included the disclosure made during the course of search operations of ₹ 2,00,00,000. Pursuant to the search, the assessee filed a disclosure petition before the ADIT (Investigation), disclosing the additional income of ₹ 2,00,00,000 for this year as the assessee may not be able to instantly produce all the relevant documentation required by the Department with regard to monies received from various parties including advances, margin money and deposits. The assessee explained that it was carrying on the activity of sale and purchase of shares for its own and also carried on the same on behalf of the clients to earn brokerage. The AO levied penalty u/s. 271AAA. On appeal, the ITAT deleted the penalty and held that penalty u/s. 271AAA cannot be levied just because the income not offered to tax in the original return filed u/s. 139(1). The ITAT relied on the disclosure petition u/s. 132(4) filed by the assessee along with reasons for offering the additional income and proper documentation, filed to the satisfaction of the AO. The ITAT held that the Assessee was entitled to immunity from penalty u/s. 271AAA. (AY. 2009-10)

DCIT v. Salasar Stock broking Ltd. (2016) 47 ITR 616 (Kol.)(Trib.)

S. 271B. Failure to get accounts audited

S. 271B : Penalty – Failure to get accounts audited – *Bona fide* belief – Penalty cannot be levied [S. 44AB] 2489

Allowing the appeal the Court held that it is clear from section 273B of the Income-tax Act, 1961, that no penalty shall be leviable to a person or on assessee for any failure referred to under the provision of section 271B of the Act, if, it is proved that there was reasonable cause for such failure. Held, that it was clear that the assessee was under the bona fide belief that the provisions of section 44AB were not applicable to a club, while supplying beverages, liquor, etc., to its members as it was not engaged in any business. Penalty could not be imposed under section 271B.

Koramangala Club v. ITO (2016) 387 ITR 630 (Karn.)(HC)

2490 **S. 271B : Penalty – Failure to get accounts audited – Belief that a mutual association like a club is not liable for tax audit is a bona fide one and constitutes reasonable cause u/s. 273B [S. 44AB, 273B]**
Allowing the appeal of assesssee the Court held that without entering into the issue of applicability of section 44AB of the Act, the assessee had the *bona fide* belief which constituted reasonable cause to absolve him from the levy of penalty. Section 273(B) of the Act makes it clear that that no penalty shall be leviable to a person or on assessee for any failure referred to under the provision of Section 271B of the Act, if, it is proved that there was reasonable cause for such failure. (ITA No. 279 & 280 of 2010, C/W ITA No. 173/2009, dt. 26.02.2016)
Koramangala Club v. ITO (Kar.)(HC); www.itatonline.org

2491 **S. 271B : Penalty – Failure to get accounts audited – Dispute with auditor is a reasonable cause – Levy of penalty was not justified [S. 273B]**
Allowing the appeal of the assessee the Tribunal held that penalty for delay in furnishing tax audit report should not be imposed if there is no *mala fide* reason for the delay. Dispute with auditor is a reasonable cause u/s. 273B for the delay in furnishing the tax audit report. (ITA No. 514/JP/2014, dt. 14.09.2016) (AY. 2008-09)
Gemorium v. ITO (Trib.)(Jaipur); www.itatonline.org

S. 271C. Penalty for failure to deduct tax at source

2492 **S. 271C : Penalty – Failure to deduct at source – Tax and interest was paid – Penalty cannot be levied if Department is unable to show contumacious conduct on the part of the assessee [S. 201(1), 201(IA)]**
The Tribunal deleted the levy of penalty u/s. 271-C for failure to deduct tax at source on the basis that the department has to show that there was "contumacious conduct on the part of the assessee, which was affirmed by the High Court. On appeal to the Supreme Court, HELD dismissing the appeal: "On facts, we are convinced that there is no substantial question of law, the facts and law having properly and correctly been assessed and approached by the Commissioner of Income Tax (Appeals) as well as by the Income Tax Appellate Tribunal. Thus, we see no merits in the appeal and it is accordingly dismissed. No costs".
CIT v. Bank of Nova Scotia (2016) 380 ITR 550 / 237 Taxman 594 / 283 CTR 128 / 130 DTR 240 (SC)

2493 **S. 271C : Penalty – Failure to deduct at source – Reasonable cause – Debatable – Rent – Contract – Levy of penalty was held to be not justified [S. 194C, 194-I, 271(1)(c), 273B]**
On appeal Court held that the assessee failed to deduct a substantial portion of the tax that ought to have been deducted under section 194-I of the Act. Therefore, section 271C stood straightaway attracted. However at the stage when the tax had to be deducted at source the question whether tax had to be deducted at source under section 194C or under section 194-I of the Act was not a settled one. The Central Board of Direct Taxes itself had to issue circulars clarifying the position. Since the issue that whether the tax was to be deducted at source from warehouse charges under section

194C or under section 194-I of the Act was a debatable one, there was a reasonable cause for the failure of the assessee to deduct tax at source under section 194-I of the Act at the time such deduction had to be made. Penalty could not be levied under section 271C of the Act.
Hindustan Coca Cola Beverages P. Ltd. v. JCIT (2016) 387 ITR 471 / 73 taxmann.com 71 / 140 DTR 73 (Delhi)(HC)
Editorial : Order of the Appellate Tribunal in Hindustan Coca-Cola Beverages P. Ltd. v. Joint CIT (2004) 270 ITR (AT) 114 (Delhi) set aside

S. 271C : Penalty – Failure to deduct at source – Assessee under *bona fide* belief that tax not deductible at source – Issue involved nascent – Levy of penalty was quashed [S. 264] 2494
For the assessment year 1999-2000, the AO levied penalty under section 271C on the ground that there was no reasonable cause shown by the assessee for non-deduction of tax at source. The Commissioner affirmed this in revision under section 264. On writ petitions:
Held, allowing the petitions, that the order of the Commissioner and the penalty imposed by the AO under section 271C were to be quashed on the ground that assessee under *bona fide* belief that tax not deductible at source. (AY. 1999-2000)
Woodward Governor (India) Ltd. v. CIT (2016) 389 ITR 65 (Delhi)(HC)

S. 271C : Penalty – Failure to deduct at source – CIT (A) nowhere mentioned reason on basis of which he had concluded that penalty was to be deleted, matter was remanded back [S. 194J] 2495
Allowing the appeal of the revenue, the Tribunal held that CIT(A) deleted penalty imposed by AO stating that there were favourable decision available to assessee. However, he had nowhere mentioned to assessee during relevant time according to which assessee was not liable to deduct tax on payments made by assessee third party administrator (TPA) to hospitals. Matter was remanded back. (AY. 2007-08, 2008-09)
ACIT v. United Healthcare India (P.) Ltd. (2016) 160 ITD 631 (Mum.)(Trib.)

S. 271C : Penalty – Failure to deduct at source – No penalty in case tax was not deducted based on certificate of CA and the taxability of the payment for services was contentious 2496
The assessee had made certain payments to non-residents for engineering and drafting services and purchase of shrink-wrapped software. The AO disallowed the same on the basis that no tax was deducted while making the payments. No appeal was filed by the assessee against the disallowance. Penalty was levied by the AO. The ITAT deleted the levy of penalty on the basis that there was reasonable cause for not deducting tax u/s. 273B. The taxability of technical services and purchase of software was contentious and the assessee in *bona fide* belief relied on the certificate of the CA for non-deduction of tax. (AY. 2009-10)
Addl. DIT v. Leighton Welspun Contractors P. Ltd. (2016) 156 ITD 515 / 47 ITR 97 (Mum.) (Trib.)

2497 **S. 271C : Penalty – Failure to deduct at source – Payee had paid taxes on its income and hence assessee cannot be treated as assessee in default**

The assessee, a State Electricity Board, was engaged in generation, transmission and distribution of power. The power was transmitted through the transmission network of the Power Grid Corporation and the assessee made payment on account of wheeling charges and transmission charges. Further as per the agreement entered into with PGCIL, the tariff was to be decided by the Central Electricity Regulatory Commission (CERC), and as per clause 7 of the regulation of the CERC, tax on incomes of generating companies or transmission licences was to be computed as an expense and recovered from beneficiary. In view of the same PGCIL had collected all due taxes from the assessee in the various bills raised on it for the relevant assessment years. The assessee was under the *bona fide* belief that since it has already paid taxes to PGCIL any further tax deduction at source would only amount to double taxation, and, therefore, did not deduct tax at source. The Assessing Officer imposed penalty under section 271C of the Income tax Act, 1961, on the ground that the assessee had failed to deduct tax at source on the payments of transmission charges to the Power Grid Corporation. The Commissioner (Appeals) confirmed the order of the Assessing Officer. The Tribunal held that the assessee was liable to deduct tax at source but had failed to do so on payments made to the Power Grid Corporation. Admittedly, the Power Grid Corporation had paid taxes on its income received from the assessee and, hence, the assessee was not to be treated as an assessee in default under section 201 of the Act. Since there was a reasonable cause for not deducting the tax at source on the payment, the penalty levied under section 271C was to be deleted. (AY. 2007-08)

Himachal Pradesh State Electricity Board v. Addl. CIT (TDS) (2016) 46 ITR 113 / 177 TTJ 18 (UO)(Chd.)(Trib.)

2498 **S. 271C : Penalty – Failure to deduct at source – Confirmation of demand raised u/s. 201, cannot be sole criteria for imposing penalty as proceedings are two separate and independent proceedings – No *mala fide* intention could be imputed to assessee for failure to deduct tax and, accordingly, penalty imposed was deleted [S. 195, 201, 273B]**

Imposition of penalty u/s. 271C is neither automatic nor mandatory; authority concerned is empowered u/s. 273B not to impose penalty in a deserving case if he is satisfied that there was reasonable cause for failure to comply with statutory requirement. Where confirmation of demand raised u/s. 201, cannot be sole criteria for imposing penalty u/s. 271C as proceedings u/s. 271C and 201 are two independent and separate proceedings. Assessee paid a certain sum in foreign currency to a non-resident for development of website and other allied works. Assessee submitted that payment was made without deduction of TDS under section 195 on basis of advice of her CA that tax was not required to be deducted at source on said remittances because payment was made to a non-resident having no PE in India and that too, for services rendered outside India. AO treated assessee as an assessee-in-default u/s. 201(1), though the assessee challenged said order, but she accepted her liability on the basis of same AO. initiated penalty proceedings u/s. 271C. No *mala fide* intention could be imputed to assessee for failure to deduct tax and, accordingly, penalty imposed u/s. 271C was deleted. (AY. 2007-08)

Aishwarya Rai Bachchan (Smt.) v. Addl. CIT (2016) 158 ITD 987 / 140 DTR 297 / 180 TTJ 643 (Mum.)(Trib.)

S. 271C : Penalty – Failure to deduct at source – Failure to remit to revenue tax deducted at source – Penalty is held to be leviable [S. 273B] 2499

Where tax was deducted at source and was remitted belatedly, though with interest the provisions of section 271C of the Income-tax Act, 1961, are fully applicable. Penalty has to be imposed. Section 273B providing for waiver or reduction of penalty is not attracted in a case where tax was deducted and not remitted to the Revenue.

Classic Concepts Home India P. Ltd. v. CIT (2016) 383 ITR 626 (Ker.)(HC)

S. 271C : Penalty – Failure to deduct at source – Based on the certificate of chartered accountant certificate – Levy of penalty was held to be not justified – DTAA-India-UK [S. 201, 201(IA), 273B, Art. 13] 2500

Dismissing the appeal of revenue the Tribunal held that; where view adopted by assessee based upon certificate of CA that engineering services availed by it were not technical services, was one of possible views, there was reasonable cause as envisaged under section 273B for not deducting tax at source by assessee and, thus, penalty under section 271C was not to be imposed. (AY. 2009-10)

ADIT v. Leighton Welspun Contractors (P.) Ltd. (2016) 156 ITD 515 / 47 ITR 97 (Mum.) (Trib.)

S. 271D. Penalty for failure to comply with the provisions of section 269SS

S. 271D : Penalty – Takes or accepts any loan or deposit – Limitation – AO has the power to initiate penalty proceedings under section 271D of the Act and upon referral to the Additional Commissioner, the penalty order would by barred by limitation as the date of issue of notice would be the date when the AO issued notice [S. 269SS, 274] 2501

Dismissing the appeal of the revenue, the Court held that section 271D(2) of the Act provides that the jurisdiction of imposing penalty is vested in the Joint Commissioner. The High Court held that though section 271D of the Act vests the jurisdiction of imposing penalty solely in the Joint Commissioner, it is silent as regards to who could initiate the proceedings. Relying on the ruling of the Supreme Court in the case of *D. M. Manasvi v. CIT (1972) 86 ITR 557*, the High Court held that in a case falling under section 271D the AO is not precluded from initiating the proceedings by issuing a notice. The High Court had distinguished the ruling of the Kerala High Court in the case of Grihalakshmi Vision (2015) (379 ITR 100) wherein it was held that if the AO has come across a case of violation of law attracting penal provisions and has thereafter a notice, it would tantamount to be an act without jurisdiction. Thus, the High Court held that the order is hit by limitation as the proceedings were initiated on 26-12-2006 when the notice was issued by the AO and hence the period of limitation expired on 30-6-2007, whereas the order imposing penalty was passed on 21-9-2007. Thus, the appeal was dismissed. (AY. 2004-05)

CIT v. Narayani & Sons (P) Ltd. (2016) 141 DTR 315 / 289 CTR 301 / 73 taxmann.com 21 (Cal.)(HC)

2502 **S. 271D : Penalty – Takes or accepts any loan or deposit – Loan was taken to meet sudden business exigency – Levy of penalty was held to be not justified [S. 269SS, 273B]**

Allowing the appeal of the assesse, the Tribunal held that since cash transactions were due to business exigency warranting immediate discharge of certain liability, these transactions would be genuine and there was reasonable cause as envisaged in under section 273B, therefore, no penalty could be imposed. (AY. 2008-09)

Chawla Chemtech (P.) Ltd. v. JCIT (2016) 158 ITD 48 (Chd)(Trib.)

S. 271E. Penalty for failure to comply with the provisos of section 269T

2503 **S. 271E : Penalty – Repayment of loan or deposit – Fresh assessment order was concerned that there was no satisfaction recorded regarding penalty proceedings u/s. 271E of the Act, though in the order the AO wanted penalty proceedings to be initiated u/s. 271(1)(c) of the Act. Penalty u/s. 271E was without any satisfaction and no such penalty could be levied [S. 269SS, 271(1)(c)]**

Assessment Order was passed on the basis of CIB information informing the Department that the assessee was engaged in large scale purchase and sale of wheat, but it is not filing IT Return. Ex-parte order was passed at certain income. AO observed that the assessee had contravened the provisions of section 269SS of the Act and because of this, AO initiated penalty proceedings u/s. 271E of the IT Act. CIT(A) allowed the appeal and set aside the order with direction of *de novo* after affording adequate opportunity to the assessee. After remand, the AO passed fresh Assessment Order. In this Assessment Order, the AO did not recorded satisfaction regarding initiation of penalty proceedings u/s. 271E. On the basis of original Assessment order, show cause notice was given to the assessee and it resulted in passing the penalty order. Tribunal and High Court allowed the appeal of assessee and deleted penalty. On appeal in SC, Hon'ble SC held that fresh assessment order was concerned that there was no satisfaction recorded regarding penalty proceedings u/s. 271E of the Act, though in the order the AO wanted penalty proceedings to be initiated u/s. 271(1)(c) of the Act. Penalty u/s. 271E was without any satisfaction and no such penalty could be levied. (AY. 1991-92, 1992-93)

CIT v. Jai Laxmi Rice Mills (2015) 379 ITR 521 / (2016) 134 DTR 223 / 286 CTR 159 / 237 Taxman 375 (SC)

2504 **S. 271E : Penalty – Repayment of loan or deposit – Repayment by cash would not attract penalty if as on the date of repayment, there was no unsecured loan**

The assessee took cash loans from a party during the year, on which penalty u/s. 271D was levied. Subsequently, during the same year, the credit balance of the party changed to a debit balance and came within the category of loans and advances. The Assessee repaid the loan, which was taken earlier, in cash. The AO levied penalty on the cash repayment of loans. The ITAT held that as on the date of cash repayments, the ledger of the party was not an unsecured loan and hence, no penalty u/s. 271E could be levied. (AY. 2008-09)

Hemant Rajnikant Shroff v. Addl. CIT (2016) 47 ITR 388 / 179 TTJ 365 (Ahd.)(Trib.)

S.271G. Penalty for failure to furnish information or document under section 92D

S. 271G : Penalty – International transactions – Failure to furnish information required to be maintained – Penalty proceedings – Not to be stayed – But order to be implemented only after decision on whether there was international transaction [S. 92D, 92E] 2505

On writ the Court held that penalty proceedings under section 271G had been initiated on the basis that the provisions of Chapter X and in particular sections 92D and 92E had not been complied with by the assessee, which invited penal consequences. As the assessee did not have an opportunity to represent its case, while the penalty proceedings might be continued the order imposing penalty, if any, was not to be implemented till the decision of the Dispute Resolution Panel or the Commissioner (Appeals) as the case may be on the preliminary issue as to whether the transactions were international transactions or not. (AY. 2011-12, 2012-13, 2013-14, 2014-15)

Shri Vishnu Eatables (India) Ltd. v. Dy. CIT (2016) 389 ITR 385 / 243 Taxman 446 / 289 CTR 337 (P&H)(HC)

S. 272A. Penalty for failue to answer questions, sign statements, furnish information, returns or statements, allow inspections etc.

S. 272A : Penalty – Failure to answer questions – Sign statements – Furnish information – Levy of penalty for non-filing of e-TDS statements is upheld [S. 272A(2)(k)] 2506

The assessee deducted tax at source in respect of certain payments made and after having deposited to the credit of the Central Government, failed to furnish the statements from AY 2008-09 to AY 2012-13. The Assessing Officer levied penalty under section 272A(2)(k) as the assessee did not provide any sufficient or reasonable cause for not filing the statements within the time limit prescribed. CIT(A) partially reduced the penalty i.e., penalty was levied for default from 1/4/2010 as the new Principal had joined in January 2010 and that the earlier standby Principal did not have any administrative experience. The same was upheld by the Tribunal. On appeal, it was held that the levy of penalty was justified even though there is no loss of revenue to the Government for non-filing of the statements as it leads to hassles with respect to processing of returns of assessees and therefore, stringent action is to be taken for non-compliance. (AY. 2009-10 to 2012-13)

Raja Harpal Singh Inter College v. PCIT (2016) 386 ITR 327 / 240 Taxman 123 / 288 CTR 435 / 138 DTR 289 (All.)(HC)

S. 272A : Penalty – Furnish information – Deduction at source – No plausible explanation given by assessee – Concurrent finding that there was no justifiable reason or cause for delay – Levy of penalty was held to be justified [S. 200, 273B] 2507

Held, dismissing the appeal, that on a perusal of Form 26Q for the financial year 2008-09 relating to the Assessment Year 2009-10 there was a delay of nearly five years in filing the statements of tax deducted at source. No plausible explanation had been tendered by the assessee for filing the returns regarding tax deducted at source belatedly

and therefore the benefit under section 273B of the Act could not be given. Since the assessee had failed to mandatorily file the return pertaining to tax deducted at source within the prescribed time, it had rightly been treated to be in default for delayed filing of such return. The assessee failed to explain that there was any reasonable cause or failure to comply with the provisions of law and the authorities below had concurrently concluded that there was delay in filing the return without any justifiable reason or cause. The penalty was rightly imposed on the assessee in all the three financial years. There was no error or perversity in the approach of the authorities below or in the findings recorded by them warranting interference. (AY. 2009-10)
Central Scientific Instruments Organisation v. CIT (TDS) (2016) 385 ITR 617 / 143 DTR 234 (P&H)(HC)

2508 **S. 272A : Penalty – Delay in filing e-TDS return – Reasonable cause – Levy of penalty was held to be not justified [S. 272(2)(k), 273B]**
Allowing the appeal of the assesse, the Tribunal held that delay in filing quarterly return was due to non-availabliity of expert staff, who were aware of intricacies of filing e-returns. Tribunal also held that provisions of section 273B cover default committed under section 272A(2)(k). (AY. 2011-12)
Nav Maharashtra Vidyalaya. v. (2016) 161 ITD 732 / 182 TTJ 729 (Pune)(Trib.)

2509 **S. 272A : Penalty – Delay in filing TDS return – Different stand before AO and CIT(A) – No reasonable cause – Levy of penalty was held to be justified [S. 272A(2)(k)]**
Before AO, assessee submitted its Explanation by stating that deductee was director of company to whom rent/professional fee was paid and salary was paid to family members of company, hence, there was no wilful intention to delay or deprive any deductee of TDS credit. However, assessee had taken completely different stand in Appeal proceedings by stating that due to oversight of staff, TDS statement could not be filed. It was held that no specific reasonable cause having been shown by assessee for admitted delay in filing TDS returns and assessee taking different stands before AO and appellate authority, penalty under s. 272A(2)(k) was sustainable. (AY. 2010-11).
Weatherguard Aircon (P) Ltd. v. Addl.CIT (2016) 130 DTR 133 / 176 TTJ 141 (Mum.)(Trib.)

2510 **S. 272A : Penalty – Non-filing of TDS returns – Penalty technical in nature as TDS deposited within due date as the delay in filing is revenue neutral, levy of penalty was not justified [S. 200(3), 272A(2)(k)]**
Penalty levied u/s. 272A(2)(k) by AO as assessee bank did not file the quarterly return of tax deducted at source (TDS) in Form 26Q as required under section 200 (3) within the stipulated time. Assessee submitted that as bank located in semi-rural area and most clients being agriculturists and small businessmen or from unorganised sector could not submit their PAN numbers on time. As per rule declared by the Department *vide* press release that e-return without PAN numbers would not be accepted unless 85%-90% of the permanent account number of deductees have been filed. CIT(A) upheld order of AO. The ITAT held that assessee had duly complied with the statutory requirement of deducting and depositing the tax due on or before the due date but was prevented by sufficient cause in not filing the return of TDS within the time specified

u/s. 200(3). Penalty is merely technical in nature and no loss was caused to the Revenue Department. It noted that levy of penalty is not mandatory in each and every case and depends upon facts of the case. Considering explanation of the assessee, the ITAT held that there was reasonable cause in favour of assessee for non-filing of TDS return. Hence, the penalty order was set aside. (AY. 2008-09)
Punjab National Bank v. JCIT (TDS) (2016) 48 ITR 8 (Chd.)(Trib.)

S. 273B. Penalty not to be imposed in certain cases

S. 273B : Penalty – Not to be imposed – Deduction at source – Absence of reasonable cause, levy of penalty was held to be justified [S. 194A, 271C] 2511
Allowing the appeal of revenue, the Court held that when there was a failure on the part of the assessee to deduct tax at source in violation of section 194A of the Act, the penal provisions of section 271C of the Act were attracted. In such a case, the only way out for the assessee was to take the benefit of section 273B of the Act by establishing that there was reasonable cause justifying its failure to comply with section 194A of the Act. The assessee failed to establish reasonable cause, as contemplated in section 273B of the Act to resist an order of penalty under section 271C of the Act. The Commissioner (Appeals) and the Tribunal acted illegally in cancelling the penalty levied on the assessee. (AY. 1998-99)
CIT v. Muthoot Bankers (Aryasala) (2016) 385 ITR 51 / 71 taxmann.com 110 / 141 DTR 198/289 CTR 309 (Ker.)(HC)

S. 275. Bar of limitation for imposing penalties

S. 275 : Penalty – Bar of limitation – Penalty proceedings for contravention of Sections 269SS & 269T are not related to the assessment proceeding but are independent of it. Therefore, the completion of appellate proceedings arising out of the assessment proceedings has no relevance. Consequently, the limitation prescribed by S. 275(1)(a) does not apply [S. 269SS, 269T, 271D, 271E] 2512
On appeal by the department to the Supreme Court HELD dismissing the appeal: On perusing the judgment of the High Court, it is found that penalty imposed on the respondent herein was also set aside on the ground that the provisions of sections 271D and 271E of the Income-tax Act were invoked after six months of limitation and, therefore, such penalty could not have been imposed. Since the outcome of the judgment of the High Court can be sustained on this aspect alone, it is not even necessary to go into other aspects. Leaving the other questions of law open, the appeal is dismissed. (AY. 1993-94 to 1995-96)
CIT v. Hissaria Brothers (2016) 386 ITR 719 / 243 Taxman 174 / 140 DTR 18 / 288 CTR 244 (SC)
Editorial : Decision in CIT v. Hissaria Brothers (2007) 291 ITR 244 (Raj.)(HC)

2513 **S. 275 : Penalty – Bar of limitation – During the pendency of appeal before ITAT, penalty u/s. 271(1)(c) cannot be levied on the assessee [S. 147, 148, 271(1)(c)]**

Certain addition was made to assessee's income in reassessment proceedings. First Appellate Authority had disposed off the appeal and further appeal of assessee before the Tribunal was pending. In the meantime, the AO levied penalty on the assessee u/s. 271(1)(c). Held, order imposing penalty cannot be passed if the appeal against basic order of assessment is pending before the competent superior authority. Held, notices initiating penalty, could not have been issued before the order of the ITAT. (AY. 1959-60)

R. B. Shreeram Durgaprasad v. CIT (2016) 237 Taxman 189 / 137 DTR 332 / 287 CTR 228 (Bom.)(HC)

2514 **S. 275 : Penalty – Bar of limitation – Penalty u/s. 271D – Accepts any loan or deposit – Penalty valid if levied within the expiry of financial year in which proceedings u/s. 271D has been initiated, or the end of one year from the end the financial year in which order of CIT(A) initiating penalty was received [S. 271D]**

The assessee made cash deposits on various dates but was unable to explain the source of the cash deposited. Addition u/s. 68 was made by the AO. The addition was deleted by the CIT(A) since it was explained by the assessee that it had taken cash loan from the assessee's brother to pay the EMIs on loans from various banks. On direction of the CIT(A) *vide* his order dated 1-03-2013, penalty u/s. 271D was initiated by the AO *vide* notice dated 19-08-2013 and levied *vide* order dated 28-03-2014. The ITAT held that there was no delay in levy of penalty u/s. 271D since the time limit for levy of penalty expires on 31-03-2014, being expiry of financial year in which proceedings u/s. 271D have been initiated as well as the end of one year from the end the financial year in which order of CIT(A) was received. Further, the ITAT also upheld the levy of penalty since neither parties were agriculturalists and had bank accounts in Surat and were regularly filing return of income. (AY. 2008-09)

Hemant Rajnikant Shroff v. Addl. CIT (2016) 47 ITR 388 / 179 TTJ 365 (Ahd.)(Trib.)

CHAPTER XII
OFFENCES AND PROSECUTIONS

S. 276C. Wilful attempt to evade tax, etc.

S. 276C : Offences and prosecutions – Wilful attempt to evade tax – Notice under section 156 for recovering the tax need not be issued before launching prosecution. Existence of other modes of recovery cannot act as a bar to the initiation of prosecution proceedings [S. 156, 221(1)] 2515

Assessee filed the return of income declaring the total income of ₹ 2.10 crore on which tax and interest of ₹ 68.28 lakh became payable. However, out of the above tax payable, the assessee did not pay a sum of ₹ 58.15 lakh. Notice under section 221(1) was issued to him by the DCIT to produce the details of tax paid. Assessee filed a letter stating that he had done contracts for the State Government on which tax was payable. However, self-assessment tax was not paid as he did not receive the amounts due from the State Government and that he was willing to pay the tax once these amounts were received from the Government. Prosecution proceedings were launched against the assessee. High Court rejected the assessee's plea that prosecution should be quashed as notice under section 156 was not served on the assessee. High Court held that such notice is not required to be issued for prosecution. High Court further held that existence of other modes of recovery cannot act as a bar to the initiation of prosecution proceedings. (AY. 2012-13)

Kalluri Krishan Pushkar v. Dy. CIT (2016) 236 Taxman 27 / 135 DTR 351 (AP &T)(HC)

S. 276D. Failure to produce accounts and documents

S. 276D : Offences and prosecutions – Failure to produce books of account – Documents – Pendency of appeal has no bearing on the initiation of the prosecution under the Act – At the time of commission of alleged offence the petitioner has not reached the age of 70 years, hence circular was held to be not applicable 2516

Assessee filed return of income declaring total income of ₹ 75,31,769. Subsequently, when the Income-tax department received information regarding existence of a foreign bank account, the assessee offered to pay the tax on the amount lying in his foreign bank account. Later on, assessee filed appeal against the assessment order and penalty order passed by the Assessing Officer. The assessee also filed a stay application, before Additional Chief Metropolitan Magistrate, against launch of prosecution on the ground that the appeal before the appellate authority is pending. The Additional Chief Metropolitan Magistrate dismissed the stay application filed by the assesse. On writ petition, High Court held that pendency of appeal before the authority has no bearing on the prosecution. The Court also held that at the time of commission of alleged offence offence the petitioner has not reached the age of 70 years hence the instruction No. 5051 dated 07-02-2011 which stated that no prosecution can be initiated against a person who is above the age of 70 years was held to be not applicable. (AY. 2007-08)

Pradip Burman v. ITO (2016) 382 ITR 418/ 236 Taxman 606 / 129 DTR 404 (Delhi)(HC)

S. 277. False statement in verification, etc.

2517 **S. 277 : Offences and prosecutions – False statement – Verification – Search and seizure – Statement that assessees did not have any bank locker found to be untrue – Complaint filed by Deputy Director (Investigation) incompetent [S. 116, 132, Code of Criminal Procedure, 1973, S. 195]**

The assessees had residences at Bhopal and Aurangabad and filed their returns of income at Bhopal. Search operations under section 132 of the Act were simultaneously conducted at both places on the strength of the warrant of authorisation under section 132 of the Act, issued, signed and sealed by the Director of Income-tax (Investigation), Bhopal. In the course of the interrogation of the assessees on whether they or any of them either individually or jointly did hold any locker, their answer was in the negative. Their statements were recorded by the Income-tax Officers. Further investigation revealed that they did hold a locker in a bank at Aurangabad. The office of the Deputy Director of Income-tax (Investigation), Bhopal issued a show-cause notice to the assessees under section 277 of the Act alleging that they had made false statement under section 132(4) thereof, and seeking a reply why prosecution should not follow by virtue thereof. Pursuant to this, a complaint was filed by the Deputy Director of Income-tax (Investigation), Bhopal, in the Court of the Chief Judicial Magistrate, Bhopal, asserting that by making such false statement in the course of search operations which were judicial proceedings in terms of section 136 of the Act, the assessees had committed offence under sections 109, 191, 193, 196, 200, 420, 120B and 34 of the Indian Penal Code, 1860. The Chief Judicial Magistrate issued process and on petitions before the High Court by the assessees seeking quashing of the proceedings on the ground that the search operations having been undertaken by the Income-tax Officers, the complaint could not have been lodged by the Deputy Director of Income-tax (Investigation) who was not the appellate authority in terms of section 195(4) of the 1973 Code and further no part of the alleged offence having been committed within the territorial limits of the court of the Chief Judicial Magistrate, Bhopal, the latter had no jurisdiction to either entertain the complaint or take cognizance of the accusations. The High Court upheld the jurisdiction of the Chief Judicial Magistrate and the competence of the Deputy Director (Investigation) to lodge the complaint. On further appeal:

Held accordingly, that the Deputy Director of Income-tax (Investigation), Bhopal, was not an authority to whom appeal would ordinarily lie from the decisions/orders of Income-tax Officers involved in search proceedings so as to empower him to lodge the complaint in view of the restrictive preconditions imposed by section 195 of the 1973 Code. The complaint filed by the Deputy Director of Income-tax, (Investigation), Bhopal thus on an overall analysis of the facts of the case and the law involved was incompetent. The complaint was unsustainable in law having been filed by an authority, incompetent in terms of section 195 of the 1973 Code.

Court also held that it could not be said that in the singular facts and circumstances, no part of the offence alleged had been committed within the jurisdictional limits of the Chief Judicial Magistrate, Bhopal. On a cumulative reading of sections 177, 178 and 179 of the 1973 Code in particular and the in-built flexibility discernible in the latter two provisions, in the attendant facts and circumstances of the case where a single and

combined search operation had been undertaken simultaneously both at Bhopal and Aurangabad for the same purpose, the alleged offence could be tried by courts otherwise competent at both these places. To confine the jurisdiction within the territorial limits to the court at Aurangabad would amount to impermissible and illogical truncation of the ambit of sections 178 and 179 of the 1973 Code.
From the decision of the Madhya Pradesh High Court.
Babita Lila v. UOI (2016) 387 ITR 305 / 288 CTR 489 / 243 Taxman 258 (SC)

S. 279. Prosecution to be at instance of Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner

S. 279 : Offences and prosecutions – Compounding of offences – Application for compounding cannot be rejected merely because, conviction of assessee in criminal court [S. 276B, 278B] 2518
Chief Commissioner of Income tax TDS has rejected the petitioner's application for compounding the offence committed by the petitioner under section 276B read with section 278B of the Income-tax Act, on the ground that the assessee has been convicted by the Criminal Court. Allowing the petition the Court held that the assessee has been convicted of an offense does not mean that the application for compounding of the offence is not maintainable. Under the guidelines, the competent authority has to examine the merits of the case and decide whether there is a case for compounding. There are no fetters on the powers of the competent authority under the guidelines. Thus, this Court is of the view that the respondent can examine the matter afresh without being, in any manner, influenced merely because of the conviction passed against the petitioner by the Criminal Court. (AY. 1981-82, 1983-84, 1984-85)
V. A. Haseeb and Co. (Firm) v. CCIT (2017) 152 DTR 306 (Mad.)(HC)

CHAPTER XXIII
MISCELLANEOUS

S. 281. Certain transfers to be void

2519 **S. 281 : Certain transfers to be void – Notice issued under section 13(2) of SARFAESI Act by financial institution tantamount to an attachment and where such notice was issue prior to attachment order passed by TRO, it would get precedence over attachment of property by TRO [SARFAESI Act, 2002, S. 13(2) 19, 35]**

Assessee filed WP in HC challenging the order attaching the property and also prayer for a direction to the sub-registrar to register the sale deed executed by the IDBI Bank in favour of the Petitioner transferring title of the ground floor of the property in question. Also assessee prayed for direction to IDBI to refund the entire amount paid by the Petitioner as consideration for the ground floor of the property in question. Allowing the WP, HC held that notice issued by IDBI u/s. 13(2) of SARFAESI Act was prior to the impugned order dated 25/11/2013, passed to the impugned order dated 25/11/2013, passed by the IT department attaching the property in question and therefore it had the right to proceed e-auction the property in question on 25/2/2015 notwithstanding that the IT Department had passed the impugned attachment order dated 25/11/2013. The petition was allowed,

Suresh Kumar Goyal v. CIT (2016) 139 DTR 362 / 73 taxmann.com 10 (Delhi)(HC)

S. 282. Service of notice generally

2520 **S. 282 : Service of notice – Shifting of address from time-to-time and simultaneous operation of business from different places – Affixture of notice at last known address proper**

Held that considering that the assessee admittedly received the notice dated April 12, 2010 under section 148 at a place other than the address where the assessee admittedly was carrying on business and considering that the assessee had simultaneously been operating from four different places, the view taken by the Tribunal that the assessee had been shifting its address from time-to-time and when such frequent change in the address the service at the last known address by affixture was proper was a plausible view and did not admit of any challenge on the ground of perversity. (AY. 2008-09)

Ramshila Enterprises P. Ltd. v. PCIT (2016) 383 ITR 546 / 239 Taxman 17 (Cal.)(HC)

2521 **S. 282 : Service of notice – On facts as there was no valid service of notice assessment was quashed [S. 143(2), 292BB]**

Allowing the appeal of assessee the Tribunal held that if there is no valid service of the notice the assessment is bad in law. (ITA No. 669/Del/2012, dt. 27.05.2016) (A.Y. 2006-07)

Micro Spacematrix Solution P. Ltd. v. ITO (Delhi)(Trib.); www.itatonline.org

S. 292BB. Notice deemed to be valid in certain circumstances

S. 292BB : Notice of demand to be valid in certain circumstances – Failure of AO to issue notice u/s. 143(2) prior to finalising reassessment order could not be condoned by referring to Section 292BB and is fatal to the order of reassessment – Reassessment was not sustainable in law [S. 147, 148] 2522

The assessee was issued notice u/s. 148 for reopening of a concluded assessment. However, the assessee was not issued a notice u/s. 143(2) till the date the assessee informed AO that the return filed originally should be treated as the return filed pursuant to notice u/s. 148 of the Act.

On appeal before the CIT(A), the assessee raised an issue that in absence of a notice u/s. 143(2), the reassessment order was invalid. However, CIT(A) negatived the contention of the assessee that no specific notice was required to be issued u/s. 143(2). Assessee's further appeal was allowed by the Tribunal.

On revenue's appeal, the HC held that if the AO found that there were problems with the return which required explanation by the assessee then AO ought to have followed up with a notice u/s. 143(2). Department cannot take reliance of section 292BB to condone such procedural lapses as provisions of section 292BB applies for failure of "service" of notice and not with regard to failure to "issue" of notice. Thus, the reassessment order was not held to be sustainable in law. (AY. 2008-09)

CIT v. Jai Shiv Shankar Traders Pvt. Ltd. (2016) 383 ITR 448 / 129 DTR 63 / 282 CTR 435 (Delhi)(HC)

S. 293. Bar of suits in civil courts

S. 293 : Bar of suits in civil courts – Payment made in installments in accordance with the order of the Court for release of assets seized – Three pay orders deposited with the department not encashed – Principal amount remaining dormant without interest accruing thereon – Dispute settled by the Settlement commission – Demand finalised by the AO – Interest on amount of the pay order demanded by the assessee – Civil suit filed – Held, dues of the assessee stood determined by the order of Settlement commission – Held, assessee has no right to claim interest on the bank drafts pending encashment at this stage – Held, right way was to file appeal against the AO order – Held, no jurisdiction with the High Court to entertain civil suit [S. 245D] 2523

In a search operation, certain silver bars of the assessee were seized. On filing a writ petition, the Court directed the assessee to make payment in installments of the market value of the seized assets and get the assets released. The assessee, *inter-alia,* gave three pay orders which were not encashed by the Department and therefore, the principal amount was lying dormant with the bank without interest accruing thereon. In so far as the assessments were concerned, the assessee went to the Settlement Commission, who had passed the order. Pursuant to such order, the AO computed the income and determined the amount payable by the assessee. Assessee was aggrieved by the fact that no interest was paid to him on the amount of pay orders which was not encashed by the Department. In the civil suit filed by the assessee, the Court held that, assessee was well aware about the said pay orders but he did not raise the issue before the Settlement

Commission or the AO. Thus, the Court held that either the issue was not raised or if it was raised, the AO had denied the interest to the assessee. Accordingly, it was held that the right remedy was to file an appeal against the said order of the AO and in view of section 293, no civil suit can be entertained by the Court.
Vishwanath Khanna v. CCIT (2016) 237 Taxman 502 (Delhi)(HC)

2524 **S. 293 : Bar of suits in civil courts – Income-tax Act is a complete Code and no separate suit is maintainable for claim of damages when the assessee had exhausted all the remedies under the Income-tax Act and further where the assessee had failed to prove that search carried out was illegal and that damages were actually suffered**
Search was conducted at the premises of the assessee, a registered partnership firm and assessee's stock of perishable items were seized. It was alleged by the assessee that the search was illegal and that search warrants were obtained with an ulterior motive by the tax officer from the higher authorities by misleading the facts. The assessee filed a suit for recovery of damages caused by the act of revenue authorities. Trial Court and the First Appellate Court dismissed the suit of the assessee. High Court noted that the Lower Courts had given a categorical finding that the assessee had exhausted all the remedies under the Income-tax Act, 1961 which could not be interfered with. High Court held that Income-tax Act is a complete Code and no separate suit is maintainable. High Court further noted that the assessee had failed to prove that any illegal raid was conducted by the Income Tax Authorities and had also failed to prove the damages suffered by it. (BP. 1986-87 to 1996-97)
Paras Rice Mills v. UOI (2016) 236 Taxman 21 (P&H)(HC)

Gift tax Act, 1958

S. 6. Value of gifts, how determined

S. 6 : Valuation of shares – Promoter's quota and were prevented from being traded in stock exchange during lock-in-period – SLP is granted [S. 4(1)(a)] 2525

The High Court after noticing the lock-in period held that the CIT(A)'s finding were correct and upheld its order and dismissed the order passed by the Tribunal. Against High Court's ruling that where shares transferred, which were subject matter of gift tax proceedings belongs to promoter's quota and were prevented from being traded in stock exchange during lock-in-period, same could not be subject-matter of quotation in stock exchange and as a class these could not fall within definition of quoted shares. The leave is granted by the Supreme Court. (AY. 1993-94)

DCIT v. BPL Ltd. (2016) 240 Taxman 301 (SC)

Editorial : Refer BPL Ltd. (2007) 293 ITR 21 (Karn.)(HC)

Interest-tax Act, 1974

S. 2. Definitions

2526 **S. 2(7) : Interest – Interest on debentures and upfront fees and interest on monies lent to other corporations – Levy is not attracted**
Dismissing the appeal of revenue the Court held that Interest on debentures and upfront fees and interest on monies lent to other corporations would not attract the provisions of the Interest-tax Act, 1974.
CIT v. Gujarat Industrial Investment Corporation (2016) 388 ITR 484 / 243 Taxman 56 / 144 DTR 337 / (2017) 291 CTR 17 (SC)(HC)

2527 **S. 2(7) : Interest – Interest on inter-corporate deposits is not chargeable to tax [S. 5]**
Dismissing the appeal of revenue the Court held that the expression "advance" occurring in section 2(7) of the Interest-tax Act, 1974, along with the expression "loan" should take its colour from "loan" and cannot be given wider interpretation to include deposit as well. Hence, inter-corporate deposit is not in the nature of loan or advance within the meaning of section 2(7) and therefore, interest thereon is not chargeable to the interest-tax under section 5.
CIT v. Gujarat Industrial Investment Corporation Ltd. (2016) 387 ITR 573 (Guj.)(HC)

2528 **S. 2(7) : Interest – Inter-corporate deposits – Not included**
Allowing the appeal the Court held that it was not possible to accept the contention of the Department that the expression "interest on loan and advances" occurring in section 2(7) of the Act should include "interest on deposits" as well notwithstanding that there was no reference to such interest in the definition itself. The Special Bench of the Appellate Tribunal in *Housing & Urban Development Corporation Ltd v. JCIT dt. 25-11-2005 (SB)(Trib.)*, had answered the question in favour of the assessee for the AYs. 1992-93, 1993-94 and 1996-97. The present appeals pertained to the AYs. 1994-95 and 1995-96. Therefore, by applying the rule of consistency the Department was directed to follow the judgment which had attained finality as the view expressed had been accepted by the Department. (AY. 1994-95, 1995-96)
Housing and Urban Development Corpn. Ltd. v. Dy. CIT (2016) 386 ITR 212 / 140 DTR 108 (Delhi)(HC)

S. 10. Interest escaping assessment

2529 **S. 10 : Reopening of assessment – If no assessment order is passed, there cannot be a notice for reassessment inasmuch as the question of reassessment arises only when there is an assessment in the first instance**
On the return filed by the assessee for the assessment year 1997-98 under the Interest-tax Act, 1974 no assessment order was passed. Much after the last date of the assessment year, the Assessing Officer sought to reopen the assessment by notice under section 10 of the Act and thereafter proceeded to reassess the interest chargeable under

the Act. The Commissioner (Appeals) set aside the reassessment order and this was upheld by the Appellate Tribunal. On further appeal by the Revenue, the High Court reversed the Tribunal holding that even if there was no original assessment order passed under section 10, there could be reassessment. On further appeal:

Held, allowing the appeal, that where there was no assessment order passed, there could not be a notice for reassessment inasmuch as the question of reassessment would arise only when there was an assessment in the first instance. Trustees of H. E. H. the *Nizam's Supplemental Family Trust v. CIT (2000) 242 ITR 381 (SC)* followed. (AY. 1997-98)

Standard Chartered Finance Ltd. v. CIT (2016) 381 ITR 453 / 238 Taxman 87 / 284 CTR 210 /132 DTR 87 (SC)

Kar Vivad Samadhan Scheme, 1988

S. 88. Settlement of tax payable

2530 **S. 88 : Instructions issued by Ministry of Finance cannot modify Scheme having statutory character – Instructions regarding applicability of marginal rate to unpaid tax for determining disputed income – Not applicable to taxable income arising from capital gains for which uniform rate applies – Assessing Officer to determine disputed income in relation to unpaid tax by applying rate of 33.6% and to calculate tax at 35% of disputed income [S. 89]**

The instructions issued by the Ministry of Finance cannot modify a scheme which is statutory in character. The instructions of the Ministry of Finance regarding applicability of a marginal rate to the unpaid tax for determining the disputed income cannot apply where the taxable income arises only from capital gains and to which a uniform rate of 33.6% applies.

Held, that the instructions issued were not consistent with the provisions of the Finance (No. 2) Act, 1998, which did not deal with the marginal rate, particularly when computing the disputed income arising out of the capital gains. The Act would stipulate the rate of tax where the tax was in arrears. For the assessee, the rate was 35% of the disputed income. Therefore, the first step was to determine the unpaid tax which undisputedly was ₹ 81,58,392. The next step was to determine the disputed income in relation to the unpaid tax applying the rate of 33.6% Thirdly, the tax payable would be calculated at 35% of the disputed income so computed. The Department was directed to re-compute the disputed income and thereafter calculate the tax payable by the assessee in terms of the Scheme. (AY. 1994-95)

B.P. Jain and Associates v. CIT (2016) 381 ITR 423 / 67 taxmann.com 332 / 137 DTR 288 / 287 CTR 334 (Delhi)(HC)

S. 95. Scheme not to apply in certain cases

2531 **S. 95 : Penalty – Concealment – Criminal proceedings – As per Circular where assessee had been discharged before filing of declaration, then, he was entitled to avail of Samadhan Scheme [S. 96, 271(1)(c)]**

Metropolitan Magistrate passed order discharging assessee and its partners from prosecution and penalty imposed u/s. 271(1)(c) was reduced. Assessee filed declaration under Samadhan Scheme, seeking to settle outstanding penalty and interest. Designated Authority rejected assessee's declaration, this on ground that prosecution for concealment of income had already been instituted before date of filing of declaration, therefore, benefit of the Samadhan Scheme could not be extended in view of clear mandate of Section 95(i)(a) of the Finance No. 2 Act, 1988. On writ allowing the petition the Court held that as clarified by Circular issued under Section 96 of Samadhan Scheme, mere initiation of criminal proceedings would by itself not be bar, if assessee concerned had been discharged. Only exclusion was of pending proceedings for conviction or conviction prior to filing of declaration. Circular clarified that where

assessee had been discharged before filing of declaration, then, he was entitled to avail of Samadhan Scheme. Asssessee was discharged before it filed its application of settlement, thus, Designated Authority was bound to accept application made for settlement under Samadhan Scheme. Criminal Revision Petition filed by Income Tax Department was rejected for non-removal of office objection and Revenue had taken no steps till date to have matter restored – It appeared that Revenue itself was not serious about prosecuting Criminal Revision Petition filed by it to High Court. Accordingly Court set aside order passed by designated Authority under Samadhan Scheme and restore issue for fresh consideration, to include satisfaction of all other requirements.
Tigrania Steel Corporation v. CIT (2016) 143 DTR 310 / (2017) 496 (Bom.)(HC)

Securities Transaction Act – Finance Act, 2004

S. 100. Collection and recovery of security transaction tax

2532 **S. 100 : Collection and recovery of security transaction tax – Short deduction – SEBI issued circular to NSE for using two client codes on certain transaction of Foreign Institutional Investors and NSE intimated brokers/members to take separate codes, and brokers/members did not take separate client code, NSE could not be held liable for alleged short-deduction of Securities Transaction Tax as NSE was not authorised to collect tax beyond client codes [S. 98, 99]**

All Securities Transaction Tax (STT) collected through a Member could be made under a particular client code only which was provided by members/brokers and not by NSE. Where SEBI issued circular to assessee NSE for using two client codes, one for sale and second for purchase in case of Foreign Institutional Investors (FIIs), if brokers/members did not take any separate client code, then assessee could not be held responsible, because assessee had already intimated/circulated that each and every broker/member should in such cases take two client codes. Assessee was only required to see that transactions of purchase and sale had undertaken through particular client codes or not and there was no mechanism provided under Act or rules that NSE should mandatorily collect STT beyond client codes. Thus, NSE could not be held liable for any alleged short-deduction of STT. (AY. 2005-06 to 2009-10)

National Stock Exchange v. Addl. CIT (2016) 158 ITD 850 / 178 TTJ 409 / 136 DTR 49 (Mum.)(Trib.)

Wealth-tax Act, 1957

S. 2. Definitions

S. 2(e) : Assets – Net wealth – Where the possession and control of the property vests with the assessee to the exclusion of everyone else and it is the assessee who is exploiting the property for its own purposes, it is not open to the assessee to contend that the property in question does not belong to it [S. 4] 2533

Allowing the appeal of revenue the Court held that where control and possession of land and building leased out by development authority DDA vested with assessee to exclusion of everyone else and it was also exploiting property for its own purpose, value of said property would be included in net wealth of assessee even though lease deed of property had not been executed yet by DDA in assessee's favour. (AY. 1989-90 to 1991-92)

CWT v. Mohan Exports India P. Ltd. (2016) 387 ITR 252 / 70 taxmann.com 220 (Delhi) (HC)

S. 2(ea) : Assets – Urban land-Exclusions – Land occupied by any building "which has been constructed" with approval of appropriate authority – Means building whose construction is complete – Not building which is being constructed – The land on which a building is under construction is liable to wealth tax 2534

The assessee HUF was the owner of land. He entered into various development agreements for construction of residential flats. The assessee contended that he continued to be the owner of land till the sale of flats. The WTO held that the land in question was urban land hence liable to tax under wealth tax Act. Tribunal held that the land owned by the assessee was exempt from Wealth-tax Act in terms of clause (ii) of Explanation 1(b) to section 2(ea)(v). High Court reversed the order of Tribunal on the ground that as the building had not been constructed and was still under construction during the assessment year in question. On appeal the Supreme Court also held that Land occupied by any building "which has been constructed" with approval of appropriate authority, means building whose construction is complete and not building which is being constructed. (AY. 2000-01)

Giridhar G. Yadalam v. CWT (2016) 384 ITR 52 / 237 Taxman 392 / 284 CTR 433 / 132 DTR 289 (SC)

Editorial : Arising out of order in CWT v. Giridhar G. Yadalam (2007) 163 Taxman 372 / (2010) 325 ITR 233 (Ker.)(HC)

S. 2(ea) : Assets – Ownership of asset disputed – Right to income in dispute – Asset not includible in net wealth of assessee 2535

Dismissing the appeal of revenue the Court held that the Tribunal was justified in holding that the provision of Wealth-tax Act did not stand attracted yet. That too would have to await the final decision in the appellate proceedings emanating from the order of the Additional District Judge in the proceedings under section 31(2) of the Land Acquisition Act. (AY 1985-86 to 1992-93)

CWT v. Suman Dhamija (2016) 382 ITR 343 (Delhi)(HC)

2536 **S. 2(ea) : Assets – Urban land – Structure standing over the land during relevant period being a half/semi-finished one could not come within the exclusionary clause so as to take it out from ambit of urban land**

Assessee company initially engaged in business of manufacturing soft drinks. Later on, it was sold. However, land along with business premises remained under ownership and possession of assessee. Assessee entered into an agreement with developer, according to which, old building was to be demolished by assessee and new commercial complex was to be developed by developer. Assessing Officer treated property in question as 'Urban Land' under section 2(ea)(v). Commissioner (Appeals) upheld order of Assessing Officer. Tribunal held that structure standing over the land during relevant period being a half/semi-finished one could not come within the exclusionary clause so as to take it out from ambit of urban land under section 2(ea). (AY. 2003-04 and 2004-05)

Hyderabad Bottling Co. Ltd. v. ACIT (2015) 154 ITD 470 / 174 TTJ 898 / 130 DTR 10 (Mum.)(Trib.)

S. 5. Exemption in respect of certain assets

2537 **S. 5(1)(i) : Exemption – Refund of wealth tax paid – On the date of belated filing of the WT Return, the assessee was fully aware that it did not comply with the essential conditions for claiming exemption. Therefore they were not entitled for refund wealth -tax voluntarily [S. 10(2)(b), 14(1)]**

Petitioner was a charitable Trust registered u/s. 12A(a) of the IT Act, 1961. The Petitioner Trust was holding shares of Bajaj Auto Ltd. as on 31/3/1991. In terms of s. 11(5) of IT Act r.w.s. 13(1)(d) of the IT Act, the shares held by charitable trust were required to be invested in conformity or modes that had been specified in S. 11(5) of IT Act, failing the exemption provided to the charitable trusts from payment of income tax would be forfeited. In view of amendment in s. 13(1)(d) of IT Act, it filed a revised return of Income on 18/6/1992 claiming exemption u/s. 11 of IT Act. Further Petitioner filed belated wealth Tax Returns for AY. 1991-92 under protest on 26/11/1993 disclosing certain amount of wealth. Petitioner paid self assessment tax, including interest for late filing of return, the Petitioner claimed that it was entitled to exemption u/s. 5(1)(i) of WT Act. On appeal in HC, Hon'ble HC dismissed assessee's appeal and held that conduct of assesee in filing the WT return belatedly and much after date by which it was required to disinvest the shares held in the prohibited modes and the fact that it did not do so, should disentitle it to any of the reliefs prayed for. On the date of belated filing of the WT Return, the assessee was fully aware that it did not comply with the essential conditions for claiming exemption. Therefore they were not entitled for refund wealth-tax voluntarily. (AY. 1991-92)

Wular Trust v. ADIT (WT(E) (2016) 134 DTR 359 (Delhi)(HC)

S. 17. Wealth escaping assessment

2538 **S. 17 : Reassessment – Reassessment only for examining correctness of claim was held to be not proper [S. 2(ea)]**

Allowing the appeal the Court held that; in the absence of any specific meaning ascribed to the expression "industrial purposes" by the Act, it would be safe to treat the banking

activity carried on by the assessee as an industrial enterprise and, the usage of any vacant land held by it as falling within the expression "industrial purposes" and, hence, for a period of two years from the date of acquisition of such vacant urban land, it was liable to be kept outside the purview of the expression "asset" described under section 2(ea) of the Act. No attention had been paid by any of the three authorities, who dealt with the case of the assessee, in this regard. That the proviso to rule 14 would be applicable where it is not possible to calculate the amount of debt that is utilised for purposes of acquiring each of the assets and the formula contained therein brought out the theory of proportionate liability and the principle that would become applicable. Since more than fifteen years had elapsed, the court found that no useful purpose would be served in remanding the matter and restored the original order of the Assessing Officer. (AY. 1999-2000, 2000-01, 2001-02)
Karur Vysya Bank Ltd. v. CIT (2016) 388 ITR 37 / 74 taxmann.com 69 / (2017) 150 DTR 375 (Mad.)(HC)

Finance Act, 1983 (1983) 142 ITR 41 (St.)

S. 40. Revival of levy of wealth tax in the case of closely held companies

S. 40 : Net wealth – Leasehold interest in the land is to be considered while computing the net wealth of the assessee (S. 40 Finance Act, 1983) 2539
Assessee had taken a land, situated at Pimpri, on lease from MIDC. Out of the total land admeasuring 9,605 sq.m., part of the land admeasuring 2,175 sq.m. was vacant. Assessee did not include the land in the net wealth computed for the purpose of wealth tax on the ground that definition of asset u/s. 40 of Finance Act, 1983 did not include any interest held in the land and secondly, the land did not “belong” to the assessee. Assessing Officer assessed the leasehold interest in the land to wealth tax and completed the assessment. The CIT(A) and Tribunal confirmed the order of the AO. On appeal, the High Court held that the definition includes land other than agriculture land and the proviso to section 40(3)(v) uses the word “held” and not “owned” by the assessee. Therefore, leasehold interest is assessable to wealth tax. The High Court also held that the words “belonging to” have been used to include assests in possession without full ownership but having domain over it to exercise powers which would otherwise vest in the owner. Therefore, leasehold land held by the assessee belongs to the assessee and is exigible to wealth tax. (AY. 1988-89)
Jai Hind Sciaky Ltd. v. Dy. CIT (2016) 383 ITR 25 / 130 DTR 177 / 286 CTR 76 (Bom.)(HC)

Interpretation of taxing statutes

2540 **Beneficial provisions**

Beneficial provisions of the law must be construed liberally. While interpreting a beneficial legislation, the rule of liberal construction should be preferred over the rule of strict interpretation, and, therefore, an effort must be made to see how the benefit can be provided to the person claiming it sincerely and genuinely. An interpretation that achieves the object of the legislation should be preferred over the one that tends to frustrate it, and the one which takes in a direction to find out how the benefit can be denied. Thus, for appreciating the true meaning of the terms used in the section, an expression of wider amplitude may be preferred in comparison to a narrower one while defining the scope and boundaries of the benefits intended to be provided by the Legislature. A narrow minded approach or myopic view while examining the eligibility of deduction may cause undue hardship to eligible persons and may frustrate the object of legislation. Purposive construction is a well accepted rule of interpretation which says that the courts must look upon the object which the statute seeks to achieve, especially while interpreting any beneficial legislation. If there is an ambiguity, a purposive approach for interpreting the Act is necessary. If two views are possible, one that effectuates the purpose or intendment of the provision and the other that frustrates it, the former must be preferred. Every effort should be made to make a purposive construction with a view to effectuate the purpose and object of the statutory provision. (AY. 2001-02, 2002-03)

Sunil Gavaskar v. ITO (IT) (2016) 47 ITR 243 / 177 TTJ 500 / 134 DTR 113 (Mum.)(Trib.)

2541 ***Casus omissus***

There is no presumption that a *casus omissus* exists and a court should avoid creating a *casus omissus* where there is none. It is a fundamental rule of interpretation that courts would not fill the gaps in a statute, their functions being to declare or decide the law.

Babita Lila v. UOI (2016) 387 ITR 305 / 288 CTR 489 / 243 Taxman 258 (SC)

2542 **Conflict between welfare legislation and tax legislation – Welfare legislation will prevail**

If there is a conflict between a social welfare legislation and a taxation legislation, then, the social welfare legislation should prevail since it sub-serves larger public interest. The Motor Vehicles Act, 1988 is one such legislation which has been passed with a benevolent intention for compensating the accident victims who have suffered bodily disablement or loss of life and the Income-tax Act which is primarily intended for tax collection by the State cannot put spokes in the effective and efficacious enforcement of the Motor Vehicles Act.

Managing Director, Tamil Nadu State Transport Corpn (Salem) Ltd. v. Chinnadurai (2016) 385 ITR 656 / 240 Taxman 162 / 142 DTR 65 / 290 CTR 297 (Mad.)(HC)

Finance Ministers announcement in parliament – The fact that the Finance Minister announced a concession in Parliament does not entitle the assessee to relief if the same is not set out in the Finance Act [Constitution of India, Art. 14] 2543

(i) The whole thrust of the appellant is that the proposals of the Finance Minister were duly approved by the Parliament. No doubt, the appellant has placed before this Court the proposals of the Finance Minister which discloses the intention of the Government but there is no material placed before us to demonstrate that the budget proposals are duly accepted by the Parliament. It is an admitted fact that pursuant to the proposals, the Finance Act was passed by the Parliament wherein for the goods specified under Tariff Sub-Heading 2208.10, particular tariff was specified. We are unable to agree with the argument advanced by the appellant for the reason that he is unable to make note of the difference between a proposal moved before the Parliament and a statutory provision enacted by the Parliament, because the process of Taxation involves various considerations and criteria.

(ii) Every legislation is done with the object of public good as said by Jeremy Bentham. Taxation is an unilateral decision of the Parliament and it is the exercise of the sovereign power. The financial proposals put forth by the Finance Minister reflects the Governmental view for raising revenue to meet the expenditure for the financial year and it is the financial policy of the Central Government. The Finance Minister's speech only highlights the more important proposals of the budget. Those are not the enactments by the Parliament. The law as enacted is what is contained in the Finance Act. After it is legislated upon by the Parliament and a rate of duty that is prescribed in relation to a particular Tariff Head that constitutes the authoritative expression of the legislative will of Parliament. Now in the present facts of the case, as per the Finance Bill, the legislative will of the Parliament is that for the commodities falling under Tariff Head 2208.10, the tariff is ₹ 300/- per litre or 400% whichever is higher. Even assuming that the amount of tax is excessive, in the matters of taxation laws, the Court permits greater latitude to the discretion of the legislature and it is not amenable to judicial review. In view of the foregoing discussion, we are unable to concur with the submission of the appellant that the budget proposals are duly passed and approved by the Parliament and moreover, if the appellant is aggrieved by the particular tariff prescribed under the Finance Act and the same is contrary to the approved budget proposals, he ought to have questioned the same if permissible. (Civil Appeal Nos. 4676-4677 of 2013, dt 22.07.2016)

Amin Merchant v. Chairman CBEC (SC); www.itatonline.org

Finance Ministers speech – Aids to construction – Budget speech of Finance Minister 2544

The speech of a Minister is relevant in so far it gives the background for the introduction of a particular provision. It is not determinative of the construction of the provision, but gives the render an idea as to what was in Minister's mind when he sought to introduce it.

CIT v. Meghalaya Steel Ltd. (2016) 383 ITR 217 / 132 DTR 273 / 284 CTR 321 / 238 Taxman 559 (SC)

2545 **Heading of section**

Section 153A of the Income-tax Act, 1961, bears the heading "Assessment in case of search or requisition". It is well settled that the heading of the section can be regarded as a key to the interpretation of the operative portion of the section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning.

PCIT v. Saumya Construction P. Ltd. (2016) 387 ITR 529 (Guj.)(HC)

2546 **Limitation – Practical and rational construction – Limitation [S. 158BE]**

Court held that a provision relating to limitation must be strictly construed. As a general rule, therefore, when there is no stay of the assessment proceedings passed by the Court, Explanation 1 to section 158BE of the Act may not be attracted. However, this general statement of legal principle has to be read subject to an exception in order to interpret it rationally and practically.

VLS Finance Ltd. v. CIT (2016) 384 ITR 1 / 286 CTR 146 / 134 DTR 305 / 239 Taxman 404 (SC)

Editorial : Decision in VLS Finance Ltd. v. CIT (2007) 289 ITR 286 (Delhi)(HC) is affirmed. Review petition was dismissed VLS Finance Ltd. v. CIT (2016) 386 ITR 407 (SC)

2547 ***Obiter dicta* – Rule of consistency – Court stated that the how revenue casually takes up the important matter – Copy of order was sent to Chairman CBDT, Principal Chief Commissioner [S. 145, 260A]**

Court has made observation that though 95% additions were deleted by the Tribunal, the Revenue has neither filed an appeal nor cross objection when the question of law was admitted by High Court. Court also observed that "we need not comment anything further except to bring to the knowledge of the higher officials of Revenue as to how casually important matters like this are taken care of and seriousness which should be attached to such matters is taken lightly. While appeals which have hardly any important are being filed as a matter of routine."

Obiter dicta : It is the prerogative of the Revenue to challenge or not to challenge the orders of the Commissioner (Appeals)/Income Tax Appellate Tribunal to a higher forum but there should be proper justification and reasoning when a decision is taken not to challenge the deletion of heavy additions made by the Assessing Officer. Copy of order was sent to Chairman CBDT, Principal Chief Commissioner (AY. 2000-01, 2001-02)

Chaturbhuj Manoj Kumar v. CIT (2016) 388 ITR 194 (Raj.)(HC)

Rajaram and Ors v. CIT (2016) 388 ITR 194 (Raj.)(HC)

Hazariram and Ors v. CIT (2016) 388 ITR 194 (Raj.)(HC)

2548 **Precedent – Decision of one High Court not binding on another**

The decision of one High Court is not a binding precedent upon another High Court and at best can only have persuasive value.

Humayun Suleman Merchant v. CCIT (2016) 387 ITR 421 / 242 Taxman 189 / 140 DTR 209 (Bom.)(HC)

Precedent – Supreme Court – Decision of Supreme Court on particular set of facts – No change in facts or law in subsequent year – Appellate Tribunal cannot disregard decision and arrive at contrary conclusion 2549

On the same transactions and same set of facts reaching a different conclusion than that reached by the Supreme Court was not possible and was impermissible. The Tribunal's order was vitiated by serious errors of law apparent on the face of the record. It was also perverse for it ignored vital materials which had been noted extensively in the judgment of the Supreme Court. None of the amendments post the Supreme Court judgment would enable the Department to urge that the position as noted in the Supreme Court judgment no longer subsisted. There were no capital gains. Since there was no income the provisions of section 92B read with section 92F(v) were not applicable. (AY. 2008-09)

Vodafone India Services P. Ltd. v. CIT (2016) 385 ITR 169 / 284 CTR 441 / 69 taxmann. com 283 (Bom.)(HC)

Editorial : The Supreme Court has granted special leave to the Department to appeal against this judgment CIT v. Vodafone India Services P. Ltd. (2016) 384 ITR 182 (St.)

Precedent – Binding precedent – Decision of High Court binding on income-tax authorities and appellate authorities within its jurisdiction. [Contempt of Courts Act, 1971 [S. 2(b)] 2550

The law laid down by the High Court must be followed by all authorities and subordinate Tribunals and they cannot ignore it either in initiating proceedings or deciding the rights involved in such a proceeding. If in spite of the earlier exposition of law by the High Court having been pointed out and attention being pointedly drawn to that legal position, proceedings are initiated, it must be held to be a wilful disregard of the law laid down by the High Court and would amount to civil contempt as defined in section 2(b) of the Contempt of Courts Act, 1971.

Kaira District Co-op. Milk Producers Union Ltd v. Dy. CIT (2016) 386 ITR 633 (Guj.)(HC)

Precedent – High Court – Decision of High Court on question binding on co-ordinate Bench – That decision did not involve large tax effect and therefore not taken on appeal – Not a ground not to not follow it 2551

Held, dismissing the appeal, that if the Tribunal had followed the decision of the court, no substantial question of law would arise for consideration in the appeal. The Department's contention that since the tax amount was less in the earlier case and the matter had been not carried before the Supreme Court, the efficacy of the decision of the court would be lost was not tenable. When on the same issue a co-ordinate Bench of the court had already taken a view, departure therefrom was not permissible unless there were strong and valid reasons or the Supreme Court had taken a different view. When the issue was covered by the decision of the court, no substantial question of law would arise for consideration. (AY. 2008-09)

PCIT v. C. Gopalaswamy (2016) 384 ITR 307 (Karn.)(HC)

2552 **Precedent – High Court – Effect to be given not to be deferred till decision of Supreme Court**

When an issue is covered by the decision of the court, effect to be given to it cannot be deferred until such time as the Supreme Court ultimately decides the matter. (AY. 2006-07 to 2008-09)

CIT v. Tata Elxi Ltd. (2016) 382 ITR 654 (Karn.)(HC)

2553 **Reasonable interpretation**

If a strictly literal interpretation of the statute leads to a manifestly unreasonable and absurd consequence, the literal interpretation would have to make way for a reasonable interpretation which avoids such absurdity and mischief and makes the provision rational and sensible, and in accordance with the object and purpose of the statute, even if such interpretation results into doing of "some violence" to the language used by the Legislature. (AY. 1980-81)

Somaiya Organo Chemicals Ltd v. CIT (2016) 388 ITR 423 / 290 CTR 30 / 142 DTR 361 (Bom.)(HC)

2554 **Strict construction – *Casus omissus***

The principles of law have been settled that the fiscal statute should be construed strictly as applicable only to taxing provisions such as surcharge provisions or a provision imposing penalty. Any liberal construction of the statute cannot be permissible under law.

It is well settled that in the matter of interpretation of taxing statutes, courts would not be justified in interpreting some other expressions, which the legislation thought to omit. *Casus omissus* cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if a literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the Legislature.

Ashok Kumar Sethi v. Dy. CIT (2016) 387 ITR 375 / 244 Taxman 174 (Mad.)(HC)

2555 **Strict interpretation**

In interpreting a fiscal statute one must have regard to the strict letter of law and intent can never override the plain and unambiguous letter of the law.

Humayun Suleman Merchant v. CCIT (2016) 387 ITR 421 / 242 Taxman 189 / 140 DTR 209 (Bom.)(HC)

2556 **Strict construction**

In a taxing Act, one has to look merely at what is clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be implied. One can only look fairly at the language used.

CIT v. Yokogawa India Limited (2017) 391 ITR 274 / 145 DTR 1 / 291 CTR 1 / 244 Taxman 273 (SC)

The Constitution of India

Art. 226. Power of High Courts to issue certain writs

Art. 226 : Writ – Existence of alternative remedy – Writ will not ordinarily issue – Appeal filed against assessment order – No allegation of infringement of fundamental rights or lack of jurisdiction – Writ petition not maintainable 2557

When an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. It is true that the existence of another remedy does not affect the jurisdiction of the court to issue a writ; but the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs. *Union of India v. T. R. Varma (1958) SCR 499* relied on.

Considering the fact that the assessee had already availed of the remedy of appeal before the Commissioner (Appeals) against the order in relation to several points, including the point involved in the present case, the court would not exercise its extraordinary jurisdiction, inasmuch as, interference by the court would result in examination of the same order, may be, on different points by the Commissioner (Appeals) as well as this court, leading to an anomalous situation. [The Commissioner (Appeals) was directed to hear and decide the appeal as expeditiously as possible, and considering that in earlier years the issue had been decided in favour of the assessee, there shall be no coercive recovery pursuant to the demand notice to the extent of demand pertaining to the addition in question.] (AY. 2012-13)

Kaira District Co-op. Milk Producers Union Ltd v. Dy. CIT (2016) 386 ITR 633 (Guj.)(HC)

Art. 226 : Writ – Assessee, a non-resident shown as beneficiary in Swiss bank account – Reassessment proceedings based on information received by Central Board of Direct Taxes from French Government – Non-co-operation by assessee in obtaining necessary documents from foreign bank – Court will not interfere under writ jurisdiction [S. 147, 148] 2558

Held, that in the normal course, if the assessee had nothing to hide and serious allegations or questions were being raised by the Department about the funds in Swiss bank account, the assessee would have co-operated in obtaining the necessary documents from the bank which would have revealed or given clues as to the source of the monies in the bank. The conduct on the part of the assessee and her uncle in not being forthcoming, led to the conclusion that it was not a fit case to interfere with the orders of the statutory authorities in exercise of writ jurisdiction. (AY. 2006-07)

Soignee R. Kothari v. Dy. CIT (2016) 386 ITR 466 / 285 CTR 230 / 134 DTR 193 (Bom.) (HC)

Allied laws

Advocate Act, 1961

S. 28. Power to make rules

2559 **S. 28(2) : Standards of professional conduct and Etiquette – A Public Interest Litigation (PIL) filed by a lawyer to gain popularity and publicity and attract more clients amounts to an unethical practice of soliciting work and is in violation of the Code of Conduct. The media should not publish the names of the advocates who appeared in any case as it is an indirect method of soliciting work or indulging in advertisement of the professional abilities or skills of the advocates. The media should also not publish the names of the Judges unless it is so essentially required**

A Public Interest Litigation (PIL) filed by a lawyer to gain popularity and publicity and attract more clients amounts to an unethical practice of soliciting work and is in violation of the Code of Conduct. The media should not publish the names of the advocates who appeared in any case as it is an indirect method of soliciting work or indulging in advertisement of the professional abilities or skills of the advocates. The media should also not publish the names of the Judges unless it is so essentially required (WP No. 15480 of 2016, dt. 22.08.2016)

S. Baskar Mathuram v. the State of Tamilnadu (Mad.)(HC), www.itatonline.org

Chartered Accountants Act, 1949

2560 **S. 21 : Professional or other misconduct – Carrying on business of company directly and obtaining the loan from the bank was held to be professional misconduct and his name was to be removed from membership register of Council for a period of three years [S. 22]**

A complaint had been lodged by bank that respondent, Chartered Accountant had obtained a term loan from the bank. Report of Disciplinary Committee stated that as a Chartered Accountant respondent was carrying on business directly and his claim that he was merely a director in his professional capacity was incorrect. On reference the Court held that since the findings with reasons given by the Council have not been controverted, in that, the respondent has chosen not to contest the instant proceedings, the findings of the Council are not reopened which are detailed and would rest of crystallizing the same as above. Indeed, professional misconduct under clauses 5, 6, 7 and 8 of Part I of the 2nd Schedule is made out and it is concurred, and thus penalty of removing respondent's name from the membership register of the Council for a period of three years is inflicted upon.

Council of Institute of Chartered Accountants of India v. B. K. Dhingra (2016) 243 Taxman 90 (Delhi)(HC)

S. 22 : Professional misconduct – Disclosure of confidential/privilege information by an auditor which was gathered in course of audit of a company would be a professional misconduct which is liable to penalty [S. 21] 2561

Chartered Accountant had shared information gathered as an auditor of company with third party, it would be a professional misconduct. Since company had tried to defame respondent Chartered Accountant first and he had retaliated, he was to be reprimanded. Held that he was liable to penalty.

Council of the Institute of Chartered Accountants of India v. Devinder kumar Jain (2016) 242 Taxman 41 (Delhi)(HC)

S. 22 : Professional misconduct – Not detecting of fraudulent transactions in bank was held to be professional misconduct and liable to penalty [S. 21] 2562

Taking into account said fact and that we are deciding the reference in the year 2016 we are of the opinion that accepting the decision of the Council at its meetings held on January 16 and 17, 2011 in so far it concludes the respondent guilty of misconduct contemplated by clause (7) of Part I of Second Schedule read with sections 21 and 22 of the Chartered Accountants Act, 1949, ends of justice would suffice if penalty of severe reprimand contemplated by section 21(6)(c) of the Chartered Accountants Act, 1949 is inflicted upon the respondent. Not detecting of fraudulent transactions in bank was held to be professional misconduct.

Council of the Institute of Chartered Accountants of India v. Uma Shanakar Jha (2016) 242 Taxman 49 (Delhi)(HC)

S. 22 : Professional misconduct – Chartered Accountant as a liquidator – Levy of penalty was held to be not justified as he was not acting as chartered Accountant [S. 21] 2563

As the assessee was acting as individual in his dealings with complainant which were purely commercial, hence while selling shares held by him, assessee was not acting as Chartered Accountant, and thus impugned conduct would not be a misconduct for the purposes of the Act and penalty would not be imposable.

Council of the Institute of Chartered Accountants of India v. Gurvinder Singh (2016) 242 Taxman 36 (Delhi)(HC)

S. 22 : Professional misconduct – Professional who threatened client would certainly committed misconduct because act was of kind which was not expected by members of civil society to be committed by professional – Liable to penalty [S. 21] 2564

A professional who threatens a client would certainly commit a misconduct because the act is of a kind which is not expected by members of a civil society to be committed by a professional and penalty envisaged thereby would be justified. Liable to penalty.

Council of the Institute of Chartered Accountants of India v. Mahesh Kumar Gupta (2016) 242 Taxman 44 (Delhi)(HC)

S. 22 : Professional misconduct – Held guilty of professional misconduct as he did not provide services after receiving advance fee [S. 21] 2565

The conduct of the respondent justifies the proposed penalty.

We answer the reference in the affirmative holding that the respondent is guilty of misconduct and we impose the penalty of suspension of the name of the respondent No. 1 Rakesh Verma from the Register of Members for a period of one year. Held guilty of professional misconduct as the CA did not provide services after receiving advance fee of ₹ 2.50 lakhs.

Council of the Institute of Chartered Accountants of India v. Rakesh Verma (2016) 242 Taxman 55 (Delhi)(HC)

The Code of Criminal Procedure, 1973

S. 177. Ordinary place of inquiry and trial

S. 177 : Offences and prosecution – Court – Territorial jurisdiction – False statement during search – Single and combined search operation undertaken simultaneously at Bhopal and Aurangabad – Offence could be tried by Courts at both places [S. 132, 277, CRPC, S. 178, 179] 2566

Dismissing the petition the Court held that Single and combined search operation undertaken simultaneously at Bhopal and Aurangabad. Offence could be tried by courts at both places

Babita Lila v. UOI (2016) 387 ITR 305 / 288 CTR 489 / 73 taxmann.com 32 (SC)

S. 195. Prosecution for contempt of law full authority of public servants, for offences against public justice and for offences relating to documents given in evidence

S. 195 : Prosecution – Territorial jurisdiction and competence of the Deputy Director of Income-tax to lodge a complaint for evasion of tax – Allowing the petition the Court held that the complaint is unsustainable in law having been filed by an authority, incompetent in terms of section 195 of the Code [Income-tax Act 1961, S. 131, 132, 136. Constitution of India, Art 136, Indian Penal code, S. 109, 191] 2567

The essence of the discord is the competence of the Deputy Director, Income Tax (Investigation)-I, Bhopal (M.P.) to lodge the complaint. Whereas, according to the appellants, he is not the authority or the forum before which appeals would ordinarily lie from the actions/decisions of the I.T.Os who had recorded their statements, as mandated by section 194 (4) of the Code, it is urged on behalf of the respondent that having regard to the overall scheme of the Act, he indeed was possessed of the appellate jurisdiction to maintain the complaint. As nothing much turns on the ingredients of the offences under sections 193, 196, 200 IPC *qua* the issue to be addressed, after detailed discussion analysing various provisions the Court held that though the concept of "cause of action" identifiable with a civil action is not routinely relevant for the determination of territoriality of criminal courts as had been ruled by this Court in *Dashrath Rupsingh Rathod vs. State of Maharashtra and Another, (2014) 9 SCC 129*, their Lordships however were cognizant of the word "ordinarily" used in section 177 of the Code to acknowledge the exceptions contained in section 178 thereof. Section 179 also did not elude notice. Be that as it may, on a cumulative reading of sections 177, 178 and 179 of the Code in particular and the inbuilt flexibility discernible in the latter two provisions, we are of the comprehension that in the attendant facts and circumstances of the case where to repeat, a single and combine search operation had been undertaken simultaneously both at Bhopal and Aurangabad for the same purpose, the alleged offence can be tried by courts otherwise competent at both the aforementioned places. To confine the jurisdiction within the territorial limits to the court at Aurangabad would amount, in our view, to impermissible and illogical truncation of the ambit of sections 178 and 179 of the Code. The objection with regard to the competence of the Court of the Chief Judicial

Magistrate, Bhopal is hereby rejected. The inevitable consequence of the determination in its entirety however is that the complaint is unsustainable in law having been filed by an authority, incompetent in terms of section 195 of the Code.
Babita Lila v. UOI (2016) 387 ITR 305 / 243 Taxman 258 / 140 DTR 241 / 288 CTR 489 (SC)

Customs Act, 1962

S. 110 : Accountability – Strictures – Customs officials directed to pay costs of ₹ 14 lakh + interest @ 9% p.a. from personal account and to face disciplinary action for "high-handedness", arbitrariness" and seeking to "hoodwink" Court 2568

Honourable Court explained the accountability of the public officers by referring various Judgments of Apex Court and held that when this Court has found that the petitioners have been put to a loss of at least ₹ 14,69,650/- on account of complete deterioration of quality of split betel nuts solely on account of deliberate laches on the part of the officials of the Custom Department it would direct respondent No. 2 to pay a sum of ₹ 14,69,650/- along with interest at the rate of 9% per annum for the period 28.3.2013, the date on which the order of provisional release of the seized article was passed by the competent authority to the order directing release of the seized articles dated 9.8.2014 within a period of three months from to AY. The Court also observed that; It is, however, made clear that such amount, which has to be paid by way of compensation for the loss caused to the petitioners on account of delay of nearly 1½ years in release of the seized articles, shall be recovered from the erring officials and for the purposes of fixing individual responsibility on such erring officials this Court would direct the Chairman of Central Board of Excise and Customs Department of Revenue, New Delhi to get an enquiry conducted by an Officer not below in the rank of Chief Commissioner of Customs who must not be posted and/or associated in any manner with Patna Zone of the Custom Department. Upon completion of such enquiry and upon submission of enquiry report appropriate action under the orders of Chairman Central Board of Excise and Customs, New Delhi be taken against erring officials not only for recovery of the amount directed to be paid under this judgment to the petitioners but also for initiating and concluding disciplinary proceedings by the competent authority against the erring officials of Customs Department of Patna zone who are found to have caused delay in release of the seized articles of the petitioners in any part of period in between 28.3.2013 to 9.8.2014. This whole exercise must be completed within a period of six months from the date of receipt of this judgment by the Chairman of the Central Board of Excise and Customs, New Delhi, who having taken his action as directed above shall also submit his action taken report to the registry of this Court on or before 30th of June, 2016. With the aforementioned observations and directions, this writ application is allowed with a cost of ₹ 25,000/- quantified by this Court for coercing and compelling the petitioners to file this writ petition for release of their seized betel nuts to be paid by the Respondents to the petitioners within a period of three months from today. It is, however, made clear that irrespective of initiation and conclusion of the aforesaid proceedings against the erring officials of Customs department of Patna zone by the Chairman of Central Board of Excise and Customs, the payment of the amount of ₹ 14,69,650/- along with interest at the rate of 9% per annum from 28.3.2013 to 9.8.2014 must be made to the petitioners within a period of three months from today, failing which the amount of interest on the amount of ₹ 14,69,650/- shall stand enhanced from 9% per annum to 18% per annum from 28.3.2013 till the date of its actual payment. Let a copy of this judgment be sent immediately to not only the Chairman of Central Board of Excise and Customs Department of Revenue, Ministry of Finance, New Delhi, but also

to the Commissioner of Customs (Preventive), respondent No. 2, for its compliance in letter and spirit. (Civil WP. No. 13382 of 2014, dt. 30.11.2015)
Overseas Enterprises v. UOI (Patna)(HC); www.itatonline.org

Hindu Succession Act, 1956

S. 6. Devolution of interest in coparcenary property

S. 6 : Ancestral property – Formation of a HUF by the surviving members of the deceased [Amendment of 2005] 2569

(a) The law, therefore, insofar as it applies to joint family property governed by the Mitakshara School, prior to the amendment of 2005, could therefore be summarized as follows:—

(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (*vide* Section 6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener who is governed by section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of section 6 proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants.

(b) Applying the law to the facts of this case, it is clear that on the death of Jagannath Singh in 1973, the joint family property which was ancestral property in the hands of Jagannath Singh and the other coparceners, devolved by succession under Section 8 of the Act. This being the case, the ancestral property ceased to be joint family property on the date of death of Jagannath Singh, and the other coparceners and his widow held the property as tenants in common and not as joint tenants. This being the case, on the date of the birth of the appellant in 1977 the said ancestral property, not being joint family property, the suit for partition

of such property would not be maintainable. (Civil Appeal No. 2360 of 2016, dt. 02.03.2016)

Uttam v. Saubhag Singh, AIR 2016 SC 1169, 2016 (3) Bom CR 83 / (2016) 286 CTR 15 / 134 DTR 145 (SC)

2570 **S. 6 : The Hindu Succession (Amendment Act), 2005 which came into effect on 09.09.2015 and by which daughters in a joint Hindu family, governed by Mitakshara law, were granted statutory right in the coparcenary property (being property not partitioned or alienated) of their fathers applies only if both the father and the daughter are alive on the date of commencement of the Amendment Act**

(i) An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective. In the present case, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the Amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.

(ii) Contention of the respondents that the Amendment should be read as retrospective being a piece of social legislation cannot be accepted. Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the Amendment applicable on and from its commencement and only if death of the coparcener in question is after the Amendment. Thus, no other interpretation is possible in view of express language of the statute. The proviso keeping dispositions or alienations or partitions prior to 20th December, 2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6 (5) by being limited to a transaction of partition effected after 20th December,2004. Notional partition, by its very nature, is not covered either under proviso or under sub-section 5 or under the Explanation.

(iii) Interpretation of a provision depends on the text and the context (*RBI v. Peerless (1987) 1 SCC 424, para 33*). Normal rule is to read the words of a statute in ordinary sense. In case of ambiguity, rational meaning has to be given (*Kehar Singh v. State (1988) 3 SCC 609*). In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given (*District Mining Officer v. Tata Iron and Steel Co. (2001) 7 SCC 358*).

(iv) There have been number of occasions when a proviso or an explanation came up for interpretation. Depending on the text, context and the purpose, different rules of interpretation have been applied (*S. Sundaram Pillai v. R. Pattabiraman (1985) 1 SCC 591*).

(v) Normal rule is that a proviso excepts something out of the enactment which would otherwise be within the purview of the enactment but if the text, context or purpose so require a different rule may apply. Similarly, an explanation is to explain the meaning of words of the section but if the language or purpose so require, the explanation can be so interpreted. Rules of interpretation of statutes are useful servants but difficult masters (*Keshavji Ravji & Co. v. CIT (1990) 2 SCC 231*). Object of interpretation is to discover the intention of legislature.

(vi) In this background, we find that the proviso to section 6(1) and sub-section (5) of Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to 20th December, 2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to 20th December, 2004 is not to make the main provision retrospective in any manner. The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced. Main provision of the Amendment in section 6(1) and (3) is not in any manner intended to be affected but strengthened in this wAY. Settled principles governing such transactions relied upon by the appellants are not intended to be done away with for period prior to 20th December, 2004. In no case statutory notional partition even after 20th December, 2004 could be covered by the Explanation or the proviso in question.

(vii) Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation. (Civil Appeal No. 7217 of 2013, dt. 24.11.2015)

Prakash v. Phulvati (SC); www.itatonline.org

S. 6 : Co-parcener – Eldest daughter is entitled to be Karta of the HUF – Pursuant to the amendment to the Hindu Succession Act, 1956 by the Hindu Succession (Amendment) Act, 2005 all rights which were available to a Hindu male are now also available to a Hindu female. A daughter is now recognised as a co-parcener by birth in her own right and has the same rights in the co-parcenary property that are given to a son. Consequently, the eldest daughter is entitled to be the Karta of the HUF. 2571

The High Court had to consider whether the plaintiff, being the first born amongst the co-parceners of the HUF property, would by virtue of her birth, be entitled to be its Karta. HELD by the High Court upholding the claim:

(i) It is rather an odd proposition that while females would have equal rights of inheritance in an HUF property, this right could nonetheless be curtailed when it comes to the management of the same. The clear language of Section 6 of the Hindu Succession Act does not stipulate any such restriction. Therefore, the submissions on behalf of defendant Nos. 1 to 4 which are to the contrary are untenable.

(ii) The impediment which prevented a female member of a HUF from becoming its Karta was that she did not possess the necessary qualification of co-parcenership. Section 6 of the Hindu Succession Act is a socially beneficial legislation; it gives equal rights of inheritance to Hindu males and females. Its objective is to recognise the rights of female Hindus as co-parceners and to enhance their right to equality apropos succession. Therefore, Courts would be extremely vigilant apropos any endeavour to curtail or fetter the statutory guarantee of enhancement of their rights. Now that this disqualification has been removed by the 2005 Amendment, there is no reason why Hindu women should be denied the position of a Karta. If a male member of an HUF, by virtue of his being the first born eldest, can be a Karta, so can a female member. The Court finds no restriction in the law preventing the eldest female co-parcener of an HUF, from being its Karta. The plaintiff's father's right in the HUF did not dissipate but was inherited by her. Nor did her marriage alter the right to inherit the co-parcenary to which she succeeded after her fathers demise in terms of Section 6. The said provision only emphasises the statutory rights of females. Accordingly, issues 5, 6 and 8 too are found in favour of the plaintiff. In these circumstances, the suit is decreed in favour of the plaintiff in terms of the prayer clause, and she is declared the Karta of "D.R. Gupta & Sons (HUF)". (CS (OS) 2011/2006, dt. 22.12.2015)

Sujata Sharma v. Manu Gupta (2016) IIAD (Delhi) 312 / 226 (2016) DLT 647 (Delhi)(HC); www.itatonline.org

Indian Penal Code, 1860

S. 408. Criminal breach of trust by clerk or servant

S. 408 : Corruption – Strictures – High Court Shocked at Loot of Taxpayers Funds by Corrupt Babus – Calls For Non-Cooperation Movement by Taxpayers to Eradicate "Hydra Headed Monster" of corruption – If corruption continues taxpayers may resort to refuse to pay taxes by 'non-cooperation movement' [S. 4, Code of Criminal Procedure, 1973] 2572

Hon'ble Justice A. B. Chaudhari of the Nagpur Bench of the Bombay High Court has passed severe strictures against the Government for turning a blind eye to the rampant corruption in the country. The learned Judge lamented that "It shocks one and all as to the manner in which the taxpayers' money is being swindled, misappropriated and robbed by such unscrupulous holders of posts".

He also pointed that corruption has become the order of the day over the past few decades and that taxpayers are helpless victims of the sordid state of affairs.

"Does the taxpayers pay the money to the Government for such kind of acrobatics being played" Justice Chaudhari asked in a rhetorical manner.

He also lamented that ethics and morals have taken a back seat in modern India's scheme of things. He opined that to eradicate the "hydra headed monster" of corruption, citizens have to come together to tell their Governments that they have had enough. He also recommended that taxpayers' may have to resort to refuse to pay taxes by a "non-cooperation movement".

The learned Judge also found fault with the attitude of the employees' unions who are otherwise very vigilant about their rights. He expressed surprise that the Unions do not "condemn, outcast or demonstrate against their counterpart bureaucracy indulging in corruption" and on the contrary support their misdeeds.

"The reply filed on behalf of the State shows misappropriation and embezzlement of amount to the tune of approximately ₹ 385 crores, which is stymieing. It shocks one and all as to the manner in which the taxpayers' money is being swindled, misappropriated and robbed by such unscrupulous holders of posts. The money was meant for upliftment of the 'Matang' community and instead of that, the political appointee, the Chairman Ramesh Kadam, in league with the Managing Director and the Bank Officers of the Bank of Maharashtra, looted the taxpayers' money. How this huge amount of ₹ 385 crores will come back is a 'million dollar question'.

For the last over two decades, this has become the order of the day and sordid state of affairs; whereas the taxpayers' are merely looking at this grim situation.

Does the taxpayers pay the money to the Government for such kind of acrobatics being played.

Ethics and morals have taken a back seat in modern India's scheme of things. In my considered opinion, corruption can be beaten if all work together.

To eradicate the cancer of corruption the "hydra headed monster", it is now a high time for the citizens to come together to tell their Governments that they have had enough. That is this miasma of corruption. If the same continues, taxpayers' may resort to refuse to pay taxes by 'non-cooperation movement'. It is surprising that the Unions

of Central or State Government employees, whether politically affiliated or otherwise, make demonstrations for demanding the application of VII Pay Commission, but they do not condemn, outcast or demonstrate against their counterpart bureaucracy indulging in corruption. On the contrary, they provide support.

There has been a report in the recent point of time that there are some more Corporations of the State of Maharashtra who have indulged into huge misappropriation of the taxpayers' money in the alike fashion.

Therefore, this Court expects the Director General of Police, MS, Mumbai and rather requests him to take up such cases and find out the veracity of such a claim made in newspapers, and if there is substance, to immediately proceed to take action in all such cases as the taxpayers are in deep anguish. Let the Government as well as mandarins in the corridors of power understand the excruciating pain and anguish of the tax payers, who have been suffering for over two decades in the State of Maharashtra. There is a onerous responsibility on those who govern to prove to the taxpayers that eradication of corruption would not prove for them a "forlorn hope".

Pralhad @Pratap S/o. Tanbaji Pawar v. State of Maharashtra (2016) 238 Taxman 83 (Bom.)(HC)

Sales Tax Tribunal

Sales tax Tribunal – Residential accommodation to members of the Sales tax Tribunal – Severe strictures passed at the attitude of the Government in creating "hurdles and obstacles in the smooth working and functioning of all the tribunals and courts – Copy of this order be forwarded to the Chief Secretary of the State 2573

Severe strictures passed at the attitude of the Government in creating "hurdles and obstacles in the smooth working and functioning of all the Tribunals and Courts" and the fact that the "State has yet to adopt a culture of respect and regard for the judiciary". Directions given that issue of allotment of residential quarters to Tribunal Members should not be kept a "closely guarded secret" but made public. We are not making these observations by restricting the case only to the Sales Tax Tribunal. We would expect these directions and observations to hold good equally for other Courts and Tribunals functional in the State. Let therefore a copy of this order be forwarded to the Chief Secretary of the State. He should invite the attention of all concerned to the above observations. (WP No. 2069 of 2015, dt. 28.06.2016)

Sale Tax Tribunal Bar Association v. The State of Maharashtra (Bom.)(HC); www.itatonline.org

Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976

2574 **S. 2 : Notice issued to wife of convict on basis of income-tax returns – Purchase of properties from agricultural income and foreign remittances made through proper banking channels – No nexus shown between properties and convict or income from illegal activity – Individual properties of relative cannot be forfeited [S. 7(1), Constitution of India, Art. 226]**

Dismissing the writ petition of the Competent Authority against the order of Tribunal which set aside the order, the Court held that it was only when the link or the nexus of the properties with the convict or detenu or to the income from such illegal activity was established, the properties standing in the name of a relative could be forfeited. The Department had accepted the agricultural income and the foreign remittances had been made through proper banking channel. The properties had been purchased from agricultural income and remittances. Upon a perusal of the statement of reasons with the notice it was evident that the entire proceedings had been initiated on the basis of income-tax returns. Indisputably the properties were individual properties without any nexus to the convict and therefore could not be forfeited.

Competent Authority (SAFEM (FOP) and NDPS Act v. M. Khader Moideen (2016) 387 ITR 390 (Mad.)(HC)

Service tax – Finance Act, 1994

Constitutional validity – Parliament was competent to bring within the service tax net the activity of job work involved in the manufacture of alcoholic liquor for human consumption 2575

Petitioner has challenged the levy of service tax on manufacture of alcoholic liquor for human consumption on job basis. HC dismissed the WP and held that challenge to the validity of section 113A(1) of Finance Act, 2009 being which section 65(19) of the Finance Act, 1994 stood amended as also challenge to the validity of section 60B of the Finance Act, 1994 r/w 65B(40) & section 66D of the Finance Act, 1994 as amended by clause (f) of section 107 & cl (2) of section 109 of Finance Act, 2015 was negative. Parliament was competent to bring within the service tax net the activity of job work involved in the manufacture of alcoholic liquor for human consumption.

Carlsberg India (P) Ltd. v. UOI (2016) 139 DTR 289 / 288 CTR 128 (Delhi)(HC)

Service tax

2576 **Constitutional Validity – Service component of composite contract of supply of food and drinks by an air conditioned restaurant within the service tax net, food and drinks by an air conditioned restaurant within the service tax net was constitutionally valid. [Service tax (determination of value) Rules, 2006, r. 2c**

The question of law in WP in HC was whereby the provision of any person by a restaurant by having the facility of air conditioning in any part of its establishment beverages to service tax. Also challenged was the constitutional validity for the declaration that section 66E(i) of Finance Act, 1994 to the extent it seeks to constitute a service portion in any activity of supply of food or other articles as 'declared service' to be bad in law. The Petitioners sought a declaration that r. 2c of service tax (Determination of value Rules, 2006 as invalid. Hon'ble HC dismissed the WP and held that it was not possible to accept the contention of the assessee that parliament lacks legislative competence to enact section 65(105)(zzzzv) with view to bring the service component of composite contract of supply of food and drinks by an air conditioned restaurant within the service tax net, food and drinks by an air conditioned restaurant within the service tax net, provisions of section 65B(105)(zzzzv) r.w.s 66E (i), section 65B(zz) & section 65B(44) as well as r. 2C of Service Tax (determination of value) Rules, 2006 was constitutionally valid. Further section 65(105)(zzzzw) pertaining to levy of service tax on the provision of short term accommodation and the corresponding seeking to operationalise the levy was unconstitutional and invalid.

Federation of Hotels & Restaurants Association of India v. UOI (2016) 139 DTR 321 / 288 CTR 245 (Delhi)(HC)

2577 **S. 65B : Taxable Service – Nature of services – Buying and selling of lottery tickets did not fall within meaning of 'service' u/s. 65B – In absence of privity of contract between petitioner and sellers and buyers, levy of reverse service tax is unsustainable and liable to be struck down – Sub-rule (7C) of Rule 6 of Service Tax Rules, 1994 did not create charge of service tax and was subordinate piece of legislation [S. 66D, 67]**

Petitioner Companies are engaged in the business of sale of paper and online lottery tickets organized by the Government of Sikkim. Petitioner procures the lottery tickets in bulk from the Government and resells the same to the public at large through various agents, stockists, resellers etc. Post amendments in various clauses u/ss. 65B, 66D and 67 of the Finance Act, 1994 by Finance Act, 2015, Petitioner were sought to be covered under the net of service tax. On a writ petition, the HC held that activities carried on by the Petitioners in relation to promotion of marketing, organizing, selling of lottery of facilitating in organizing lottery of any kind in any other manner, would not fall within the meaning of 'service' under Clause (44) of section 65B. Further, in absence of privity of contract between Petitioner and the sellers and buyers down the line after the second tier, levy of reverse service tax is clearly unsustainable and liable to struck down. Further, by insertion of Explanation to Section 66D the main provision, is sought to be expanded, is being *ultra vires* the Finance Act, 1994 and is accordingly struck down. The Sub-Rule (7C) of Rule 6 of the Service Tax Rules, 1994 only provides an optional composite scheme for payment of tax and therefore, does not create a charge of service tax and is a subordinate piece of legislation, hereby stands quashed.

Future Gaming & Hotel Services (P) Ltd. v. UOI (2016) 282 CTR 225 / 129 DTR 275 (Sikkim)(HC)

Circulars/Instructions/ Guidelines – Referencer

Circulars/Instructions/Orders/Press Notes/Releases/Articles/Opinions.

Circular No. 23 of 2015 dt. 28-12-2015 – TDS under section 194A, of the Act on interest on fixed deposit made on direction of courts – Reg. (2016) 380 ITR 16 (St.)

Circular No. 24 of 2015 dt. 31-12-2015 – Recording of satisfaction note under section 158BD/153C of the Act – Reg. (2015) 380 ITR 32 (St.)

Circular No. 25 of 2015 dt. 31-12-2015 – Penalty under section 271(1)(c) wherein additions/disallowances made under normal provisions of the Income-tax Act, 1961 but tax levied under MAT provisions under section 115JB/115JC, for cases prior to assessment year 2016-17 – Reg. (2016) 380 ITR 34 (St.)

Circular No. 1 of 2016 dt. 15th February, 2016 – Clarification of term "initial assessment year" in section 80IB(5) of the Income-tax Act, 1961 (2016) 381 ITR 1 (St.)

Circular No. 2 of 2016 dt. 25th February, 2016 – Benefits of the India-United Kingdom (UK) Double Taxation Avoidance Agreement to UK partnership firms (2016) 382 ITR 8 (St.)

Circular No. 3 of 2016 dt. 26th February, 2016 – Clarification regarding nature of share buy-back transactions under Income-tax Act, 1961 – Regd. (2016) 382 ITR 9 (St).

Circular No. 4 of 2016 dt. 29th February, 2016 – Tax deduction at source (TDS) on payments by broadcasters or television channels to production houses for production of content or programme for telecasting (2016) 382 ITR 12 (St)

Circular No. 5 of 2016 dt. 29th February, 2016 – Tax deduction at source (TDS) on payments by television channels and publishing houses to advertisement companies for procuring or canvassing for advertisements (2016) 382 ITR 13 (St)

Circular No. 6 of 2016 dt. 29th February, 2016 – Issue of taxability of surplus on sale of shares and securities – Capital gains or business income – Instructions in order to reduce litigation – Reg. (2016) 382 ITR 14 (St)

Circular No. 7 of 2016 dt. 7th March, 2016 – Clarification regarding taxability of consortium members – Ref. (2016) 382 ITR 27 (St.)

Circular No. 8 of 2016 dated 17th March 2016, – Sub-Modification of

Circular dated 8th March, 2016 – Clarification on applicability of Circular No. 21 of 2015 (2015) 379 ITR 107 (St.) – Regarding – Reference – Cross-objection. (Monetary limits for filing appeals before Tribunal and High Courts)(2016) 382 ITR 43 (St.)

Circular dated 18th April, 2016 – Draft rules for granting relief or deduction of income-tax under section 90/90A/91 of the Income-tax Act – Reg. (F. No. 142/24/2015-TPL) (2016) 383 ITR 19 (St.)

Circular No. 9/DV of 2016, dated 26th April, 2016 – Commencement of limitation for penalty proceedings under section 271D and 271E of the Income-tax Act, 1961 – Reg. (2016) 383 ITR 21 (St.)

Circular No. 10 of 2016, dated, 26th April, 2016 – Limitation for penalty proceedings under section 271D and 271E of the Income-tax Act, 1961 – Reg. (2016) 383 ITR 22 (St.)

Circular No 11 of 2016 dated 26th April, 2016 – Payment of interest on refund under section 244A of excess TDS deposited under section 195 of the Income-tax Act, 1961. – Reg. (2016) 383 ITR 23 (St.)

Circular No. 12 of 2016, dated 30th May, 2016 – Admissibility of claim of deduction of bad debt under section 36(1)(vii) read with section 36(2) of the Income-tax Act, 1961 – Regd. (2016) 384 ITR 178 (St.)

Circular No. 13 of 2016, dated 9th May, 2016 – Sub: Verification of tax-returns for assessment years 2009-10, 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15 through EVC which are pending due to non filing of ITR-V form and processing of such returns (2016) 384 ITR 140 (St.)

Circular No 14 of 2016, dated 18th May, 2016 – Sub-Digital reporting of Form No. 60 – Reg. (2016) 384 ITR 142 (St.)

Circular No. 15 of 2016, dated 19th May, 2016 – Sub-Additional depreciation under section 32(1)(iia), of the Income-tax Act, 1961 – Reg. (Printing and publishing amounts manufacture) (2016) 384 ITR 143 (St.).

Circular No. 16 of 2016, dated 20th May, 2016 – Subject: Explanatory notes on provisions of the Income Declaration Scheme, 2016 as provided in Chapter IX of the Finance Act, 2016 (2016) (2016) 384 ITR 144 (St.)

Circular No. 17 of 2016, dated 20th May, 2016 – Subject: Clarification on the Income Declaration Scheme, 2016 (2016) 384 ITR 148 (St.)

Circular No 18 of 2016, dated 23rd May, 2016, Subject: Relaxation for furnishing of UID in case of Form 15G/15H for certain quarter – Regarding (2016) 384 ITR 152 (St).

Circular No. 19 of 2016, dated 25th May, 2016 – Income declaration Scheme – Principal Commissioner to whom declaration to be made (2016) 384 ITR 153 (St.)

Circular No. 20 of 2016, dated 26th May, 2016 – Sub – e-Filing of appeals: Extension of time limit – Regd. (2016) 384 ITR 179 (St.)

Circular No. 21 of 2016, dated 27th May, 2016 – Sub-Clarification regarding cancellation of registration under section 12AA of the Income-tax Act, 1961 in certain circumstances – Regd (2016) 384 ITR 180 (St.)

Circular No. 22 of 2016, dated 8th June, 2016 – Amendment in section 206C *vide* Finance Act, 2016 – Clarifications – Reg. (2016) 384 ITR 185 (St.)

Circular No. 23 of 2016, dated 24th June, 2016 – Amendment in section 206C of the Income-tax Act, *vide* Finance Act, 2016 – Clarification – Regd. (2016) 385 ITR 18 (St.)

Circular No. 24 of 2016, dated 27th June, 2016 – Clarifications on the Income declaration Scheme, 2016 (2016) 385 ITR 19 (St.)

Circular No. 25 of 2016, dated 30th June, 206 – Clarifications on the Income Declaration Scheme, 2016 (2016) 385 ITR 22 (St.)

Circular No. 26 of 2016 dated 4th July, 2016 – Applicability of section 197A(ID) and section 10 (15) (viii) of the Income-tax Act, 1961 to interest paid by IFSC banking units (IBUs) – Clarification, Regd. (2016) 385 ITR 49 (St.)

Circular No. 27 of 2016, dated 14th July, 2016 – Clarification on the income Declaration Scheme, 2016 (2016) 385 ITR 50 (St.)

Circular No. 28 of 2016 dated 27th July, 2016 – Clarification regarding attaining prescribed age of 60 years/80 years on 31st March itself, in case of senior/very senior citizens whose date of birth falls on 1st April, for purposes of Income-tax Act, 1961 – Regd (2016) 386 ITR 4 (St.)

Circular No. 29 of 2016, dated 18th August, 2016 – Clarifications on the Income Declaration Scheme, 2016 (2016) 386 ITR 21 (St.)

Circular No. 30 of 2016, dated 26th August, 2016 – Streamlining the process of no objection certificate (NOC), port clearance certificate (PCC), voyage return and voyage assessment in the case of foreign shipping companies (FSCs) (2016) 386 ITR 29 (St.)

Circular No. 32 of 2016, dated 1st September, 2016 – Enquiry or investigation in respect of document/evidence relating to the Income Declaration Scheme (IDS), 2016 found during the course search under section 132 or survey action under section 133A of the income-tax Act, 1961 – Reg. (2016) 386 ITR 34 (St.)

Circular No. 33 of 2016, dated 12th September, 2016 – Clarification on the Direct Tax Dispute Resolution Scheme, 2016 (2016) 387 ITR 9 (St.)

Circular No. 34 of 2016, dated 21st September, 2016 – Sub: order under section 119 of the Income-tax Act, 1961 (IDS) (F. No. 282/227/2016-IT (Inv).V.) 26/2016 (2016) 387 ITR 21 (St.)

Circular No. 35 of 2016, dated 13th October, 2016 – Applicability of TDS provisions of section 194-I of Income-tax Act, 1961 on lump sum lease premium paid for acquisition of long term lease – Reg. (2016) 388 ITR 38 (St)

Circular No. 36 of 2016, dated 25th October, 2016 – Taxability of the compensation received by the land owners for the land acquired under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (RFCTLARRA Act) – Reg (2016) 388 ITR 48 (St).

Circular No. 37 of 2016, dated 2nd November, 2016 – Chapter VI-A deduction on enhanced profits – Reg. (2016) 388 ITR 62 (St)

Circular No. 38 of 2016, dated 22nd November, 2016 – Admissibility of expenditure incurred by affirm on Keyman Insurance Policy in the case of a partner – Reg. (2016) 389 ITR 12 (St.)

Circular No. 39 of 2016 dated 29th November, 2016 – Transport, power and interest subsidies received by an industrial undertaking – Eligibility for deduction under section 80IB, 80IC, etc. – Reg. (2016) 389 ITR 28 (St)

Circular No. 40 of 2016, dated 9th December, 2016 – Directions under section 119 of the Income-tax Act, 1961 – Reg. (2016) 389 ITR 42 (St.)

Circular, dated, 14th September, 2016 – Sub-Clarification, reg. under section 119 of the Income-tax Act, 1961, dated 9th September, 2016 (F. No. 225/195/2016-ITA II) (2016) 387 ITR 14 (st)

Circular, dated 14th September, 2016 – Clarification reg. under section 119 of the Income-tax Act, 1961 dated 9th September, 2016 (F. No. 225/195/2016-ITA II) (2016) 387 ITR 14 (St)

Circular, dated 15th September, 2016 – Office Memorandum (IDS) (F.NO 225/233/2016 –ITA II (2016) 387 ITR 15 (St.)

Circular dated 26th September, 2016 – Implementation of the Direct Tax Dispute Resolution Scheme, 2016 – Reg. (2016) 387 ITR 34 (St.)

Circular dated 30th September, 2016 – Uploading of Form-I filed under the Income Declaration Scheme, 2016 – Reg. (2016) 387 ITR 35 (St.)

Circular dated 26th October, 2016 – Withholding of tax on "other sum chargeable" in the case of non-residents – Disallowance under section 40(a)(i) of the Income-tax Act, 1961 – Reg. (2016) 388 ITR 52 (St.)

Notifications 1

Amendment of Rules regarding quotation of PAN for specified transactions – Reg. – (Rule 114B dt. 17-12-2015) (2016) 380 ITR 11 (St.)

Order dt. 17-12-2015 – Income-tax Act, 1961: Order under section 119

Declaration of Undisclosed Income: Designated Income-tax Authority (2015) 380 ITR 15 (St.)

Instruction No. 18 of 2015 dt. 23-12-2015 – Applicability of Minimum Alternative Tax (MAT) on foreign companies for the period prior to 1-4-2015 – Reg. (2015) 380 ITR 10 (St.)

Instruction No. 20 of 2015, dt. 29-12-2015 – Scrutiny assessments some important issues and scope of scrutiny in case selected through computer scrutiny selection ("CASS") reg. (2016) 380 ITR 36 (St.)

Notification No. 1 of 2016, dated 19th January, 2016 – Electronic Verification Code (EVC) for electronically filed income-tax Return – Additional modes (2016) 380 ITR 1 (St.)

Notification No. 2 of 2016 dated 3rd February, 2016 – Procedure and Standards for ensuring secured transmission of electronic communication – Reg. (2016) 380 ITR 5 (St.)

Instruction No. 1 of 2016, dated 15th February, 2016 – Following the prescribed time limit in passing order under sub-section (8) of section 154 of the income-tax Act, 1961 – Reg. (2016) 382 ITR 16 (St.)

Instruction No. 2 of 2016, dated 15th February, 2016 – Passing rectification order under section 154 of the Income tax Act, 1961 – Reg. (2016) 392 ITR 17 (St).

Instruction No. 3 of 2016, dated 10th March, 2016 – Sub-Guidelines for implementation of Transfer Pricing Provisions – Replacement of Instruction No. 15 of 2015 – Reg (2015) 378 ITR 27 (St.) (2016) 382 ITR 36 (St.)

4 of 2016 dt. 6th April 2016. Sub-Procedure for registration and submission of statement as per clause (k) of sub-section (1) of section 285BA of the Income-tax Act, 1961 read with sub-rule (7) of Rule 114G of the Income-tax Rules, 1962 (2016) 393 ITR 7 (St.)

Office memorandum dated, 29th January, 2016 – Issue of refunds – procedure to be followed in other cases where notice under section 245 has been issued for ITRs processed in financial year 2015-16 – Reg. (F. No. 312/109/2015-ot) (2016) 382 ITR 17 (St.)

Instruction No. 9 of 2016 – Reg. (Audit objection)(2016) 382 ITR 44 (St.)

Order dated 6th May, 2016. Committee notified. (S. 9A, Rule 10 VVA) (2016) 384 ITR 154 (St.)

Notification under section 48, Explanation, clause (v): Cost of Index for 2016-17 specified for purpose of computation of capital gains. (Notification No. S.O. 1948 (E), dated 2nd June, 2016 (2016) 384 ITR 185 (St.)

Notification No. S.O. 2143(E), dated 17th June, 2016 – S.197A – No deduction of tax on certain payments (2016) 385 ITR 17 (St.)

Order dated, 6th May, 2016. Committee notified. – Rule 10VA, read with 9A (F. No. 173/237/ 2016 –ITA-I) (2016) 384 ITR 154 (St.)

Instruction No. 4 of 2016, dated 14th July, 2016 – Compulsory manual selection of cases for scrutiny during the financial year 2016-17, Reg. (2016) 385 ITR 53 (St.)

Instruction No. 5 of 2016, dated 14th July, 2016 – Direction regarding scope of enquiry in case under "limited Scrutiny" selected through CASS and 2016 – Reg. (2016) 385 ITR 56 (St.)

Order dated 29th July, 2016 – Income-tax Act, 1961: Order under section 119 : Extension of due date for filing returns from 31-7-2016 to 5-8-2016 (2016) 386 ITR 8 (St.)

Order dated 29th July, 2016 – Income-tax Act, 1961: Order under section 119: Extension of due date for filing returns from 31-7-2016 to 31-8-2016 (2016) 386 ITR 8 (St.)

Order dated 29th July, 2016 – Income-tax Act, 1961: Order under section 119: Extension of due date for filing returns from 31-7-2016 to 31-8-2016 in the State of Jammu and Kashmir (2016) 386 ITR 8 (St.)

Order dated 29th July, 2016 – Income-tax Act, 1961: Order under section 119: Further extension of due date for filing returns from 31-8-2016 to 30-9-2016 in the State of Jammu and Kashmir (2016) 386 ITR 35 (St.)

Instruction No. 8 of 2016, dated 15th September, 2016 – The Income Declaration Scheme, 2016 – Reg. (F. No. 142/8/ 2016-TPL)(2016) 388 ITR 51 (St).

Instruction No. 9 of 2016, dated 27th September, 2016 – The Income Declaration Scheme 2016 – Reg. (F. No. 142/8/2016–TPL) (2016) 387 ITR 32 (St.)

Instruction No. 10 of 2016, dated 28th September, 2016 – The Income Declaration Scheme, 2016 – Reg. (F. No. 142/8/2016–TPL) (2016) 387 ITR 33 (St.)

Instruction No. 11 of 2016, dated 13th October, 2016 – The Income Declaration Scheme, 2016 – Reg. (2016) 388 ITR 40 (St.)

Order dated 9th September, 2016 – Order under section 119 : Extension of due date for filing returns by tax payers whose accounts are audited from 30-09-2016 to 17-10-2016 (F. No. 225/195/2016/ITA. II (2016) 387 ITR 4 (St.)

Circular dated 30 the September, 2016 – Order under section 119 of the Income tax Act, 1961, dated 9th September, 2016 (F. No. 225/195/2016 /ITA–II)-(Extension of due date to all assesses). (2016) 387 ITR 36 (St.)

Circular dated 27th September, 2016 – Sub-Extended office hours on 30th September, 2016 for the IDS – 2016 (2016) 387 ITR 28 (St).

Notification under section 90: Agreement between the Government of the Republic of India and the Government of Republic of Maldives for avoidance of double taxation of income derived from international air transport (No. S.O. 2853 (E), dated 2nd September, 2016) (2016) 387 ITR 16 (St).

Order dated 15th October, 2016 – Order under section 119 of the Income-tax Act, 1961: Extension of due date for filing returns and reports of audit pertaining to assessment year 2016-17 for all categories of assesses in the State of Jammu and Kashmir to December, 2016 (2016) 388 ITR 49 (St.)

Order dated 25th October 2016 – Order under section 119 of the Income-tax Act, 1961 – Issue of intimation under section 143(1) of the Income-tax Act, 1961 beyond the prescribed time in non-scrutiny cases – Reg. (F. No. 225/220/2016–ITA.11) (2016) 388 ITR 50 (St.)

Notification No. 11 of 2016, dated 2nd December, 2016 – Procedure for the purpose of furnishing and verification of Form 26A for removing of default of short deduction and/or non-dedcution of tax at source – Reg. (2016) 389 ITR 42 (St.)

Press Notes

Sub: Threshold limit of tax audit under section 44AB and section 44AD – Clarification regarding (2016) 385 ITR 15 (St.)

Rules

Income Declaration Scheme Rules, 2016 (2016) 384 ITR 165 (St.)

Income Declaration Scheme Rules, 2016: Corrigendum (2016) 384 ITR 188 (St.)

Income Declaration Scheme (Amendment) Rules, 2016 (2016) 386 ITR 3 (St)

Direct Tax Dispute Resolution Scheme Rules, 2016 (2016) 384 ITR 183 (St.)

Finance Bill, 2016

Budget speech of Minister of Finance for 2016-17:
Part A (2016) 381 ITR 9 (St.)
Part B (2016) 381 ITR 29 (St.)
Annexures (2016) 381 ITR 40(St.)
Finance Bill, 2016 (2016) 381 ITR 51 (St.)
Notes on clauses (2016) 381 ITR 169 (St.)
Memorandum explaining the provisions in the Finance Bill, 2016 (2016) 381 ITR 241 (St).
Finance Bill, 2016: Notice of amendments (2016) 383 ITR 10 (St.)
Finance Act, 2016 (Assent of the President) on 14th May, 2016 (2016) 384 ITR 1(St.)
Repealing and amending Act, 2016 (Act No. 23 of 2016) (Assent of president on 6th May, 2016) (2016) 385 ITR 9 (St.)
Taxation laws (Amendment) Bill, 2016 (As introduced in Lok Sabha on 8th August, 2016) (2016) 386 ITR 25 (St.)
Finance Act, 2016 : Notification under section 187: Commencement of section 187: Amendment – (2016) 386 ITR 5 (St.)
Taxation Laws (Amendment) Act, 2016 (No. 47 of 2016) (Assent of the President on 8th September, 2016) (2016) 387 ITR 5 (St.)
The Taxation Laws (Second Amendment)Bill, 2016 (2016) 389 ITR 14 (St.)
Taxation Laws (Second Amendment) Act, 2016 (Act No 48 of 2016) (Assent of the President on 15 – December, 2016) (2016) 389 ITR 48 (St.)

Circular No. 3 of 2017, dated 26th January, 2017 – Explanatory notes to the provisions of the Finance Act, 2016 (2017) 391 ITR 253 (St.)

Finance Act, 2016: Notification No. S.O. 4058 (E), dated 16-12-2016 – Notification under sections, 199A(1) and 199C (1)

Schemes

Gold Monetisation Scheme, 2015 (2016) 382 ITR 18 (St.)
Gold Monetisation (Amendment) Scheme, 206 (2016) 386 ITR 11 (St.)
Pradhan mantra Garib Kalyan Deposit Scheme, 2016 (2016) 389 ITR 56 (St.)
Commencement of Pradhan Mantri Garib Kalyan Yojana, 2016 (2016) 399 ITR 68 (St.)

Indian Trusts (Amendment) Bill, 2016 (2016) 386 ITR 10 (St.)

Articles – Section wise

S.2(15) : A charitable and/or religious trust is entitled to carry forward and adjust the excess expenditure in earlier years against the income of subsequent years by S. K. Tyagi (2016) 389 ITR 1 (Journal)

S.10(10D) : Taxability of returns from foreign Insurance Companies by Dr. Neha Pathakji (2016) 243 Taxman 1 (Mag.)

S.10(5) : Meaning of term "leave" under section 10(5) of the Income-tax Act, 1961, relating to LTA/LTC by S. K. Tyagi (2016) 386 ITR 1 (Journal)

S.10(23C) : Condonation of delay in filing application – Delays in filing applications under section 10(23C) of the Income-tax Act,1961 for exemption cannot be condoned by Revenue authorities by T. N. Pandey (2016) 388 ITR 45 (Articles)

S.12A : Charitable trust – Income-tax department's view that Spiritual and Religious activities cannot be entwined for determining taxability of anonymous donation is reversed by the Tribunal by T. N. Pandey (2016) 236 Taxman 1 (Magazine)

S.12A : Charitable Trusts – Exemption and deduction under section 12A and 80G of the Income-tax Act, 1961 by Bhagirath Patel (2016) 290 CTR 2 (Articles)

S. 13A : Tax exemption of income of political parties – Delhi High Court Decisions by T. N. Pandey (2016) 385 ITR 26 (Journal)

S.14A : No disallowance under section 14A, where the assessee has got no income from a composite and indivisible business, by S. K. Tyagi (2016) 384 ITR 1(Journal)

S.14A : Expenditure under Section 14A not disallowed if no exempt income received during the year by Vineet Sawheny (2016) n 237 Taxman 1 (Mag.)(Articles)

S.15 : 'Salary' – A word assigned different meanings under the I.T. Act, 1961 by T. N. Pandey (2016) 240 Taxman 1 (Mag.)

S.17(2) : Conveyance allowance or transport allowance? Minimisation of tax incidence, by payment of conveyance allowance, as also transport allowance, to an employee by S. K. Tyagi (2016) 384 ITR 41 (Journal)

S.24 : Controversies – Interest paid on borrowings for purchase of house – Section 24 & S. 48 by Pradip Kapasi (2016) BCAJ – July – P. 63

Controversies – Taxability of foreign salary credited to NRE Bank account by Pradip Kapasi (2016) BCAJ–August – P. 61

S.32 : Depreciation on aired radio programmes: Aired radio programme cannot be a thing entitled for additional depreciation under section 32(1)(iia) of the Act. by T. N. Pandey (2016) 383 ITR 1 (Journal)

S.32 : Interpretation of word "Acquired" for additional depreciation – An analysis by Sanjay Bansal (2016) 241 Taxman 1 (Mag.)

S.37(1) : Business expenditure – Disallowance of business expenditure for non-deduction of tax source by Dr. Govindrajan (2016) 388 ITR 1 (Article) (Journal)

S.37(1) : Business expenditure – Payment of compensation for encroachment cannot be deducted under section 37(1) by T. N. Pandey (2016) 287 CTR 36 (Articles)

S.40(a)(ia) : Tax deduction at source – Tax deduction under a wrong section cannot avoid applicability of S.40(a)(ia) – By T. N. Pandey (2016) 282 CTR 20 (Articles)

S.40A(2)(b) : Transactions with related parties. – Section 40A(2)(b) of the Income-tax Act, 1961 by Manoj Mehta (2016) 240 Taxman 31 (Mag.)

S.41(1) : A provision to ensure equity and fair play by T. N. Pandey (2016) 381 ITR 9 (Journal)

S.41(1) : Controversies – Write – Back of loans – Section 41(1) & 28(iv) by Pradip Kapasi (2016) BCAJ – June – P. 79

S.44AD: Relief or Pain by Deepak Kalani (2016) 237 Taxman 23 (Mag.) (Articles)

S.45 : Capital gains – Taxation issues in case of 'Transfer" of property under development agreement (2016) 239 Taxman 49 (Mag.)

S.45 : Capital gains – loans and advances are capital assets generating capital gains or losses on transfer by T. N. Pandey (2016) 287 CTR 6 (Articles)

S.45 : Controversies – Rate of tax applicable to capital gains on loss exemption by a charitable or religious Trust by Pradip Kapashi (2016) BCAJ – December – P. 47

S.45 : Controversies – Rate of taxation and deemed short term capital gains by Pradip Kapashi (2016) BCAJ – November P. 51

S.45 : Controversies – Need for deposits under capital gains account scheme by Pradip Kapasi (2016) BCAJ – July – P. 63

S.45 : Controversies – Need for deposits under capital gains accounts Scheme, by Pradip Kapasi (2016) BCAJ – October P. 49

S.50 : Decision of Bombay High Court on applicability of deemed provisions of section 50 of the Act, by S. Krishnan (2016) 238 Taxman 1 (Mag.) (Articles)

S.50 : Controversies – Depreciable asset forming part of block of assets is sold and new depreciable asset is acquired at the fag end of the financial year whether includable in the block of assets for the purpose of section 50 by Kaushik D. Shah (2016) ACAJ, October, P. 453

S.54F : Capital gains – Exemption on liquidation of a company – A case study on exemption of capital gain under section 54F available to a share holder on liquidation of a company By Jignesh R. Shah (2016) 389 ITR 13 (Journal)

S.54F : Capital gains – For exemption u/s. 54F of the Income-tax Act, 1961, acquisition of a residential house is necessary – Not its use as such by T. N. Pandey (2016) 241 Taxman 15 (Mag).

S.54F : Capital gains – Exemption under S.54F for cost on additions and improvements in the house by T. N. Pandey (2016) 284 CTR 7 (Articles)

S.68 : Cash credits – Credits in bank accounts cannot be taxed as income by invoking S.68 by T. N. Pandey (2016) 290 CTR 1 (Articles)

S.73 : Controversies – Business of derivatives trading and Explanation to S. 73 by Pradip Kapasi (2016) BCAJ – September P. 49

S.79 : Controversies – Carry forward of loss and section 79 by Pradip Kapasi (2016) BCAJ – February – P. 50.

S.80E : Interest on loan taken for higher education abroad is also deductible by T. N. Pandey (2016) 283 CTR 1 (Articles)

S.80IA : Controversies – For the purpose of claiming deduction u/s. 80IA of the Act, is it mandatory to maintain separate books of account? By Kaushik D. Shah (2016) ACAJ – February – P. 684

S.80IA : Controversies – Whether compensation for loss of energy generation received entitled for deduction u/s. 80IA of the Act, by Kaushik D. Shah (2016) ACAJ – March – P. 748

S.80IB(10) : Controversies – Deduction u/s 80 IB(10) – Delay in receipt of completion Certificate by Pradeep Kapasi (2016) BCAJ – January – P. 35

S.92 : Transfer Pricing – Computation having regard to or in conformity with arm's length price is not income chargeable to tax – R. P. Garg and Beenu Yadav (2016) 386 ITR 14 (Journal)

S.115BBC : Income tax department's view that spiritual and religious activities cannot be entwined for determining taxability of anonymous donations is reversed by the Tribunal by T. N. Pandey (2016) 236 Taxman 1 (Mag.) (Articles)

S.115JB : MAT impact on special reserve created by NBFCs by S. K. Gandhi (2012) 242 Taxman 73 (Mag.)

S.119 : Misuse of S. 119 by the Board – Glaring instance by Minu Agarwal (2016) 289 CTR 17 (Articles)

S.139 : Controversies – Obligation of foreign company to file return of income where income exempt under DTAA by Pradip Kapasi (2016) March – BCAJ – P. 45

S.143(2) : limited scrutiny – Limited to what extent? by Deepak Goel (2016) 241 Taxman 19 (Mag.)

S.143(3) : Assessment – Assessment must stand to reason by T. N. Pandey (2016) 45 ITR 7 (Journal) (Trib.).

S.147 : A critical analysis of amendments to section 147 and 149 by the Finance Act, 2012 by H. Padamchand Khincha (2016) 243 Taxman 3 (Mag.)

S.147 : Assessment of income accruing retrospectively: Assessments cannot be reopened for earlier years when income accrues retrospectively from a later date – by T. N. Pandey (2016) 386 ITR 25 (Journal)

S.151 : Reading down the Rule of *Audi Alteram Partem* in section 151 of the Income-tax Act, 1961 – A mandatory safeguard, by Sanjay Bansal (2016) 240 Taxman 7 (Mag).

S.147 : A Comprehensive Guide to The law of Reopening of Assessments Under Sections 147 to 153 of The Income-tax Act, 1961 – Shri Ajay Singh, Advocate www.itatonline.org

S.192 : Tax-Treatment and TDS in respect of remuneration payable to an employee of an Indian company, located abroad by S. K. Tyagi (2016) 385 ITR 1 (Journal)

S.194A : A note on *New India Assurance Company Ltd. v. Sudesh Chawala* (2016) 380 ITR 467 (P& H)(HC) by Pasupathi (2016) 382 ITR 9 (Journal)

S.194J : Closements – Whether payment of transaction charges to stock exchange amounts to FTS – S. 194J – Part – 11, by Kishor Karia (2016) BCAJ – July – 59

S.194J : Closements – Whether payment of transaction charges to stock exchange amounts to FTS – S. 194J – Part 1 by Kishor Karia (2016) BCAJ – June – 73

S.194J : Closements – Whether payment of transaction charges to stock exchange amounts to FTS –S. 194J –Part 1 by Kishor Karia (2016) BCAJ – July – 59

S.199 : Deduction at source – Controversies – When there is mismatch between income as per 26AS statement and income as per books of account whether addition can be made as undisclosed income.? By Kaushik D. Shah (2016) ACAJ – May – 90.

S.206AA : Relaxation to non-Residents from higher withholding tax rate in absence of PAN – Much needed relief by Ankur Kansal and Jasmeet Kohli (2016) 240 Taxman 37 (Mag.)

S.206AA : Impact of section 206AA on the rates of TDS, particularly in respect of payments to non-residents by S.K. Tyagi (2016) 388 ITR 57 (Articles)

S.254(1) : Appellate Tribunal – Whether Tribunal can put informal questions during hearing of an Appeal ? by Gopal Nathani (2016) 242 Taxman 7 (Mag.)

S.255(3) : Constitution of the Special Bench of ITAT – High Court view the Constitution of Special Bench of the ITAT through private meeting as being opposed to the Rule of law, fairness and transparency by T. N. Pandy (2015) 380 ITR 14 (Journal).

S.263 : Revision: Show cause notice for initiating proceedings under section 263: The Supreme Court has reiterated that formal show cause notice is not necessary for initiating proceedings under section 263 of the Income-tax Act in Amitabh Bachchan's case by T. N. Pandey (2016) 386 ITR 47 (Journal).

S.263 : Revision: An analysis by Deepa Khare (2016) BCAJ – January – P.11.

S.263 : Revision: Power of Revisionary Authority to direct for Penalty – Baffling legal position by Minu Agarwal (2016) 283 CTR 4 (Articles)

S.263 : AO's order, subject to revision u/s 264 of the I.T. Act, 1961, cannot once again be revised u/263 & No cross objection can be filed by the revenue before the Tribunal in assessee's appeal against order u/s 263 by T. N. Pandey (2016) 239 Taxman 33 (Mag.) .

S.264 : Revision petition u/s. 264 of the Income-tax Act, 1961, can be filed against intimation u/s. 143(1) of the Act and Assessing Officer should not take advantage of the assessee's ignorance, by T. N. Pandey (2016) 241 Taxman 7 (Mag.)

S.270A : Levy of Penalty on Deposit of Unaccounted Cash u/s. 270A of The Income-Tax Act: Opinions of Two Eminent Experts – Jaiprakash Bairagra, CA www.itatonline.org.

S.270A : The Entire Law on Penalty for Under – Reporting and Misreporting of Income Explained – Shri Rahul Hakani, Advocate www.itatonline.org

S.270AA : Immunity from imposition of penalty etc. Whether inherently vague and anomalous by Minu Agarwal (2016) 286 CTR 1(Articles)

S.270AA : New penal provisions under section 270A, r/w S. 270AA of the IT Act, 1961 by Mr. N. M Ranka (2016) 287 CTR 27 (Articles)

S.271(1)(c) : Penalty – Concealment – Tax delinquency : What is more serious – Under reporting of income or its misrepresentation by T. N. Pandey (2016) 239 Taxman 1 (Magzine)

S.271(1)(c) : Penalty – Concealment – The satisfaction note in penalty proceedings by T.C.A. Ramanujam (2016) 287 CTR 33 (Articles)

S.288 : Cracking the conundrum : Appearance clause under taxation statutes by Ajay Jain (2016) 239 Taxman 37 (Mag.)

Articles – Subject wise

A.

Assessment – Notice to a deceased – Whether nullity or irregularity by Minu Agarwal (2016) 288 CTR 1 (Articles)

Accounting – Accounting of cash discounts by S. Ramachandran (2016) 288 CTR 4 (Articles)

Accounts – Recent amendments to Accounting Standards (2016) 285 CTR 17 (Articles)

Accounts – Inadequate clarifications on Indian Accounting Standards (2016) 287 CTR 9 (Articles)

Assessment–E. Governance of income-tax – New controversies in the making – by Minu Agarwal (2016) 282 CTR 1 (Articles)

The Seeds of Litigation Plant – "Assessment Proceedings" – Shri Prarthana Jalan, CAwww.itatonline .org

Appeal – Revenue's filing of frivolous appeals is viewed with displeasure by the ITAT By T. N. Pandey (2016) 45 ITR 1 (Journal)(Trib.)

Appeal – Complete Guide to Filing Appeals Before CIT(A) and Drafting Applications For Stay of Demand – Shri. Rahul R. Sarda, Advocate www.itatonline.org

Account – Deferred tax accounting for depreciation and other asset related items by S. Ramachandra (2016) 283 CTR 33 (Articles)

Accounts – Draft revised Schedule III of the Companies Act, 2013 – Some comments by S. Ramachandran (2016) 284 CTR 1 (Articles)

Accounts – Recent amendments to Accounting Standards by S. Ramachandran (2016) 285 CTR 28 (Articles)

Assessment – Effective steps needed for apathetic and indifferent handling of income-tax assessments by income tax authorities by T. N. Pandey (2016) 284 CTR 48 (Articles)

Assessment – Casual treatment of obvious tax avoidance – Casually passing of assessment order by Assessing Officer practice of results in High Court's confirmation of an apparent tax avoidance by T. N. Pandey (2016) 384 ITR 24 (Journal)

Accounts – Defects in Indian Accounting Standards by S. Ramachandran (2016) 286 CTR 12 (Articles)

B.

A brief introduction to the Benami Property (Prohibition) Amendment Act, 2016 by Aditya Ajgaonkar (2016) AIFTPJ – August – P. 19 www.itatonline.org

Buy back of shares – Financial Restructuring through buy-back of Shares by Dr. Jagdish Joshipura (2016) ACAJ – May. P. 74

Buy-back of shares by private and public unlisted companies under the Companies Act, 2013 by Ashok Dhere (2016) BCAJ – January – P.83

Bogus purchases – By C. R. Sharedalal (2016) ACAJ – March – P. 734

Black Money law – Combat against undisclosed Foreign Income and assets by P.V.S.S. Prasad (2016) AIFTP Journal – January – P. 29

Budget 2016: An uncalled for penalty – Rewriting the law relating to penalty for concealment or furnishing inaccurate particulars of income seems uncalled for ! by T.N. Pandey (2016) 382 ITR 13 (Articles) (Journal)

Budget 2016: Tax reforms on course by T.C.A. Ramannujam (2016) 382 ITR 27 (Articles) (Journal)

Buy-back of shares – Tax incidence (2016) 288 CTR 9 (Opinion)

C.

Constitution of India – Art. 141 – Constitution ensures finality of supreme Court's decisions – Not their Infallibilty by T. N. Pandey (2016) 387 ITR 10 (Journal)

The Rule of consistency by T.C.A Ramanujam (2016) 387 ITR 1 (Journal)

Chamber's Journal – Important Supreme Court Decisions, (2016) January – P. 13-83

Chamber's Journal – Base Erosion & Profit Shifting (BEPS)(2016) February – P. 11 to 246

Chamber's Journal – Finance Bill, 2016 (2016) March – P. 13 to 116

Chamber's Journal – Charitable Trusts and Association – Law and procedure – (2016) April – P.11 to 76

Chambers's Journal – Provisions Applicable to IT Returns for AY.2016–17 (2016) May - P. P. 11 to 62

Chambers' Journal – Charitable Trusts and Association – Taxation and FCRA (2016) June – P. 11 TO 101

Chamber's Journal – Income disclosure scheme, dispute Resolution Scheme – 2016 and equalisation levy (2016) – July – P. 11 to 79

Chamber's Journal – Auditor 's reporting responsibilities under the Companies Act, 2013 – (2016) – August – P. 11 to 67

Chamber's Journal – Foreign direct investment in India – (2016) September – P. 11 to 94

Chamber's Journal – Development in transfer pricing law (2016) October – 11 – 126

Chamber's Journal – Taxation of royalty and FTS (2016) November – 11 – 81

Chamber's Journal – Demonetisation – Legal & Tax implications – (2016) – December – P. 11 to 46.

Controversies – Date & cost of acquisition of capital asset converted from stock-in-trade by Pradip Kapasi (2016) BCAJ –March – P. 55

Controversies – Major controversies under the Income-tax Act by V. P. Gupta (2016) AIFTP Journal – January –P. 11

Charitable Trusts – Analyzing relationship between charity and business in IT Act. By Tilak Chandana (2016) 283 CTR 22 (Articles)

Compliance Window –VDS-2016 – Why invite another embarrassment when past schemes have not been a success? By T. N. Pandey (2016) 238 Taxman 5 (Mag.)

Charitable Trust – Levy of tax if charitable institution ceases to exist or covert in to non-charitable By Narayan Jain (2016) AIFTP – Journal – April P. 14

Conventions – Conventions for the noble profession of law by N. M. Ranka (2016) AIFTP – Journal – June – P. 10

Charitable institutions: Excess expenditure adjustment – In the case of charitable institutions adjusting excess expenditure of one year against income of another year is application of income under section 11 of the Income-tax Act, by T. N. Pandey (2016) 384 ITR 21 (Journal)

Charitable institutions – Tax implications – When bodies such as Charitable institutions cease to be charitable, close down or merge with others etc., what are the tax implications? By T. N. Pandey (2016) 384 ITR 34 (Journal)

Consortium for EPC and Turnkey contracts – Much awaited guidance an AOP position by Rakesh B. Jain, Anuj Singhal and Yogesh Indap (2016) 239 Taxman 8 (Mag.)

Co-operative Society – Taxability of Interest earned from bank by any type of Co-Operative Society/Club/ Mutual Association by R. B. Popat (2016) 240 Taxman 20 (Mag.)

Charitable Trust – Double deductions for same outgoing – Whether justifiable by Minu Agarwal (2016) 286 CTR 9 (Articles)

Charitable Trust and Association – Taxation and FCRA (2016) Chamber's journal – June, 2016 11-101

Charitable Trusts – A Charitable and /or Religious Trust is entitled to carry forward and adjust the excess expenditure in earlier years the income of subsequent years by S.K Tyagi (2016) 389 ITR 1 (Article) Journal)

Conventions for the noble Profession of law by N. M. Ranka (2016) AIFTP J – June, 10
Charitable Trusts – Supreme Court Judgment in Visvesvaraya Technological University case by V. N. Murlidhran (2016) 287 CTR 14 (Articles)

D.

Demonetization – Did demonetization meet its objective? By T. N. Pandey (2016) 389 ITR 25 (Article) (Journal)

Demonetisation – Taxation of High Value Currency notes demonetised by P. N. Shah (2016) AIFTP – December – P. 11

Demonetisation *vis-a-vis* Relevant Provisions of Income-tax Act, 1961 and implications of the taxation law (Second Amendment) Bill, 2016 by I.P. Bansal (2016) AIFTP – December – P. 17

Demonetisation – Announcement of Demonetisation of Rs. 500 and Rs 1000 Bank Notes by V. R. Ghelani (2016) AIFTP – December – P. 27

Demonetisation : What does it imply with respect to income tax and Benami Transactions ? by M. M. Bhasin (2016) AIFTP – December–P. 31

Demonetisation – Tax and legal issues by V. Sridhran, Dr. K. Shivaram, Pradip Kapashi and Dr. Dilip Sheth (2016) AIFTP – December – P. 35

Denomination – Did denomination meet its objective ? – The move to demonetise high –value currency notes was a well-conceived measure for eradication (stocked) black money but it lost its sheen because of the failure to visualise the resultant problems and consequent unpreparedness to meet these –By T.N. Pandey (2016) 389 ITR 25 (Journal)

Daughter as Karta of the HUF –By T.C.A. Ramanujam (2016) 388 ITR 49 (Articles)

Demonetisation: Tax And Legal Issues – The Chamber of Tax Consultants

Taxation of High Value Currency Notes Demonetized by Shri P. N. Shah, CA www.itatonline.org

Daughter's right in coparcenary – IV by M. L. Bhakta (2016) BCAJ – February – P. 12

DTAA – The Mauritian DTAA – A big victory for a fair tax system in India by T.C.A. Ramnujam and T.C.A. Sangeetha (2016) 384 ITR 16 (Journal)

Disallowance of business expenditure for non-deduction of tax at source by Dr. M. Govindarajan (2016) 388 ITR 1 (Article)

Direct Taxes Dispute Resolution Scheme – Whether futile by Minu Agrawal (2016) 287 CTR 25 (Articles)

Double Tax Avoidance – Protocol for amendment of India Mauritius tax Treaty by Nisha Malpani (2016) 289 CTR 20 (Articles)

E.

Draft guidelines on POEM under Indian tax law : not so much of a poetry for corporates by Jiger Saiya (2016) 237 Taxman 7 (Mag.) (Articles)

Equalisation levy – Analysis of "Equalisation levy " and some issues by Rajiv G. Shah (2016) BCAJ – December – P. 19

E-Commerce in International taxation – Issues and challenges by Chetan Ladha (2016) 243 Taxman 33 (Mag.)

Easwar Committee – Feedback on Justice R. V. Easwar Committee by S. Rajaratnam (2016) 381 ITR 18 (Journal)

Easwar Committee – Income-tax simplification committee's First report (Draft) Report: A critical appraisal by T. N. Pandey, (2016) 381 ITR 33 (Journal)

Equalisation levy: A tax variant for augmenting revenue by T. N. Pandey (2016) 383 ITR 25 (Journal)

Editorial – Tribute to Hon'ble Mr. S. H. Kapadia former Chief Justice of India (2016) AIFTP – January – P.5 & 58

Editorial – Expectation from the tax Bar – Reform and stable tax regime – Structural changes for better administration of tax laws by Dr. K. Shivaram (2016) AIFTP Journal – February – P. 5

Editorial – Finance Bill, 2016 – Amnesty scheme to tax defaulters – A premium for dishonesty – Honest tax payers pay tax every year whereas dishonest taxpayers pay tax once in five years by Dr. K. Shivaram (2016) AIFTP Journal – March 2016 P. 5

Editorial – Strictures against tax administration – Case laws – By Dr. K. Shivaram (2016) AIFTP Journal – April – 5

Editorial – Elevation & Appointment of Hon'ble Judges, By N. M. Ranka (2016) AIFTP-Journal – May- P. 5

Editorial – Goods and Services Tax by P. C. Joshi (2016) AIFTP – Journal – June – P 5

Editorial – Income Declaration Scheme, 2016 and Direct Tax Dispute Resolution Scheme, 2016 by Dr. K. Shivaram (2016) AIFTPJ – July. 5

Editorial – Training programme " UDBHAV" for the judicial and accountant members of the Income Tax Appellate Tribunal, will help the institution render better administration of justice by Dr . K. Shivaram (2016) AIFTPJ – August P. 5

Editorial – Why is the Government not appointing the Vice-Presidents of the ITAT ? Whether the move of the Government to merge the ITAT with other Tribunals is justified ? by Dr . K. Shivaram (2016) AIFTPJ – October P. 5

Editorial – Demonetisation – A great move and bold step to reduce the black money circulation in our country – War against corruption and black money – Move of the Government deserves to be appreciated and encouraged by Dr. K. Shivaram (2016) AIFTPJ – November P. 5

Editorial – Demonetisation – by Dr . K. Shivaram (2016) AIFTPJ – December P. 5

F.

Finance Act, 2016 by P. N. Shah (2016) BACAJ – June – P. 10

Finance Bill, 2016 – Expectations on the Union Budget 2016: May the force be with you by T.C.A. Ramanujam and T.C.A Sangeetha (2016) 381 ITR 1 (Journal)

Finance Bill, 2016 – An uncalled penalty – Rewriting the law relating to penalty for concealment or furnishing inaccurate particulars of income seems uncalled for ! by T. N. Pandey (2016) 382 ITR 13 (Journal)

Finance Bill, 2016 – Some budgetary declarations – Whether sustainable by Minu Agarwal (2016) 284 CTR 37 (Articles)

Finance Bill, 2016 – Salient features of the Finance Bill, 2016 : Relating to direct taxes (2016) 382 ITR 37 (Articles) (Journal)

Finance Bill, 2016 – Personal taxation by T.C.A. Ramanujam (2016) 284 CTR 14 (Articles)

Finance Bill, 2016 – Proposals concerning personal taxation by T. N. Pandey (2016) 284 CTR 22 (Articles)

Finance Bill, 2016 – Union Budget, 2016 – First impression by T.C.A Sangheetha (2016) 284 CTR 17 (Articles)

Finance Bill, 2016_ Union Budget – Hidden realities of balanced budget by Minu Agarwal (2016) 284 CTR 21 (Articles)

Finance Bill, 2016 – Capital gains – Finance Bill, 2026 and Section 50C by R. Raghunathan (2016) 284 CTR 9 (Articles)

Finance Bill, 2016 – Assessment – Proposed amendments in S. 143(1) – Whether sustainable by Minu Agarwal (2016) 284 CTR 29 (Articles)

Finance Bill, 2016 – Phasing out tax incentives – By T.C.A. Ramanujam (2016) 285 CTR 6 (Articles)

Finance Bill, 2016 – Proposed amendments relatable to charitable institutions by N.M.Ranka (2016) 285 CTR 1 (Articles)

Finance Bill, 2016 – Tax law and litigation by T.C.A. Sangeetha (2016) 285 CTR 14 (Articles)

Finance Bill, 2016 – Royalty on patents under the Finance Bill, 2016 by Gayatri Sridharan (2016) 384 ITR 29 (Journal)

Finance Bill, 2016 – Income Declaration Scheme, 2016 – Constitutional issues by S. R. Wadhwa (2016) AIFTP J March –P. 21

Finance Bill, 2016 – Rationalisation of penalty provisions under the Income tax Act, 1961 as per the Finance Bill, 2106 – by K.C. Singal (2016) AIFTP J March – P. 25

Finance Bill, 2016 – Analysis of some of the provisions in Finance Bill, 2016 impacting International tax by H. Padamchand Khincha (2016) AIFTP J March – P. 33

Finance Bill, 2016 – Salient Features of the Direct Tax Dispute Resolution Scheme, 2016 and analysis thereof by V. P. Gupta (2016) AIFTP J March – P. 48

Finance Bill, 2016 – Equalisation levy and TDS by Rahul Sarda (2016) AIFTP J March – P. 54

Finance Bill, 2016 – Presumptive taxation by H. N. Motiwalla (2016) AIFTP J March – P. 61

Finance Bill, 2016 – Important Amendments made by Finance Bill, 2016 – Relating to Service tax by Ashok Chandak & Shailendra Jain (2016) AIFTP J March – P. 64

Union Budget – Amendments in customs legislation by Jayesh M. Gogri (2016) AIFTP J March – P. 71

Union Budget – Amendment to Central Excise Legislation by Payal (Prerana) Shah 2016) AIFTP J March – P. 75

Finance Bill, 2016 – Impact of Proposed Amendment In Section 10(12) by Finance Bill, 2016 on Taxability of Receipt of Accumulated Balance of Recognized Employee Provident Fund (REPF) – Shri Gautam Baid, CA www.itatonline.org

The Law on Presumptive Taxation on Professionals as Proposed by Finance Bill 2016 – Shri. H. N. Motiwalla www.itatonline.org

Impact of The Taxation Laws (Second Amendment) Bill, 2016 – Dr. Raj K. Agarwal & Dr. Rakesh Gupta www.itatonline.org

Fundamental Duties of Citizens by Hon'ble Mr. Justice R. K. Agarwal (2016) AIFTPJ – December – P 9

Analysis of The Taxation Laws (Second Amendment) Bill, 2016 – Gautam Baid, CA www.itatonline.org

Impact Of The Taxation Laws (Second Amendment) Bill, 2016 – Dr. Raj K. Agarwal & Dr. Rakesh Gupta www.itatonline.org

Fiends with tax benefits : EU spoils the party by Hardeep Singh Chawla (2016) 243 Taxman 47 (Mag)

Fortunate happenstances for the assessee by Gopal Nathni (2016) 46 ITR 23 (Journal) (Trib.)

Firm – Reconstitution of firm – Tax implications where it is inferred to be non-genuine (2016) 288 CTR 6 (Opinion)

G.

GAR – General Anti – Avoidance Rule by P. N. Shah (2016) BCAJ – August – P. 12

General – A note on *New India Assurance Company Ltd. v. Sudesh Chawla (2016) 380 ITR 467 (P& H) by Pasupathi (2016) 382 ITR 9* (Articles) (Journal)

The farcical implementation of Shome recommendation – In the garb of implementation of Shome panel's recommendations, an entirely new agenda for direct and indirect taxes cannot be introduced by T.N.Pandey (2016) 382 ITR 1 (Articles) (Journal)

H.

HUF – The daughter as Karta of the HUF – by T.C.A. Ramanujam (2016) 388 ITR 49 (St) HUF – The male monopoly of Kartas of HUF is over a Female can became Karta of HUF – An analysis by T. V. Ganeshan (2016) 239 Taxman 19 (Magzine)

HUF – A son born of lawful marriage of a Hindu with a Christian mother would be a member of father's HUF by T. N. Pandey (2016) 240 Taxman 15 (Mag.)

Understanding The Concept of Hindu Undivided Family – Shri Abhishek Jain, CA www.itatonline.org

I.
Income Tax Appellate Tribunal, Platinum Jubilee Celebration

The Income Tax Appellate Tribunal, 1941 to 2016 by Justice S. Ranganathan (2016) AIFTPJ March 2016 P. 9

ITAT – Random Thoughts by Sohrab E. Dastur (2016) AIFTPJ March 2016 P. 10

Income tax Appellate Tribunal, As I see it since, 1954 by N. M. Ranka (2016) AIFTPJ March 2016 P. 11

75 years of ITAT – A Historic Milestone – My Reminiscences by Dr. K. Shivaram (2016) AIFTPJ March 2016 P. 11.

Income Tax Appellate Tribunal's 75 years of excellence (2016) AIFTPJ March 2016 P. 17

Sample Analysis showing the result of the review of the orders of the Tribunal by the High Court's during the last 75 years (2016) AIFTPJ March 2016 P. 20

ITAT – In and about ITAT–20 things I learnt in twenty years – By Justice T.N.C. Rangarajan (Retd.) (2016) AIFTP –Journal – April – P. 7

ITAT–Special Bench – Constitution of the Special Bench of ITAT: High Court view the constitution of the Special Bench of the ITAT through private meetings as being opposed to the rule of law, fairness and transparency by T.N. Pandey (2016) 390 ITR 1 (Articles) (Journal)

ITAT – My tryst with the Tribunal by S. Rajaratnam (2016) 382 ITR 70 (Article) (Journal)

ITAT – Pending appeals before ITAT as on 1-8-2016 (2016) AIFTPJ – August – P. 58

ITAT – Pendency before ITAT as on 1-12-2015 (2016) AIFTP Journal – Dec. P. 48

ITAT – "Relive Your School Life" – Shri Prarthana Jalan, CA www.itatonline.org

Income Declaration Scheme, 2016 – Circulars, Comparison of VDIS 1997, Kar Vivad Scheme, Various Disclosure Schemes (2017) AIFTPJ – July – P. 7 – 81

Income Declaration Scheme, 2016 – Salient features by Dindayal Dhandaria (2016) 237 Taxman 29 (Mag) (Articles)

Income Disclosure Scheme, dispute resolution Scheme – 2016 and equalisation levy (2016) Chamber's Journal – July – P. 11 – 79

Income Declaration Scheme 2016 – Constitutional Issues by S. R. Wadhwa, Advocate www.itatonline.org

Income Declaration Scheme, 2016 – Whether Supersedes Law of Limitation Applicable To Reopening of Cases by Dr. Raj K. Agarwal & Dr. Rakesh Gupta www.itatonline.org

ICDS – New beginning of accounting standard under Income-tax by Jitendra Jain (2016) 242 Taxman 13 (Mag.)

ICDS – Revised income computation and disclosure Standards – Critical analysis by S. Ramachandran (2016) 289 CTR 1 (Articles)

IDS – Income Disclosure Scheme, 2016 – A black law to tackle black money ! by Dindayal Dhandaria (2016) 386 ITR 65 (Journal)

Income – Taxing amount which neither accrued nor received as income by T. N. Pandey (2016) 286 CTR 6 (Articles)

Top Brass of The Income Tax Department Explain Important Aspects of The Income Declaration Scheme 2016 www.itatonline.org

Income-tax Act, 1961 – Amending the Income–tax Act – The new initiative to amend Income-tax Act, 1961, needs substantial tuning up to be a meaningful exercise by T.N. Pandy (2015) 380 ITR 1 (Journal)

Income – Tax free interest on deposit of a public subscription money – T.C.A. Sangeetha (2016) 282 CTR 17 (Articles)

Income characterisation on sales tax-free bonds by H. Padamchand Khincha (2016) BCAJ –February – P. 17

International Taxation – Payments to non-residents law and procedure (Withholding tax provisions under section 195 of the Act by Mayur B. Nayak (2016) BCAJ – Nov – P. 55

International Taxation – Growing significance of prevention of Money Laundering Act, 2002 by Mayur B. Nayak (2016) BCAJ – September – P. 53

International Taxation – Permanent establishment and the "power of deposition" test – Deciphering the contours of the "Power of deposition" test governing permanent establishments by Ananya Kapoor (2016) 389 ITR 19 (Articles) (Journal)

International Taxation – Frame work of sources of exchange of information in tax matters – An over view by Mayur Nayak (2016) BCAJ – January – P.44

International Taxation – Home Office as PE by Bhaumik Goda (2017) BCAJ – December – P. 10

International Taxation – Transfer pricing documentation – Country by country reporting by Mayur B Nayak (2017) BCAJ –October – P. 55

International Taxation – Foreign tax credit Rules – An analysis by Maur B. Nayak (2016) BCAJ – August – P. 69

International Taxation – Equailization levy – A step into unchartered territory by Mayur Nayak (2017) BCAJ – July – P.67

International Taxation – Decoding residence Rule through not so rhyming poem – How melodious is the Indian Poem – Analysis by Mayur Nayak (2016) BCAJ – February – P. 55

International taxation – Taxation of artists and sportsmen by Mayur Nayak (2016) March – BCAJ – P. 51

International Taxation – Revised procedure for making remittances to non-residents – New rules 37BB u/s. 195(6) of the Income-tax Act, 1961 by Mayur Nayak (2016) BCAJ – March – P. 61

Guide to Rules Issued by the CBDT For Grant of Foreign Tax Credit – Shri Paras Dawar, CA www.itatonline.org

Analysis of Draft Rules issued by CBDT For Grant of Foreign Tax Credit – Shri Paras Dawar. CA www.itatonline.org

An Expert Analysis of International Tax Provisions In Finance Bill 2016 Relating to Equalisation Levy, BEPS and POEM – Shri Padamchand Khincha, CA. Shri P Shivanand Nayak, CA. Shri Prem Raj Rathod CA and Shri Mohit A Parmar, CA www.itatonline.org

Whether A Liability Exists For Filing Return of Income in Case of A Foreign Company Earning Non-Taxable Income? – Shri Chirag Wadhwa www.itatonline.org

Permanent Establishment: The Continuing Conundrum – Shri Ashish Karundia, CA www.itatonline.org

Interpretation – Rules for interpretation of tax laws – Part – 1 By N. M. Ranka (2016) BCAJ- April – P. 19

Interpretation – Rules for interpretation of tax laws – Part – II By N. M. Ranka (2016) BCAJ – May – P. 17

Interpretation – Rules of Interpretation of tax statutes – Part 111 By N. M. Ranka (2016) BCAJ – June P. 43

Interpretation – Rules of Interpretation of tax statutes –Part 1V By N. M. Ranka (2016) BCAJ – July. P. 19

Interest – Receipt of interest and full value of consideration by Pradip Kapashi (2016) BCAJ – April – P. 48

J.

Jointly and severally liable by M. K. Krishnan (2016) VST 29 (Journal)

L.

Loan is a capital asset – An analysis of the decision of Mumbai ITAT by Vinay V. Kawadia (2016) 239 Taxman 29 (Magzine)

LTC – LTC exemption cannot be vailed of for places outside India by T. N. Pandey (2016) 240 Taxman 27 (Mag.)

Legal practice – Practical aspects of legal practice (for young lawyers) by Hon'ble Justice R. Banumathi (2015) 8 SCC 28

Art of Legal Writing: Impact and Analysis – Shri Dr. Arpit Haldia, CA www.itatonline.org

M.
Moot Courts are an integral part of law Students learning process by P. C. Joshi (2016) AIFTPJ –August – P. 18

Merger – Stamp duty – 2 States : The story of mergers and stamp duty by Anup P. Shah (2016) BCAJ –June – P. 121

Merger – Stamp duty – Set–off of stamp duty payable is not permissible in case of Inter-State amalgamation of companies *(Chief Controlling Revenue Authority v. Reliance Industries Ltd (68 taxmann.com 140 (Bom)(HC)*, By Ankit Talsania (2016) ACAJ –May – P. 113

Manufacture – The connotations of the term "manufacture" – Courts have given various shades to the meaning of "manufacture" under taxation laws – By T. N. Pandey (2015) 380 ITR 35 (Journal)

Measures to prevent base erosion and profit shifting (BEPS) by T.C.A. Ramanujam (2016) 380 ITR 29 (Journal)

Mauritius Treaty amendment – Reading the fine print by Krishna Malhotra, Mahima Gautam (2016) 239 Taxman 25 (Magzine)

Mauritius tax Treaty – Knowledge sharing alert – International tax – Recent amendment to India – Mauritius tax Treaty (2016) 239 Taxman 43 (Mag.)

N.
Namaskaar – Learing to be happy by Pradeep Shah (2016) BCAJ – Jan – P. 5

Namsakaar – Duty by K.C. Narang (2016) BCAJ – March – P. 5

Namaskaar – The Three Gates of Hell by Pradeep Shah (2016) BCAJ – April – P.5

Namaskaar – Attitude by K.C. Narang (2016) BCAJ – May – P.5

Equation of success by Ashok Kataria (2016) ACAJ – February – P. 667

Natural Justice in Taxation by Dr. Ashok Saraf (2016) AIFTP – Journal – April – P. 11

O.

Opinions
S.2(15 : Collections of a charity towards corpus fund (2016) 284 CTR 1 (Opinion)

S.2(15) : Chartable Trust – Filing of audit report (2016) 289 CTR 10 (Opinion)

S.2(15) : Charitable Trust – Propagation of religious education (2016) 286 CTR 19 (Opinion)

S.2(47) : Transfer – Capital gains – Time of transfer of a development agreement by S. Rajratnam (2016) 290 CTR 9 (opinions)

S.9(1)(i) : Income deemed to accrue or arise in India – Certification fees received from abroad (2016) 284 CTR 6 (Options)

S.10A and 10B : Exemption under sections 10A and 10B –IT enabled services by S. Rajartnam (2016) 290 CTR 9 (opinions)

S.11 : Exemption – Need for proper return (2016) 2016) 286 CTR 6 (Opinion)

S.15 : Salary – Perquisite – Treatment of salary in advance (2016) 286 CTR 27 (Opinion)

S.22 : Investment in property to earn rental income (2016) 294 CTR 3 (Opinion)

S.28(1) : Income – Liability of a politician to tax on his income from political preoccupation by S. Rajratnam (2016) 290 CTR 30 (opinions)

S.28(1) : Business income or capital gains – Sale of land (2016) 289 CTR 9 (Opinion)

S. 35(2AB): Expenditure on scientific research under S. 35(2AB) (2016) 289 CTR 17 (Opinion)

S.37(1) : Business expenditure – Benefits to children of employees – Whether admissible deduction (2016) 288 CTR 1 (Opinion)

S.37(1) : Treatment of corporate social responsibility (2016) 286 CTR 1 (Opinion)

S.40A(2) : Disallowances (2016) 286 CTR 17 (Opinion)

S.40A (2) : Donation to a related Trust – Applicability of S. 40(A)(2). (2016) 287 CTR 3 (Opinion)

S.40(A)(3): Payment on behalf of another (2016) 287 CTR 1 (Opinions)

S.45 : Capital gains – Sale of disputed property by S. Rajratnam (2016) 290 CTR 25 (opinions)

S.45(4) : Firm – Retirement of a partner from LLP – Incidence of tax by by S. Rajratnam (2016) 290 CTR 13 (opinions)

S.56 : Income from other sources: Gifts between family members (2016) 289 CTR 11 (Opinion)

S.56(2)(vii) : Income-Tax implications – Creation of Trust and gift of property by S. Rajartnam (2016) 290 CTR 17 (opinions)

S.56(2)(viib) : Issue of shares by a private company – Tax implications under S. 56(2) (viib) (2016) 287 CTR 6 (Opinion)

S.80IA : Irregularities in coal mining lease – Fallout of Supreme Court Judgment (2016) 288 CTR 17 (Opinion)

S.90 : Double taxation relief – Agreement between India and USA – Fees for technical services *vis-a-vis* payment to non-profit organisation as service fee in connection with hospital (2016) 289 CTR 1 (Opinion)

S.115O : Dividend distribution tax – Effect of amendment to S. 115O by the Finance Act, 2014 (2016) 286 CTR 25 (Opinion)

S.115JB : Treatment of amount drawn from securities premium account. (2016) 289 CTR 2 (Opinion)

S.139 : Omission to file return – Options to assessee (2016) 288 CTR 12 (Opinion)

S.153A: Search and seizure – Computation of undisclosed income (2016) 286 CTR 7 (Opinion)

S.195: TDS – Payment of retainer for sales agent abroad (2016) 286 CTR 12 (Opinion)

S.199: Credit for TDS under S. 199 (2016) 286 CTR 11 (Opinion)

Subsidies – Capital subsidies and accounting by S.N. Inamdar (2016) BCAJ – November – P. 12

Settlement Commission – Income tax Settlement Commission by Chetan A. Karia (2016) AIFTPJ – June – P. 14

P.

Penalty for under reporting and misreporting of income – S. 270A –New penalty provisions introduced by Finance Act, 2016 by Rahul Hakani (2016) AIFTPJ – October –P. 32

Permanent establishment – Permanent establishment and the "Power of disposition "Test –Deciphering the contours of the "Power of disposition" Test governing permanent establishments – Ananya Kapoor (2016) 389 ITR 19 (Journal)

Panama Papers: Well worked strategy, not hurried reactions, can play bring results by T. N. Pandey (2016) 383 ITR 1(Journal)

Pradhan Mantri Garib Kalyan Yojana – FAQ – (2016) 243 Taxman 13 (Mag.)

Pradhan Mantri Garib Kalyan Yojana v. Voluntary Disclosure under section 115BBE (2016) 243 Taxman 18 (Mag.)

Pradhan Mantri Garib Kalyan Yojana: Last Call To Tax Evaders To Come Clean – Rahul Sarda, Advocate www.itatonline.org

14 things you need to know for declaring unaccounted income under PMGKY (2016) 243 Taxman 57 (Mag.)

Check list for filing declaration of unaccounted cash or deposits (2016) 243 Taxman 20 (Mag.)

Precedents – Boon or bane ? by Honourable Justice Mr. R. V. Raveendran (2015) 8 SCC J 1

Precedents – How to comprehend precedents by Mr. Mohan Pararasran (2016) 2 SCC 28 (Journal)

Penalty For Cash Deposit In Banks Declaring As Unaccounted Income? – Dr. Raj K. Agarwal & Dr. Rakesh Gupta www.itatonline.org

Guide To The Law On Levy Of Penalty On Additions Made In Search & Seizure Proceedings – Shri Vinay Kawdia, CA www.itatonline.org

Rationalisation Of Penalty Provisions Under The Income-tax Act 1961 As Per The Finance Bill, 2016 – Shri K. C. Singhal, former Vice President www.itatonline.org

The Role Of Professionals In Tax Reforms: Justice Mr. R. K. Agrawal – Justice Mr. R. K. Agrawal www.itatonline.org

R.

Reassessment – An Overview – S. 147-153 by Ajay R. Singh (2016) AIFTPJ – P. 9

Reassessment – Is there a limitation for ”Reassessment” when the return is processed u/s. 143(1)? By V. Subramani (2017) BCAJ – September – P.10

Right to Information Act – Ten years of Right to Information Act, by Dr. Mahesh Thakar Advocate (2016) AIR 105 – May – Journal.

Right to Information by Narayan Varma (2016) AIFTP Journal – January – P.9

Right to Information – Details of income tax returns cannot be requisitioned under RTI Act, except for larger public interest by T. N. Pandey (2016) 237 Taxman 15 (Mag.) (Articles)

Reserve Bank : Is the Reserve Bank of India liable to dividend distribution tax on dividend payment to Government ? By T.N. Pandy (2016) 383 ITR 20 (Journal)

Real Estate – Overview of the Real Estate (Regulation & Development) Act, 2016 by Kirit J Hakani (2016) AIFTP – June P. 39

Return – Revision – The Curious case of Amitabh Bachchan by T.C.A Sangeetha (2016) 287 CTR 1 (Articles)

S.

Settlement Commission – Income tax – Settlement commission by Chetan A. Karia (2016) AIFTP Journal – June – P. 14

Settlement Commission has no power to order special Audit in cases for Settlement before it by T. N. Pandey (2016) 238 Taxman 13 (Mag.) (Articles)

Savings – Tax savings by the end of the financial year by T.C.A Sangeetha (2016) 283 CTR 19 (Articles)

Salary – Damages for failure to employ not profits in lieu of salary – Whether sustainable by Minu Agarwal (2016) 283 CTR 17 (Articles)

Settlement Commission – Settlement Commission has no power to order special audit in cases for settlement before it by T. N. Pandey (2016) 238 Taxman 13 (Mag.)

Service tax

Service tax on Club or Association including Co-operative Housing Societies By Rajkamal Shah (2016) AIFTPJ – August – P. 23

A new dose of service tax by designating as Swatchh Bharat cess by – T.N. Pandy (2016) 282 CTR 4 (Articles)

Service tax – Service tax liability on sale of space for advertisement in magazines, journals and newsletters by Tilak Chandana (2016) 284 CTR 39 (Articles)

Service tax – Subjecting film acting to service tax and exempting artists is not discriminatory by T.N. Pandey (2016) 284 CTR 32 (Articles)

Service tax – An Overview of Finance Act, 1994, relating to Service tax – Post Negative Regime By B. Srinivas & S.S. Satyanaryana (2016) AIFTP Jaournal – January – P. 42

Service tax – Service tax on business auxiliary Services – Pre and post 1st July, 2012 scenario by T.N. Pandey (2016) 286 CTR 18 (Articles)

SLP, dismissed – 1st April – 30th November, 2015 by Samir Dalal The Chamber's Journal (2016) January P. 73 – 83

State Budget – (2016) AIFTP – Journal – April –P 18 to 39

Stay: Stay in high pitched assessment – Unsatisfactory legal position by Minu Agarwal (2016) 289 CTR 25 (Articles)

T.

Tax Revolution and Economic Revolution by Honourable Justice Mr. V. Gopala Gowda (2016) AIFTPJ – August – P. 10

Tax Reform – Role of Professional by Hon'ble Justice Mr. R.K. Agarwal (2016) AIFTPJ – August – P. 15

Tax Reform – Random reflections – By S. Rajrathnam (2016) 390 ITR 49 (Article) (Journal)

Tax reforms – Growing inequality and taxation of super rich by T.C.A. Ramanujam (2016) 286 CTR 4 (Articles)

Trust – Can a Trust be a Beneficiary in another Trust ? by M. L. Bhakta (2017) BCAJ – October – P.19

Transfer Pricing – Applicability of Transfer Pricing on marketing Intangibles –Part 1 by Dhinal A. Shah (2016) ACAJ October – P. 460

Transfer Pricing – Concept of Fraud and its relevance to Transfer Pricing by Sivam Subramanian (2016) 243 Taxman 21 (Mag)

Transfer Pricing: Interest – Free Loan to a subsidiary by Gopal Nathani (2016) 387 ITR 6 (Journal)

"To Tax and to please" – Ashok Kumbhat Memorial Endowment Lecture by Honourable Justice Easwar Judge Delhi High Court (2016) 386 ITR 11 (Journal)

Trust – Can a Trust be a beneficiary in another Trust by M. L. Bhakta (2016) BCAJ –Oct – P. 19

Tax reform – Growing inequality and taxation of super rich by T.C.A Ramanujam (2016) 286 CTR 4 (Articles)

Tax reform – Random reflections by S. Rajratnam (2016) 380 ITR 49 (Journal)

Treaty – Loss of revenue on account of a punctuation – Whether it is fair to allow slip of royalty tax for mere existence of a " comma" punctuation following the word " process' in Articles 12(3), /12(4) by Gopal Nathani (2016) 46 ITR 45 (Journal)(Trib.)

Transfer pricing – AMP: A controversy far from over, by Jigner Saiya (2016) March – BCAJ – P. 10

Tax Administration Reform Commission – The Farcical implementation of Shome recommendation by T.N. Pandey (2016) 382 ITR 1 (Journal)

Tax Articles for your Reference by Kishor Vanjara (2016) Chamber's Journal – March – P. 206

Tax Articles for your Reference by Kishor Vanjara (2016) Chamber's Journal – April – P. 136

Tax administration – Responsibilities and duties of Departmental Offices – Ten Action points for the year, 2016–17 by S.R. Wadhwa (2016) AIFTP Journal – January – P. 21

Tribunal – Whether Tribunal can decide cross objection even when it declares the appeal as non-maintainable by T.N. Pnadey (2016) 239 Taxman 13 (Magzine)

Tax deduction at source – No TDS on general provisions for expenses, made on estimate basis, at the end of the financial year by S. K. Tyagi (2016) 386 ITR 8 (Journal)

TDS and TCS: While expanding the coverage of TDS and TCS collections, the Income-tax department needs to address the taxpayers' problems concerning compliance by T.N. Pandey (2016) 388 ITR 68 (Articles)

Tax Revolution And Economic Revolution By Justice Mr. V. Gopala Gowda – Hon'ble Justice Mr. V. Gopala Gowda www.itatonline.org

Tribute – Chief Justice Sarosh Homi Kapadia – A tribute by Sohrab Dastur (2016) The Chamber's Journal – January – P. 10

Tribute – A Tribute to Hon'ble Mr. Justice S.H. Kapadia former Chief Justice of India, (2016) AIFTPJ – January P. ?

Tribute – Respectful homage to late Shri Narayan Varma by Dr. K. shivaram (2016) The Chamber's Journal – January– P. 11

Tax Articles for your Reference by Kishor D. Vanjara (2016) The Chamber's Journal – March – P. 206

Tax Articles for your Reference by Kishor D. Vanjara (2016) The Chamber's Journal – April – P. 136

Tax Articles for your Reference by Kishor D. Vanjara (2016) The Chamber's Journal – June – P. 172

Tax Articles for your Reference by Kishor D. Vanjara (2016) The Chamber's Journal – August – P. 127

Tax Articles for your Reference by Kishor D. Vanjara (2016) The Chamber's Journal – October – P. 186

V

VDIS – Recourse to the VDI Scheme: The Government is sparing no efforts to enthuse tax – Evaders to make the VDIS a success ! T.N. Pandey (2016) 386 ITR 57 (Journal)

Voluntary Disclosure Scheme under section 118BBE – 20 things to know (2016) 243 Taxman 16 (Mag.)

W.

Writ – Judicial orders of Civil Courts and amenability to writ jurisdiction (Under Article 32) : A study by Prof. (Dr.) Mukund Sarada (2016) AIR 103 – May – Journal.