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ALL INDIA FEDERATION OF TAX PRACTITIONERS JOURNAL

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80 Glorious Years of The Income Tax Appellate Tribunal

A Tribute

80 Landmark Judgments of Special Benches

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Sincere thanks to the members of the editorial and research team for sparing their valuable time towards this publication. Sincere thanks to Dr. K. Shivaram, Senior Advocate for providing guidance. Mr. Mitesh Kotecha played a crucial role in making things possible and Mr. Janak Vaghani vigilantly made the deadlines adhered to. Special thanks to the AIFTP staff for bearing with the last minute rush. Last, but, not the least staff at Finesse, the printers, for giving priority and timely suggestions.

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विधि एवं न्याय मंत्रालय
Government of India
Ministry of Law & Justice

Message

I am very happy to learn that All India Federation of Tax Practitioners is proposing to release a publication titled *"80 Landmark Decisions of Special Bench of the ITAT"* at the time of 80th Foundation Day of the Income Tax Appellate Tribunal.

I am delighted to know that the earlier publications have been received well by the readers and, similarly, this book shall also be of great help to the tax professionals.

I acknowledge the good work of the Federation in conducting free Webinars on various subjects for the benefit of the tax professionals and the tax payers during this uncertain times of Pandemic (Covid-19).

I appreciate the research team and the editorial team for their sincere efforts and convey my best wishes for the publication.

6th January, 2021

[Justice P. P. Bhatt]

सत्यमेव जयते

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दिनांक / DATED THE 08-01-2021

Message

I congratulate The All India Federation of Tax Practitioners (AIFTP), on publishing "80 Landmark Decisions of Special Benches of the ITAT". I appreciate the endeavor put in by the AIFTP team for this wonderful landmark work. I am quite optimistic that it would be of a great benefit to the readers, more specifically, the professionals practising before the Tribunal.

I am sanguine that the AIFTP would continue to achieve greater heights in future for its relentless efforts in promoting the cause of the profession through its publications catering to different issues in taxation.

One again I extend my heartiest congratulations for this monumental work.

R. S. Syal

(R. S. Syal)
Vice President (PZ)

प्रमोद कुमार
उपाध्यक्ष
आय-कर अपीलीय अधिकरण
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Message

All India Federation of Tax Practitioners has done, and continues to do so, amazing public spirited work in the field of knowledge sharing in, as also in spreading awareness about, direct and indirect taxes in India. Everyone connected with taxes, whether as a taxpayer, a tax practitioner, or as someone associated with the functioning of the Government machinery, implementing these tax laws, or associated with the tax judiciary, adjudicating on the tax disputes, deeply values immense contribution that you have made in this field. In one way or the other, all of them have benefited from your publications, your conferences, your seminars and your technical publications.

I am happy that All India Federation of Tax Practitioners is publishing a special issue of the AIFTP journal and this special issue will cover 80 important decisions of the Income Tax Appellate Tribunal. This is commendable work, and I am sure it will be very useful for everyone connected with the functioning of the Income Tax Appellate Tribunal.

All my good wishes for this initiative, as indeed for all the good work that you are doing!

January 12, 2021

Pramod Kumar

A. D. JAIN
VICE PRESIDENT

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दिनांक/Date The 22nd February, 2021

Message

I heartily congratulate The All India Federation of Tax Practitioners (AIFTP), the apex body of the tax practitioners, on publication of the Special issue of their journal, digesting 80 important Decisions of the Special Benches of the ITAT. I deeply appreciate the effort of the AIFTP team for this wonderful endeavor. This publication of the AIFTP would definitely be beneficial to all the tax professionals. Collating these many ITAT Special Bench Orders makes them readily accessible at one go.

I sanguinely trust that the AIFTP will crest even greater heights in promoting the cause of the profession through its publications, addressing varied subjects in the field of taxation.

Jai Hind.

(A. D. Jain)

जी.एस. पन्नू
उपाध्यक्ष
G. S. PANNU
Vice President

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आयकर अपीलीय अधिकरण
Government of India
Ministry of Law & Justice
Income Tax Appellate Tribunal

Message

It is a matter of immense pleasure that the All India Federation of Tax Practitioners is publishing a Publication titled *"80 Landmark Decisions of Special Benches of the ITAT"*, which is proposed to be released on the occasion of 80th Foundation Day of the Income Tax Appellate Tribunal.

It is also a matter of appreciation that during the period of pandemic of COVID-19. AIFTP has conducted more than 110 Webinars on various subjects free of cost for the benefit of the tax professionals and tax payers.

I congratulate the authors of the Journal Committee of the AIFTP for their dedicated efforts in bringing out a publication which contains 80 landmark Special Bench decisions of ITAT which had far-reaching implications. I am sure the publication would prove to be useful for tax professionals, tax payers as well as tax administrators. I convey my best wishes for its success.

[G.S. PANNU]

22nd February, 2021

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Message

I am glad to know that The All India Federation of Tax Practitioners, popularly known as AIFTP, comes out with a Special Issue of its Journal digesting 80 important Decisions of the Special Benches of the ITAT. I heartily congratulate the entire team of AIFTP and appreciate the efforts put in by them for this wonderful landmark work. I am quite sure that this publication of the AIFTP would definitely be beneficial to all the tax professionals and we look forward to have such great work in the years ahead also as was done by the AIFTP in the last several years.

I am quite confident that the AIFTP, the apex body of tax practitioners, will crest even greater heights in promoting the cause of the profession through its publications, addressing varied subjects in the field of taxation. I once again extend my heartiest congratulations for this great endeavour.

Rajpal Yadav
Vice-President (AZ)

February 22, 2021

From the Editor

Celebrating 80th Foundation Day

With

80 Select Judgements

Income Tax Appellate Tribunal completes its glorious 80 years of service to the nation. The Income Tax Appellate Tribunal, though is a creation of statuary provisions of Income tax Act, 1961, from section 253 to 256, the supervising ministry is Ministry of Law and Justice. This arrangement has been provided with great insight; the Ministry of Finance which enforces the Income tax Act, 1961 is one of the litigant before the Income Tax Appellate Tribunal through the department of Income Tax. If the supervision is left to the Ministry of Finance, then it would set a bad precedent and interference in the judicial work cannot be avoided and the assessees would lose the trust which they reposed in the judicial body from last 80 years. The importance of the independence of judicial body like Income Tax Appellate Tribunal can be gauged with the fact that several executive feats, through the bureaucracy, were made in the past to dilute the independence of the Income Tax Appellate Tribunal by tinkering with administrative powers of the President of the Income Tax Appellate Tribunal. These disputes landed up before the Hon'ble Supreme Court. In the case of *ITAT v. V.K. Aggarwal (1999) 235 ITR 175 (SC)* Apex Court held that Tribunal is a court. Again, in the case of *Ajay Gandhi v. B. Singh (2004) 265 ITR 451 (SC)* observed that "keeping in view the fact that the independence of the Tribunal is essential, for maintaining its independence any power which may be conferred upon the executive authority must be proved to be in the interest of imparting justice."

While working on this project, myself and my colleagues , who are part of the research team, came across around 532 judgements delivered by the Special Benches of the Income tax Appellate Tribunal since inception. In the year 2020 there are no Special Benches as the judicial proceedings were affected due to COVID-19 pandemic. Thus, the Income Tax Appellate Tribunal, on an average, has been delivering 6 to 7 Special Bench judgements every year. There are other statistics which we are providing at page 218 of this journal which shows that the Income Tax Appellate Tribunal has achieved its moto of delivering Impartial, Easy and Speedy Justice.

The provisions of section 255(3) provide that the President may, for the disposal of any particular case, constitute a Special Bench consisting of three or more members, one of whom shall necessarily be judicial member and one an accountant member. These provisions fell for consideration before the Apex Court in the case of *ITAT v. DCIT (1996) 218 ITR 275 (SC)*. The Apex Court explained the scope of the provisions of sub- sections (1)

and (3) of section 255 of the Income tax Act, 1961. The powers conferred on the President to constitute Benches of the Tribunal are administrative powers. The sub-section (3) empowers the President for disposal of any particular case to constitute a Special Bench. The functions, entrusted under sub-section (1) and (3) of section 255 to the President of the Tribunal, are obviously administrative functions. They have nothing to do with exercise of any judicial power. As per sub-section (5) the Tribunal can regulate its own procedure and the procedure of the Benches and for that purpose can frame appropriate regulations. The Bench of the Tribunal, hearing the matter is of course a judicial function, but so far as the President's power under sub-section (1)r/w sub-section (3) of section 255 to constitute Benches or for that matter Special Benches is concerned, the said power is an administrative power. It is obvious that the President, in this connection, may even act suo moto, if it is brought to his notice that any important point is pending for decision in a matter which requires to be decided by a larger Bench.

This Special Issue of the AIFTP-Journal is brought out with the help of the research team and the editorial team. I thank all my team members for supporting me in putting together this issue. I am especially grateful to my editorial team, which consists of very senior professionals, for providing me guidance and doing the tedious job editing. My special thanks to Journal Committee and its convenor Advocate Neelam Jadhav for coordinating and providing the Subject Index. I am thankful to Dr. K. Shivaram, Senior Advocate, doing the hand holding and helping me in overcoming the road blocks I had hit in the process of bringing out the publication. I am grateful to Lordship Justice P.P. Bhatt, President for accepting our request to release this publication during the inaugural session of the 80th Foundation Day celebration.

K. Gopal,
Editor

President's Communique

AIFTP Journal is a unique publication on Direct and Indirect Taxes and one of the prestigious Journal of the Tax Practitioners of our Country. To better equip the members of the AIFTP a team of 25-odd tax Professionals quarterly digesting important judgements from more than 20 tax magazines, reports and other sources. To mark the Centenary celebration of Padma Vibhushan Late Dr. N. A. Palkhivala, Senior Advocate the Journal Committee of the AIFTP has published a Special Issue titled **"Remembering the Legend – A Tribute"**, which was released on January 16, 2021. I am pleased to know that as a Tribute to mark the 80th years of the Income-Tax Appellate Tribunal (**ITAT**) the Journal Committee is publishing a Special issue titled **"A Tribute – 80 Glorious Years of the Income Tax Appellate Tribunal- 80 Land Mark Judgements of Special Benches"**. The said special issue contains the gist of 80 Land mark Judgements of the Special Benches with forward references and reference to 532 special Bench Judgements of the ITAT. I am sure the said special issue serve as a useful reference to all our members and Tax Practitioners Across the Country.

The said special issue is conceptualised under the able guidance of Dr. K. Shivaram, Senior Advocate and Past National President of our Association who has written Foreword for this Special issue.

We are able to publish this special issue due to very sincere efforts of Mr. Mitesh Kotecha, Chairman Journal Committee and his team. I must also acknowledge the time devoted by Mr. K. Gopal Advocate as an editor of this very prestigious special issue.

It is the team work of the editorial team and research team that we could able to publish this prestigious special issue.

I am grateful to the Hon'ble Justice Mr. P. P. Bhatt, President of the ITAT for writing a message to our special issue and agreeing to release the publication on 27th February 2021 at Ahmadabad on the occasion of the inaugural session of the members conference. I am also thankful to the Hon'ble Vice-Presidents for writing message for this prestigious publication.

For the benefit of our members and public at large this special issue will be hosted in the website of the AIFTP and is available for download on www.aiftponline.org

As a National President of the AIFTP I desire to serve our members to the best of my ability, any member or reader can send their suggestion for rendering better service to the members of the AIFTP.

M. Srinivasa Rao
National President, AIFTP

25th February, 2021

Foreword

A Tribute – 80 Glorious Years of the Income Tax Appellate Tribunal – 80 Landmark Judgements of Special Benches

Dr. K. Shivaram, Senior Advocate, Bombay High Court

January 25, 2021 was the 80th Foundation Day of the Income tax Appellate Tribunal (ITAT) (25-1-1941 to 25-1-2021), which is considered as the Mother Tribunal of our country. ITAT is one of the oldest Temples of Justice in our country. The older the temple, the greater is its sanctity and reverence. It is the strong foundation of this great institution which is made possible to retain the glory as one of the finest institutions of our country.

The year 2020 witnessed a global pandemic. However, under the able leadership of Hon'ble Mr. Justice P.P. Bhatt President with the support of Hon'ble Vice-Presidents and Hon'ble Members of the ITAT through virtual courts have disposed a greater number of matters than the appeals filed. There is an ongoing research is in the process how to take this forward. The Hon'ble Vice-Presidents of the ITAT have interacted with stake holders and representatives of the Tax Bars across the country on the issues relating to Virtual Court proceedings. Many valuables suggestions were provided for the consideration of the Hon'ble President.

In 80 years of ITAT, it has gained the confidence of both the taxpayers and the Revenue authorities alike by rendering impartial decisions in a transparent manner, no other Tribunal in India has won such well-deserved popularity and confidence of the public as the Income-tax Appellate Tribunal.

There is uniform praise in the manner in which the Tribunal functions.

As a Tribute to the ITAT, on the occasion of 80 years of the ITAT the Journal Committee of the AIFTP has published a special which will contain the gist of the 80 land mark judgements of the ITAT giving forward references to the cases. The special issue also contains a reference to Special Benches since 1967 till date.

Section 255 (3) of the Income-tax Act (**Act**) gives power to President to constitute special Bench. In *ITAT v. DCIT (1996) 218 ITR 275 (SC)* it was held that the function entrusted to the President under sub-sections (1) and 3 of Section 255 of the Act are administrative functions and the power to constitute Special Benches of the Tribunal is an administrative power. The President may also 'suo motu' constitute such a Special Bench if it is brought to his notice that any important point is pending for decision in a matter required to be decided by a larger Bench. The Apex Court also held that the High Court cannot sit in appeal over the administrative power of the President of the Tribunal unless such powers has been used in a mala fide manner. In *Jagati Publication Ltd v. President ITAT (2015) 377 ITR 31 (Bom) (HC)* the Court held that, the CBDT for seeking to constitute Special Bench for non -judicial reasons

and on grounds of "political sensitivity". The collection of tax and the adjudication must move unconcerned with political identity. It is also necessary to send a strong signal to all litigants, including the State, to make no attempts to influence a judicial body by non-judicial methods. Constitution of Special Bench on the recommendation of CBDT was strongly condemned by the Court. In *CIT v. Janapriya Engineers Syndicate (2015) 371 ITR 439 (AP& T) (HC)*, held that until and unless the decision of the Special Bench is upset by a High Court, it binds smaller and Co-ordinate Benches of the Tribunal. When official publication of the Appellate Tribunal Income-tax Tribunal decisions (1982) 1 ITD 33 to 57 was started, a list of special Benches and decision there on was published. Appellate Tribunal has rendered more than 500 decisions of the Special Benches settling various important issues. More than 86 per cent of the orders of the Appellate Tribunal are affirmed by Apex Court and High Courts and some of the decisions of the Appellate Tribunal are accepted by the Revenue and assesses and no further appeals were filed. Some of the land mark judgments of the Special Benches are summarized in this special issue which will be very useful to the readers. Most of the Judgements of the Special Benches are affirmed by the High Courts and Supreme Court. Some of the Special Bench cases were argued before the Appellate Tribunal for weeks before the ITAT. Some of the Special Benches are of seven Members. Hon'ble members were able to deliver very qualitative judgements due to oral arguments, counter arguments, very pertinent questions by the Honorable members. If the amendment proposed by the Government to have faceless ITAT, how the Special Benches will function and how much confidence will the taxpayers have in the faceless hearing, time will only decide. We hope considering the various representations made by the stake holders, the Govt may reconsider the proposal on the faceless ITAT.

The Messages from the Hon'ble Mr. Justice. P. P. Bhatt, President of the ITAT and Hon'ble Vice-Presidents will be an inspiration to the readers to understand the judgements delivered by various special Benches of the Income-tax Appellate Tribunal.

Sincere effort made by the journal committee of the AIFTP as an editor Mr. K. Gopal, Chairman Mr. Mitesh Kotecha, Leadership of Mr. M. Srinivasa Rao National President, editorial board and the contributors deserved special appreciation. Special thanks to Advocate Ms. Neelam Jadhav for preparing subject wise and section wise index to this special issue.

We hope this publication will be useful to the tax professionals to understand the development of tax laws and acknowledge the contribution of the ITAT over the last 80 years.

Date: 24-2-2021

Dr. K. Shivaram
Senior Advocate

1. S. 2(1A) : Agricultural income – Mushrooms – Production – Cultivation of mushrooms is an agricultural activity and income derived from such an activity is exempt from tax. [S.10(1)]

Facts:

Assessee (Inventa Industries Pvt. Ltd) is a private limited company engaged in the business of growing "Edible white button mushrooms" (Mushroom) under the name and style of 'Premier Mushroom' which is consistently shown as income from agriculture and accordingly, an exemption under section 10(1) of the Act is claimed in income tax returns. A survey was carried on at the preemies of the assessee. While passing the assessment orders for the assessment years 2008-09, 2010-11, 2011-12 and 2012-13, the AO rejected the activity of mushroom farming as an agricultural activity and denied the exemption under section 10(1) of the Act mainly on the ground that the activity of mushroom farming was not carried on land as Mushrooms are grown in 'growing rooms' under 'controlled conditions' in racks placed on shelves above land. While coming to the aforesaid conclusion, the AO heavily placed the reliance on the decision of the Supreme Court in the case of "*CIT v. Raja Benoy Kumar Sahas Roy (1957)32 ITR 466(SC)*" and Rule 7A, 7B and 8 of the Income Tax Rules, 1962. The AO further concluded that explanation 3 to section 2(1A) of the Act does not cover the activity of mushroom farming and also observed that mushroom is not a vegetable but a fungus. Being aggrieved, the assessee filed appeals before the CIT(A) and succeeded. The CIT(A) allowed the appeals of the assessee on the conclusion that mushroom farming is a process of agricultural production and thus, the income derived from the same is entitled for an exemption under section 10(1) of the Act. Against the said orders, the department filed appeals before the ITAT.

Issue:

To determine the aforesaid controversy, the special bench was constituted and the following question was referred for adjudication:

"Whether in the facts and circumstances of the case, the income from production and sale of Mushrooms can be termed as 'agricultural income' under the Income Tax Act, 1961?"

Views:

The special bench at the outset observed various activities/steps which are followed in production of mushrooms in a detailed manner and posed itself the following three sub-questions/issues for consideration, namely (i) "Land" is immovable property. Soil is part of land. If "soil" is placed in trays or pots and when operations are carried out on this "soil", which is detached from land, for production of mushroom, could such activity be termed as agricultural activity?(ii) Is mushrooms a "fungi" or "vegetable or plant"? Is the income derived from the production and sale of mushroom, agricultural income if the product is a 'fungi'? (iii). When agricultural production is done in "controlled conditions", does it cease to be agricultural operation resulting in the income derived therefrom not being agricultural income?

The special bench thereafter in a detailed manner analysed the definition of "agricultural income" as enshrined under Section 2(1A) of the Act and noted the observations of the Supreme Court in the decision of "*CIT v. Raja Benoy Kumar Sahas Roy*" on which heavy reliance was placed by the AO and the decision of the Madras High Court in the case of "*CIT v. K.E. Sundara Mudaliar [1950]*

18 ITR 259 (Mad.)". From a conjoint analysis of the decisions, the special bench observed that a wide meaning must be given to the term "agricultural operations". Further, the special bench after considering the definitions of "land" and "soil" given in various dictionaries reached the conclusion that land includes soil and the definition of land must receive a purposive interpretation in the given facts. It was noted by the special bench that in mushroom farming, when soil is placed in trays in order to carry on mushroom farming, it does not cease to be land and when operations are carried out on such soil, it is an agricultural activity carried upon land itself. While dealing with the aspect of applicability of explanation 3 to section 2(1A) of the Act, the special bench referred to the decision of the Madras High Court in the case of "*CIT v. Soundarya Nursery [2000] 241 ITR 530*" and noticed that the Court way back in year 2000 had given a wide meaning to the term agricultural products upholding that plants sold in pots constituted an agricultural activity. The special bench concluded that in the light of the said decision, since in the given facts, the assessee performs basic operations on soil in mushroom cultivation, it constitutes an agricultural activity even in the absence of explanation 3 to section 2(1A) of the Act. The special bench expressed its concurrence with the view taken by the Ahmedabad bench in the case of "*DCIT v. Best Roses Biotech Ltd. (2012)17 taxmann.com 56 (Ahd.)*" in which the Ahmedabad bench upheld the activity of growing good quality rose flowers in a greenhouse as agricultural activity and observed that the activities carried out in the said decision were similar to those carried in mushroom production. The special bench, thereafter observed the definitions of "spawn" and "mycelium" and concluded that the mushroom is not a vegetable but a fungus. However, it was observed by the special bench that the Supreme Court in the decision of "*CIT v. Raja Benoy Kumar Sahas Roy*" emphasised on the term "product" laying down that "Product" should be raised on land by performing some basic operations on land by expenditure of human skills and labour and the product should possess some utility for consumption for trade and commerce in order to qualify such a process as an agricultural activity. The special bench finally reached the conclusion that "Mushrooms" are cultivated on soil drawing their nourishment from the soil only and thus, fall within the ambit of "product" as per the said decision. It also observed that merely because mushrooms are grown in controlled conditions, it does not disentitle the assessee to claim it as an agricultural activity.

Held:

On the aforesaid observations, the special bench finally held that since mushrooms are produced by resorting to basic operations on soil/land by expenditure of human skills and labour and they have utility for consumption, trade and commerce, income derived from the sale of mushrooms falls within the ambit of section 10(1) of the Act and thus, is exempt from tax (AY. 2008-09 to 2012-13).

DCIT v. Inventaa Industries Private Limited (2018) 168 DTR 81/ 172 ITD 1/194 TTJ 657/65 ITR 625 (SB) (Hyd.)(Trib.)

Editorial: The traditional ideal of Agriculture conveying "doing activities only and only on land" has changed significantly and modern techniques are often adopted in carrying out agricultural operations. In this backdrop, it is a welcome decision and gains much importance as it visualises and accepts such modern ways of carrying out agricultural activities and expands the idea/scope of agriculture even for the tax laws. It also lucidly explains the celebrated decision of the Apex court in the case of "*CIT v. Raja Benoy Kumar Sahas Roy*" and sheds new light on the provisions of section 2(1A) and section 10(1) of the Act.

2. S. 2(18) : Company in which public are substantially interested – Second subsidiary – Meet the requirement of being company in which public are substantially interested.

Facts:
Both the assessee's companies are public limited companies under the Companies Act, 1956. Adavat Investment Ltd. and Samudaya Investment Ltd. being companies where public are substantially interested and being parent companies of assessee companies have 50 percent of the voting power throughout the relevant previous year in the assesee companies respectively. Akash Agencies Ltd. and Sifa Trading Co. have 50 percent of the voting power in the above-mentioned parent companies and are listed on the Bombay Stock Exchange for all the years. The assessee's companies being the second subsidiary companies claimed the status of "widely held company" for the assessment year 1991-92 as they satisfy the conditions laid down under section 2(18)(b)(B)(C) of the Act. The Assessing Officer did not agree with the assessees companies. He observed that the parent companies who are not listed on stock exchange and do not have the whole of the share capital, then the second subsidiary companies being assessee's companies cannot be treated as "widely held companies."

Aggrieved with the order of Assessing Officer the assessees companies preferred appeals before CIT(A), whereby the CIT(A) considering the earlier years in the case of Alligator Investment Ltd. for Assessment years 1986-87 to 1989-90 and also in the case of Akash Agencies Ltd. for assessment year 1990-91 and further referring to the Board's Circular No. 372 dated 21st November 1983 where the assessee is entitled to be treated as a company in which public are substantially interested or widely-held company under the section 2(18)(b)(B)(C) of the Act, allowed the claim of the assessees companies.

Against the order of CIT(A), Revenue filed the appeals before the Tribunal. The Division Bench of the Tribunal raised serious doubt on the ground that Sifa Trading Co. and Akash Agencies Ltd. are listed on the stock exchanges and qualifies to be a company in which public are substantially interested and fall under section 2(18)(b)(A). These companies have not less than 50 percent of the voting power of Samudaya Investment Ltd. and Adavat Investment Ltd. respectively throughout the previous year unconditionally and beneficially. Samudaya and Adavat qualify to be a company in which public are substantially interested but Sifa Trading Co. and Akash Agencies Ltd. do not have any shares in the assessee companies. Hence whether assessee's companies being subsidiary of Samudaya Investment Ltd and Adavat Investment Ltd also qualify to fall under the category of a company in which public are substantially interested. Therefore, the correctness on the decision in the case of Alligator and case in hand, the Tribunal recommended to constitute a Special Bench to hear these appeals and the same was proposed for the purposes of deciding a question namely, whether assessee's companies being subsidiary of Samudaya Investment Ltd and Adavat Investment Ltd also qualify to fall under the category of a company in which public are substantially interested and whether they satisfy the conditions specified in section 2(18)(b)(B)(C) of the Act.

Issue:
The Special Bench had to consider an issue

(i) Whether, the second subsidiary company of the first subsidiary company (parent company) falls within the definition of a 'company" in which public are substantially interested as per section

2(18)(b)(B)(c) of the Act, notwithstanding the fact that neither parent company holding 100 percent shares in the secondary subsidiary company?

Views:
The Special Bench after reviewing the matter at hand and the case law of Alligator Investment Ltd. made it clear that in order to be eligible to be a company there is no such condition that it has to have a status of his own and not by virtue of its being a subsidiary of the holding company to which clause (c) applies of section 2(18)(b).

When the essential ingredients of section 2(18)(b)(B)(c) are fulfilled then the company does accomplish to be a widely held company. Further they agreed with the decision of the CIT(A) and Tribunal in the earlier years.

Held:
Held by the Special Bench after considering all the facts and the circumstances that:

(i) In order to be eligible to be a company there is no such condition that it has to have a status of his own and not by virtue of its being a subsidiary of the holding company to which clause (c) applies of section 2(18)(b).

(ii) As per the section and its clauses 50 percent is a must in one case whereas no such condition for holding whole of the capital in the subsidiary which may be with or without voting rights.

(iii) The allotment of not less than 50 percent shares has to be unconditional, but there is no such requirement for wholly-owned subsidiary.

(iv) The requirement of holding not less than 50 percent shares is further condition by a term that it should be held beneficially by the parent company and it would not be sufficient that it is holding otherwise as a legal owner whereas in the case of a wholly-owned subsidiary no such condition is imposed. (AY. 1991-92)

ACIT v. Ajax Investment Ltd & Anr. (2003) 85 ITD 154/ 78 TTJ 847 (SB)(Ahd.)(Trib.)

High Court Status: No Appeal filed by the Revenue

Editorial: Ratio is very relevant while dealing with the matters relating to essential ingredients of section 2(18) of the Act with respect to widely held companies where public are substantially interested.

> *"I am sure, the Tribunal will continue to play a pivotal role in speedy and impartial resolution of tax disputes."*
>
> ***– Hon'ble Shri Narendra Modi, Prime Minster of India (ITAT Souvenir, 2016)***

3. S. 2(22)(e) : Deemed dividend – Deemed dividend can be assessed only in the hands of a shareholder of lender company and not in the hands of a person other than shareholder.

Facts :
The assessee took an interest bearing loan of Rs. 9 lakhs from another company.

The Assessing Officer held that though the borrower was not a shareholder yet, both the companies had one common shareholder, i.e., Narmadaben Nandlal Trust (NNT), and that the said trust was holding 20 per cent shares in BCPL and 10 per cent shares in UPPL, took the view that the impugned transaction of loan was covered by the second limb of provisions of section 2(22)(e). and assessed as deemed dividend.

On appeal, the Commissioner (Appeals) deleted the addition made by the Assessing Officer holding that NNT was not beneficial shareholder of shares in BCPL or UPPL and, therefore, the second limb of the provisions of section 2(22)(e) could not be applied vis-a-vis the assessee. On reference to special Bench.

Held :
Deemed dividend can be assessed only in the hands of a shareholder of lender company and not in the hands of a person other than shareholder. The expression 'shareholder' referred to in section 2(22)(e) refers to both a registered shareholder and a beneficial shareholder. Thus, if a person is registered shareholder but not beneficial shareholder or vice-versa then provisions of section 2(22) (e) would not apply. (AY. 1997-98)

ACIT v. Bhaumik Colour (P) Ltd. (2009) 118 ITD 1 / 120 TTJ 865 / 27 SOT 270 / 18 DTR 451 (SB)(Mum.) (Trib.)

Editorial: *Approved in CIT v. Universal Medicare Pvt Ltd (2010) 324 ITR 263 (Bom) (HC). CIT v. Standipack (P.) Ltd. (2012) 206 Taxman 32 (MAZ)(Delhi) (HC), CIT v. Ankitech Pvt Ltd (2012) 340 (Delhi)(HC) followed Bombay High Court, which is affirmed in CIT v. Madhur Housing Development Co (2018) 401 ITR 152/ 163 DTR 519 / 301 CTR 524 (SC).*

4. S. 2(47) : Transfer – Capital gains – Revaluation of stock – Asset forming stock-in-trade of assessee is converted into a capital asset either by implication of law or by an act or conduct of assessee and, thereupon, contributed to a firm as capital contribution by assessee in capacity of a partner at value more than cost to assessee – in such a case, there is transfer of asset taking place – a value of asset recorded in books of firm deemed to be full value of consideration received or accruing as a result of transfer of asset – chargeable to tax as assessee's income of previous year in which such transfer has taken place. [S. 28(i), 45(3)]

Facts:

The assessee was engaged in the business of real estate development. It held certain land as stock-in-trade. It entered into partnership with four of its subsidiary companies and one individual, who was one of its employees. The assessee contributed its rights in the aforesaid land as capital contribution to the newly constituted partnership firm. Its contribution in the newly constituted firm represented the market value of the land at Rs. 11.50 crores. In the assessee's books of account the cost of said land was shown at Rs. 4.40 crores. The newly constituted partnership firm credited the capital account of the assessee-company by Rs. 11.50 crores, being the market value of the land. The assessee also recorded the value of the said land as capital contributed in the firm at Rs. 11.50 crores in its books. The assessee claimed that the surplus, being difference between the value at which the land was credited in the assessee's capital account and the book-value, credited in its profit and loss account, was to be exempted from tax on the ground that there was no sale or transfer of land, in law, as there could be no sale to self. The Assessing Officer, however, relying on provisions of section brought the surplus amount to tax. On appeal, the Commissioner (Appeals) upheld the assessment order.

Issues:

The main issue for consideration before the Special Bench was whether on the facts and in the circumstances of the case, the introduction of stock-in-trade as capital contribution into the firm attracts section 45(3) of the Act.

Views:

The Special Bench (per majority) held that section 45 (3) applies when a capital asset is introduced into a firm as capital contribution. However, the said provision would also apply when stock-in-trade is introduced into the firm, because the transaction itself is on the capital account. The stock-in-trade does not, in law, retain its character as stock at the point of time of introduction. The Special Bench further relied on the fact that the assessee revalued the stock-in-trade to its market value prior to the introduction into the firm. The gains on such transfer would be chargeable to tax under section 45(3). According to the majority, the assessee had adopted a calculated device, of conversion of land to money by withdrawing substantial sums from the firm and debiting the same to the

current account. It was held that although the partnership firm itself was genuine, the contribution of stock-in-trade to the firm was nothing but a device or ruse for the purpose of monetising its land. The gain was not imaginary or notional. The surplus was chargeable to tax.

It was further held that it was possible for the ITAT to change the head of income. The Revenue authorities had made the assessment under the head of business income; yet, despite the issue arising before the ITAT through assessee's appeal, it was open to the ITAT to change the head of income and bring the amounts to tax under the head 'capital gains'.

Held:
Accordingly, it was held (by majority) that the amounts were chargeable as capital gains. (AY. 1992-93, 1997-98 to 2000-01)

DLF Universal Ltd. v. Dy. CIT (2010) 34 DTR 105 / 36 SOT 1 / 128 TTJ 121 / 3 ITR 635 / 123 ITD 1 (SB)(Delhi)(Trib.)

Editorial: The majority judgment of the ITAT may not be the last word on the subject. As noted in the dissenting judgment in the case, it is true that s. 45(3) was introduced to supersede the decision in Sunil Sidharthbhai (supra). However, the language used in the section was specifically referring to "capital asset". The reasoning of the majority is that at the point of introduction into the firm, stock-in-trade no longer retains its character as 'stock'. As the dissenting judgment notes, this is in fact contrary to the finding of the AO and the CIT(A) who had held that the stock-in-trade itself was introduced; and the Revenue had not filed any appeal challenging this finding. The reliance of the majority on the decision in McDowell 154 ITR 148 (SC) is also debatable; and the law in respect of 'tax avoidance' needs to be interpreted in light of the judgment of the Supreme Court in *Vodafone International Holdings v. Union of India 341 ITR 1 (SC)*, wherein the decisions of *McDowell (supra) and Azadi Bachao 263 ITR 706 (SC)* are harmonised. As held by the Hon'ble Supreme Court, decision of McDowell (supra) can apply only to colourable devices; but the burden of proof to establish the same at the very threshold is on the Revenue.

In *Jamnalal Sons v. CIT [2017] Taxmann.com 350 (Bom)*, the Bombay High Court considered a situation where capital contribution was made by the assessee in the form of land, shares and securities. The Court held that was no determinable consideration in the hands of the transferor for such a transfer. This result was reached for an assessment year prior to the introduction of section 45(3). Hence, as the Court was dealing with an assessment year where section 45(3) did not apply at all, it did not have to deal with the assessee's contention that what was transferred was in the hands of the assessee stock-in-trade, and not a capital asset in the hands of the transferor-assessee. However, it is noteworthy that in the later decision of *ITO v. Orchid Griha Nirman 161 ITD 818 (Kol)* it has been held that "Section 45(3) of the Act is applicable only in respect of a capital asset. The said provision has no application in the instant case since what was transferred by the partners was a current asset and not a capital asset." The decision of the Special Bench in DLF has not been considered therein. Accordingly, even after the majority decision of the Special Bench, the controversy cannot be taken to have been fully settled. With respect, it is submitted that unless the decision of the Special Bench is reversed by any High Court, other coordinate Benches should faithfully apply the majority decision in the case.

5. S. 4 : Charge of income-tax – Accrual of Income – As agreement itself got terminated there could be no other completion except completion as a result of termination of agreement and Ld. AO could tax all sums to tax on reasoning that amounts became accrued as a result of project completion method followed by assessee. Also, said receipts are chargeable to tax on accrual basis as per specific provision of section 28(ii), read with section 5 [S. 5, 28(ii)]

Facts:

The assessee was engaged in business of construction and development and it entered into a collaboration agreement with a company named DCM. In terms of the said agreement, DCM appointed the assessee as developers, builders and contractors to undertake and execute development of a project on certain acres of land. Assessee was following project completion method. Later on, DCM cancelled and terminated collaboration agreement. A total sum of Rs. 6.75 crores was agreed to be payable to assessee in terms of said agreement of which Rs. 3.90 crores was to represent refund of the security deposit and of Rs. 2.85 crores was agreed to be compensation for termination of their agreement and rights to develop and collaborate with DCM. Assessee claimed that the sum of Rs. 2.85 crores was a capital receipt and was not taxable. Ld. AO did not accept said contention. On appeal, CIT(A) after having held the receipt in question as revenue receipts, held that income of Rs. 2.85 crores could not be said to have accrued to the assessee and directed the same to be taxed in the year in which it was received. Hence, appeal was preferred before ITAT.

Issue:

As in similar case of ITAT of *Ansal Properties & Industries Ltd. v. Dy. CIT [2008] 19 SOT 391* decisions of Hon'ble Apex Court in case of *Oberoi Hotels (P.) Ltd. v. CIT [1999] 236 ITR 903 and P.H. Divecha v. CIT [1963] 48 ITR 222* was not considered, the matter was referred to be placed before Hon'ble President for constitution of a Special Bench on the following questions:-

"(i)Whether the receipt of Rs. 2.85 crores by the assessee from DCM for the termination of the agreement is a revenue receipt or a capital receipt?

(ii)Whether a sum of Rs. 2.85 crores has accrued to the assessee as income of the year under consideration or it was to be taxed in the year the said amount is received as held by the CIT (Appeals)?"

Held:

In the course of its construction business, assessee entered into agreement with DCM for undertaking development and construction on the land owned by the latter. Subsequently, DCM cancelled and terminated the agreement and agreed to pay compensation of Rs. 2.85 crores to the assessee under an out of Court settlement agreement. As per the terms of this agreement, assessee abandoned its right to carry on business under the agreement and the incomplete project stood transferred in favour of DCM. Assessee transferred the liabilities in respect of amounts received

from the prospective buyers of flats and the expenditure incurred on the project to DCM. Thus, the agreement got completed as a result of termination.

The ITAT noted that if the project is taken as complete on such termination, the assessee has clear surplus of over Rs. 9.50 crores and the AO has not even examined the tax implications of these issues upon the said settlement, but confined himself as to the taxability in respect of Rs. 2.85 crores as part of revenue receipt. When this was put to the assessee's counsel, he just conceded all issues in favour of the Revenue. Therefore it was held that since in instant case, agreement itself got terminated there could be no other completion except completion as a result of termination of agreement and to that extent, AO could have brought all sums to tax, even on reasoning that amounts became accrued as a result of project completion method followed by assessee. The ITAT also held that even otherwise AO was justified in charging said receipts on due/accrual basis as per specific provision of section 28(ii), read with section 5 of the Act. (AY. 2001-02)

Kailash Nath & Associates v. ITO (2009) 121 ITD 563 / 126 TTJ 126 / 30 DTR 438 / 1 ITR(T) 77 (SB) (Delhi)(Trib.)

"Over the last more than seven decades, the Income Tax Appellate Tribunal has shown exemplary diligence in dealing with intricate domestic as well as International taxation issues and rendering decisions which balances the interests of the taxmen and citizens. The Tribunal has been adjudicating disputes in the filed of direct taxes in affair and impartial manner. It has been discharging its functions not only to the satisfaction of the Executive but also that of the taxpayers at large."

Hon'ble Shri Pranab Mukherjee, President Republic of India. (ITAT Souvenir, 2016)

6. S. 4 : Charge of income-tax – Capital or revenue – Refund of excise duty is capital receipt hence not chargeable to tax. [S. 28(i)]

Facts:
The assessee had received excise duty refund amounting to Rs.19,98,09,716/- and claimed deduction u/s 80IB of the Income-tax Act, 1961 on the income corresponding to the receipt of the said refund. The AO after detailed discussion rejected the claim of the assessee. On appeal, additional ground was taken before the ld. CIT(A) that receipt of excise duty refund should be considered as capital receipt which was rejected by the Ld. CIT(A) following the decision of the ITAT, Amritsar Bench in the case of *Shree Balaji Alloys v. ITO* [IT Appeal No.255 (Asr) of 2009, dated 26-11-2009] and in the case of *Ravenbhel Healthcare (P.) Ltd. v. ITO, Ward 1(2), Jammu*, [ITA No. 305(Asr)/2009, dated 26.11.2009]. Assessee filed an appeal against the said order of the Ld. CIT(A).

Issue:
The Hon'ble President of the Tribunal referred the following questions for consideration of the Special Bench:

(i) "Whether in the facts and circumstances of the case, the excise duty refund set off is a capital receipt or revenue receipt.

(ii) If the excise duty refund/set off is held to be revenue receipt, whether the said amount is to be included in the business profits for the purpose of deduction u/s 80IB of the Income Tax Act.

Held:
By the time the hearing of the matter came up before the Special Bench, the issue came to be decided by the Hon'ble High Court of Jammu & Kashmir in the case of *Shree Balaji Alloys v. CIT – (2011) 333 ITR 335 (J&K)* in favour of the Assessee. Following the said judgement which had considered the issue in detail including the finer aspects of the scheme for industrial promotion, it was held by the Hon'ble Tribunal that that refund of excise duty is to be treated as capital receipt in the hands of the assessee. Accordingly, the first question was decided in favour of the assessee. Further the Hon'ble Tribunal, declined to decide the second question (AY. 2006-07).

Vinod Kumar Jain v. ITO (2013) 140 ITD 1 / 83 DTR 258 / 152 TTJ 445 / 22 ITR 567 (SB) (Asr.)(Trib.)
Balaji Rosin Industries v. ITO (2013) 140 ITD 1 / 83 DTR 258 / 152 TTJ 445 (SB) (Asr.) (Trib.)

Editorial: The judgement of the Hon'ble High Court in the case of Shree Balaji Alloys (supra) which has been completely relied on by the Special Bench has been approved by the Hon'ble Supreme Court in (2017) 80 taxmann.com 239 (SC)/[2016] 287 CTR 459 (SC).

7. S. 4 : Charge of income-tax – Capital or revenue – Mesne profit and interest – Mesne profit is a capital receipt and interest on mesne profit till the decree of the court is a capital receipt and thereafter a revenue receipt.

Facts:

The assessee i.e. Narang Overseas Pvt Ltd is a company promoted by the members of Narang family. It owed various properties including shop Nos. 3, 3A and 4 to 7 on the ground floor in the building known as 'Beach View' at Warden Road, Mumbai. This property was given by the assessee on leave and license basis to another company promoted by Narang family namely, Narang International Hotels Pvt. Ltd. (NIHPL) for a period of 11 months under an agreement dated 13-2-1990. Under the agreement, the licensee i.e., NIHPL, could use and occupy the premises for carrying on the business of selling fast food under the name 'Croissants' subject to payment of commission by way of certain percentage of sales proceeds received by NIHPL. Within a period of few months, disputes arose between the family members in respect of their properties. Thereafter, various family settlements were arrived at, but they could not be implemented including the settlement that consequent to termination of license created in favour of 'NIHPL' in respect of property in question, NIHPL shall vacate the said premises on or before 31-3-1992. Ultimately, the Supreme Court decreed various suits pursuant to consent terms arrived at by the parties. Pursuant to the said order, the licence created by the assessee in favour of 'NIHPL' was cancelled and 'NIHPL' agreed to hand over quiet, peaceful and vacant possession of the said premises to the assessee on or before 1-1-2002 and also to pay arrears of commission for occupation of the said premises along with interest and further to simultaneously pay damages and mesne profits for wrongful use and occupation of the said premises from 1-4-1992 till 31-12-2001 at the rate of Rs. 10 lakhs per month along with interest. Accordingly, the assessee received Rs. 33,47,01,137 during the assessment year 2002-03. However, in its return of income for the relevant assessment year, the assessee did not offer said amount as income on the ground that the damages/mesne profits received by it were on capital account and, hence, not liable to tax. The Assessing Officer, however, held that the amount received by the assessee could not be treated as mesne profits as the same represented arrears of commission payable by 'NIHPL' to the assessee under the licence agreement and that the same were revenue in nature. On appeal, the Commissioner (Appeals) held that the amount received by the assessee under the consent decree passed by the Apex Court represented mesne profits. As regards the nature of said receipt, he observed that the judgment of Madras High Court in *CIT v. P. Mariappa Gounder [1984] 147 ITR 676* was in the revenue's favour and the same was affirmed by the Supreme Court in *P. Mariappa Gounder v. CIT [1998] 232 ITR 2.*

Issue:

The dispute before the Division Bench of ITAT was whether the mesne profit of Rs. 34,57,01,137 received by the assessee pursuant to the consent decree dated 8-1-2002, passed by the Hon'ble Supreme Court constitutes revenue receipt assessable to tax. It was contended on behalf of the revenue that this issue stood concluded by the decision of the Special Bench of the Tribunal in the case of *Sushil Kumar & Co. v. Jt. CIT [2004] 88 ITD 35 (Kol.)*, wherein it was held that the judgment of the Hon'ble Madras High Court in the case of *CIT v. P. Mariappa Gounder [1984] 147 ITR 676* holding that mesne profit received by the assessee was revenue receipt chargeable to tax under the Income-tax Act, 1961 ('the Act') got merged in the subsequent judgment of the Hon'ble Supreme

Court which is as *P. Mariappa Gounder v. CIT [1998] 232 ITR 2* and consequently the mesne profit received by the assessee was taxable as revenue receipt. However, the learned counsel for the assessee contended before the Division Bench that the issue was not correctly decided by the Special Bench in the case of Sushil Kumar & Co. (supra), inasmuch as the issue regarding the taxability of mesne profit was neither raised before nor considered by the Hon'ble Supreme Court. Consequently a Special Bench consisting of 5 members was constituted to decide the issue "Whether in the light of the decision in 232 ITR 2 it must be held that mesne profit received by the assessee is revenue income chargeable to tax." as well as to dispose off the appeal of the assessee

Views:
Mesne profit received under order of court on account of damages for deprivation of use and occupation of property is Capital Receipt and not taxable. Interest on such mesne profit till decree of the court held to be capital receipt and interest for the period thereafter is revenue receipt and therefore, such receipt is taxable. (AY. 2002-03)

Held:
(i) The Hon'ble Supreme Court in *P. Mariappa Gounder v. CIT [1998] 232 ITR 2(SC)* was only concerned with one issue relating to the year of taxability of mesne profit, i.e., whether it was, taxable in assessment year 1963-64 or assessment year 1964-65. The issue whether mesne profit constituted revenue receipt or capital receipt was not before the Court.

(ii) After the termination of the said agreement, neither the assessee could legally recover from 'NIHPL' nor 'NIHP' was liable to pay any amount to the assessee under the terms of the said agreement. What the assessee was entitled to was the compensation as per civil law against unlawful possession by 'NIHPL'. Since the agreement ceased to exist, no part of the sum of Rs. 34,57,01,137 could be said to arise from the said agreement. Consequently, the contention of the revenue that the said disputed amount received by the assessee represented business receipt chargeable to tax under the terms of the agreement could not be accepted.

(iii) As regards the issue as to whether the mesne profits received by the assessee under the consent decree granted by the Apex Court was revenue receipt chargeable to tax or capital receipt not chargeable to tax, there is a cleavage of opinion expressed by the High Courts on this issue. On one hand, the Madras High Court in P. Mariappa Gounder (supra) has held that mesne profit is in the nature of revenue receipt chargeable to tax. On the other hand, various High Courts have expressed the view that the mesne profit is in the nature of capital receipt not chargeable to tax. There is no judgment of the jurisdictional High Court on this issue. Therefore, such conflict can be resolved only by the Supreme Court in some appropriate case. In the absence of the judgment of the Highest Court of land or of the jurisdictional High Court, the legal position is that where there are two views possible then the view favourable to the assessee should be preferred. Therefore, in view of various judgments of Supreme Court, in the instant case it had to be held that mesne profit received for deprivation of use and occupation of property would be capital receipt not chargeable to tax.

(iv) As regards the issue as to whether interest awarded from the date of termination of lease agreement till the date of consent decree could be said to be capital in nature. It is held that if the interest is paid for deprivation of use of money fallen due to them it is revenue receipt chargeable to tax. On the other hand, if the interest is paid on account of the injury to the

capital, i.e., deprivation of use and occupation of the property then it is capital receipt not chargeable to tax. In the instant case, it had already been held that mesne profit was for deprivation of use and occupation of the property. The interest received by the assessee was also for the same period as it was awarded up to the date of decree. The money had become due on the date of decree. Accordingly, it was to be held that interest from the date of termination of lease till the date of decree would be capital receipt not chargeable to tax. However, if any interest was received by the assessee beyond that period then, it would be revenue receipt chargeable to tax. (AY. 2002-03)

Narang Overseas P. Ltd. v. ACIT (2008) 300 ITR (AT) 1 / 114 TTJ 433 / 111 ITD 1 / 4 DTR 57 (SB) (Mum.)(Trib.)

Editorial: Departmental appeal against the Special Bench order was dismissed by the Bombay High Court for not removing the objections in appeal at filing stage. In *CIT v. Goodwill Theaters Pvt Ltd (2016) 386 ITR 294 (Bom)(HC)* wherein ITAT had followed the ratio of the Special Bench, Bombay High Court dismissed the appeal of the Revenue on the ground that as the Special Bench decision was not challenged by the Revenue before the High Court. On filing further appeal by the Revenue, the Apex Court held that High Court's approach of dismissing the Dept's appeal, merely on the ground that the Tribunal relied on Narang Overseas 111 ITD 1 (Mum) (SB) and the appeal against which had been dismissed by the Bombay High Court for non-removal of defects, is not correct. The High Court ought to decide the question on merits. The Supreme Court remanded the matter back to the High Court for deciding the same on merits expeditiously and in accordance with law. (CA No. 19944/2017, dt. 29.11.2017) which is reported as *CIT v. Goodwill Theatres Pvt. Ltd (2017) 160 DTR 371 / 299 CTR 457(SC).*

"Income Tax Appellate Tribunal has conducted itself in an unbiased and fair manner in the discharge of its duty of adjudicating disputes under direct tax laws, and is held in high esteem by the tax paying fraternity as well as Revenue Department."

— Hon'ble Shri Arun Jaitley, Minister of Finance, Corporate Affairs and Information & Broadcasting, India (ITAT Souvenir, 2016)

8. S. 4 : Charge of income-tax – Principle of Mutuality – Transfer fees received by the Co-operative Housing Society from transferor is exempt from income-tax in accordance with the principle of mutuality but the transfer fee received from transferee is not exempt.

Facts :
The assessee i.e. Walkeshwar Triveni Co-operative Housing Society Ltd was a co-operative housing society. During A.Y. 1998-1999 it received an amount of Rs.25,000 towards the premium on transfer of occupancy rights over the flat in the society apartment. Both the parties to the transaction were the equal contributors to the said payment. At the time of making payment, the transferee was not a member of the society whereas the transferor made the payment in the capacity of a member. The assessee claimed that the receipt was not exigible to tax on the ground of mutuality. The assessee submitted that under clause 40(d)(vii) of the bye-laws of the assessee's - Society, the premium on transfer of flat was fixed by the Government at Rs. 25,000. Consequently, the assessee-society charged the premium only within prescribed limit. The assessee-society being a voluntary association, profit motive could not be attributed to it. Both the Assessing Officer as well as the Commissioner (Appeals) held the view that the said receipt was taxable as income from other sources. The revenue's objections to the treatment of the assessee as a mutual concern were basically three-hold, viz., the assessee-society was not a voluntary association; there was profit motive in receiving the amount of premium; and principle of mutuality could not be extended in the facts and circumstances of the instant case.

Issue :
The Special bench had to consider the following issue :

"Whether the transfer fee received by the Co-operative Housing Society is exempt from income-tax by the principle of mutuality ?"

Views :
The amount received from the transferee would not satisfy the test of mutuality. The amount received from the transferor was not exigible to tax, whereas the amount received from the transferee was exigible to tax.

Held:

(i) The word 'voluntary' connotes resulting from free choice, unconstrained by interference, unimpelled by another's influence. A society could only be registered if it is in accordance with the co-operative principles, and is a voluntary association. That aspect is engrained in the requirement for getting the registration done. Once the registration is granted, it can be presumed that the Registrar of Co-operative Societies found this to be a voluntary association.

(ii) Members join the Society out of their own free choice. There is no compulsion to join the Society. Maharashtra Ownership Flats Act, 1963 (MOFA) is enacted to buttress the cause of co-operative movement and not to defeat it. As such, it cannot be said that the member who purchases a flat in a co-operative housing society does so out of compulsion. Thus, the act of joining the Society is voluntary.

(iii) Clause 40(d)(vii) of the bye-laws provided that the maximum amount of premium could not exceed Rs. 25,000. It was as per the norms set out by the Government. The Society could raise fund only for achieving the objects of the Society and not for any other purpose. So long the Society was charging the amount of premium within the framework of law, no profit motive could be attributed to the Society.

(iv) In the instant case the premium was taxed under the head 'other source'. It was not taxed as 'profits and gains of business'. As such, it could not be said that the assessee had profit motive in accepting the premium from the member on the transfer of flat.

(v) No one can make a profit out of himself. In short, this is the principle of mutuality. The cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund. There must be complete identity between the contributors and the participators. If all the contributors to the common fund are also participators and their identity is established, then the test of mutuality is satisfied. The contributors to the common fund and the participators in the surplus must be an identical body.

(vi) In the instant case, the transfer was effected subsequent upon the payment of premium only. As on the date of the payment of premium, the transferor was the owner. De hors payment of premium, it was not possible to get the flat transferred in the name of transferee. As such when the premium was paid the transferor was the owner of the flat. He continued his membership till the execution of the transfer.

(vii) The identity of the recipient with the contributor is a condition precedent to enable the benefit of mutuality. In the instant case both the parties to the transaction were the contributors towards the premium. As per law, it is the obligation of the transferor to pay the premium. With the common consent, the transferor and the transferee divided equally the premium and paid it to the Society. The Society issued separate receipts to the transferor and transferee. At the time of making payment the transferee was not the member of the Society. As such the amount paid by the transferee was not covered by the principle of mutuality. Resultantly, the amount received from the transferor was not exigible to tax, whereas the amount received from the transferee was exigible to tax. (AY. 1997-98)

Walkeshwar Triveni Co-op. Housing Society Ltd v. ITO ITO (2003) 80 TTJ 673/ (2004) 88 ITD 159 (Mum) (SB) (Trib.)

Editorial: After the decision of the Special Bench, the issue whether premium received from transferee and premium received in excess of Govt prescribed limits would be covered by the principle of mutuality, came before the Supreme Court and the Bombay High Court.

In *ITO v. Venkatesh Premises Co-Operative Society Ltd (2018) 402 ITR 670 (SC)*, Supreme Court affirmed the view of Bombay High Court in *Mittal Court Premises Co-Operative Society Ltd v. ITO (2010) 320 ITR 414 (Bom) (HC)* wherein it was held that premium received from transferee as well as premium received in excess of Govt Notifications would be covered by the principle of mutuality. In *CIT v. Darbhanga Mansion CHS Ltd.(2015) 370 ITR 443/273 CTR 532 / 113 DTR 217 (Bom.)(HC)* the Court held that, transfer fees received by Co-op Hsg Society from incoming and outgoing members (even in excess of limits) is exempt on the ground of mutuality. Thus Hon'ble Supreme Court has impliedly reversed the view taken by Special Bench ITAT.

9. S. 4 : Charge of income-tax – Capital or revenue – Mesne profits – Amount received by assessee in accordance with a consent decree for continued occupation of land does not represent 'mesne profit' and is taxable as revenue receipt. [S.5, 28(i), Code of Civil Procedure, S.2 (12), Order XX Rule 12]

Facts:
The assessee, a partnership firm, had entered into a leave and licence agreement in respect of a premises whereby occupancy rights were leased by the assessee to certain lessee company. There was a breach of the agreement and pursuant to a suit filed in the Court, a compromise decree was granted in accordance with which the lessee was to vacate premises by a specified date and also pay to the assessee a certain sum of money by way of mesne profits up-to that date. In addition to the said mesne profits, terms of the decree also provided for continued occupation of the leased premises on payment of further deposit and stipulated monthly payments. For the assessment years 1990-91 to 1995-96, it was held by the Tribunal that the amounts received by the assessee were mesne profits and were neither taxable as revenue receipt nor as capital gains. However, for the assessment years 1996-97 and 1997-98, assessee received certain sum from the lessee in consideration of occupation of the premises and claimed the said amount as not liable to tax on the ground that it was in the nature of mesne profit. The Assessing Officer disallowed the claim on the ground that the amount received by the assessee was licence fee mutually agreed upon between the parties and not a mesne profit. Aggrieved, assessee carried the matter in appeal to the Commissioner of Income-tax (Appeals). The CIT(A) by referring to section 2(12) and order XX, rule 12 of the Code of Civil Procedure, 1908 upheld the order of the Assessing Officer by pointing out that the Court had no jurisdiction to award mesne profit beyond the period of three years, and, therefore, the amount received thereafter could not be treated as mesne profit.

Aggrieved, assessee preferred an appeal before the tribunal and a Special Bench was constituted for considering the issue.

Issue:
The issue for consideration before the Special Bench was:

Whether the amount received by the assessee in terms of the consent decree is mesne profit and whether it is taxable as a capital receipt or revenue receipt

Views:
Special Bench noted that mesne profit is granted to recognize the fact that the true owner is entitled to income from property and the person in wrongful possession is to compensate its true owner by paying either actual income from the property or a reasonable estimate of that income. It was further noted that in the instant case, parties to suit had utilized process of Court to obtain a decree on mutual terms. Referring to the provisions of section 2(12) read with order XX, rule 12 of the Code of Civil Procedure, Special Bench took a view that the amount received by the assessee did not fall within the definition of 'mesne profit'

Held:
It was held that the amount received by the assessee did not amount to 'mesne profit' as the same was for user of property and was rightly taxed as revenue receipt. Tribunal also observed that even if the said sum was mesne profit, same having been received for user of property was liable to tax as a revenue receipt. (AY. 1996-97, 1997-98)
Sushil Kumar & Co. v. JCIT (2003) 81 TTJ 864 / (2004) 88 ITD 35 (SB) (Kol.)(Trib.)
Editorial: On facts this decision was upheld by the High Court (2016) 387 ITR 192 (Cal) (HC)

10. S. 4 : Charge of income-tax – Capital or revenue – Sales tax subsidy – Subsidy given for setting up/ expansion of industry in a backward area - will be capital receipt irrespective of modality/ source of funds, through/ from which it is given. [S. 28 (i)]

Facts:

The Assessee in previous assessment year 1985-86, had set up a unit in Patalganga, at Raigad district, which being a notified backward area, became eligible for the incentive in the form of exemption from liability for payment of sales tax for a period of 5 years announced by the Government of Maharashtra under its Scheme of year 1979. The assessee's claim was that quantum of sales tax liability that could be claimed as deduction on the basis that it was a capital receipt should be deemed to be treated as paid within the meaning of section 43B to be adjusted against the amount of subsidy, which the assessee would have received from the State Government. The AO rejected the assessee's claim, firstly on the ground that as per the State Government Incentive scheme, the assessee was not required to charge any sales tax from its customers and to pay any purchase tax on its purchases and secondly, no amount of subsidy either in cash or in kind had been given by the Government. On first appeal by the assessee, the CIT(A) confirmed the view taken by the AO. However, on second appeal, the Tribunal on basis of the decision of the Supreme Court in *Sahney Steel & Press Works Ltd. v. CIT [1997] 228 ITR 253/ 94 Taxman 368*, concluded that the amount determined as sales tax by the Sales-tax Officer would bear the character of subsidy which was capital in nature. This was also evident on perusal of the object of the very scheme which provided that when an incentive is given for bringing about necessary infrastructure in processing/ developing the backward area, the incentive would be capital in nature.

For the relevant assessment year 1986-87, the issue as such stood covered in favour of assessee however, the main reason for constituting the Special Bench was the submission of the CIT that the view taken by the Tribunal in its own case for earlier assessment year 1985-86 had been "virtually overruled" by the subsequent decision of the Tribunal in the case of Bajaj Auto Ltd. [IT Appeal Nos. 49 and 1101 of 1991 (Bom.) dated 31-12-2002]. Consequently, the Commissioner requested to the Hon'ble President, Tribunal to constitute a Special Bench.

Issue:

A Special Bench was constituted by the Hon'ble President of the Tribunal, wherein the main issue to be analyzed was the claim of notional sales-tax as capital receipt by the assessee, and the question formulated was:

"Whether, on the facts and in the circumstances of the case and in law the assessee-company is justified in its claim that the Sales Tax incentive allowed to it during the previous year in terms of the relevant Government Order constitutes capital receipt and is not to be taken into account in computation of total income?"

Views:

The assessee inter-alia, contended that the issue was fully covered by the earlier order of the Tribunal for the assessment year 1984-85 and that in that order the Tribunal had relied on the judgment of the jurisdictional High Court in the case of Elys Plastics (P.) Ltd. (188 ITR 1) which has

been approved by the Supreme Court in *CIT v. P.J. Chemicals Ltd. [1994] 210 ITR 830* and therefore there should be no deviation from the earlier decision that the sales tax incentive was a capital receipt. It was pointed out by the assessee, that the incentive schemes were geared to achieve these four objects viz.: (i) Development of the backward regions of the State of Maharashtra; (ii)Dispersal of the industries; (iii) Promotion of the industries for employment-oriented units; and (iv) Providing local employment to Scheduled Castes/Tribes. On the other hand, the Department argued that, the findings of the Tribunal in previous assessment year was erroneous as no sales tax was collected by the assessee or paid by it to the government, and so the same could not be considered as a deemed payment in view of section 37. The Revenue, inter-alia, also contended that the subsidy granted was for production purpose and the same must be revenue in nature as per the ratio laid by the Supreme Court in case of Sahney Steel & Press Works Ltd. 228 ITR 253. After considering the arguments of both the sides and examining all the judgments and Sahney Steel's case (supra), the Hon'ble Bench culled out three broad principles which are stated as under:

(i) It is the purpose for which the subsidy or incentive is given that would define the character of receipt in the hands of the recipient; (ii) The mere mode of payment would not alter the character of the sums received; and (iii) It would be quite irrelevant whether the money, when received, was applied for capital purposes or for revenue purposes, in the absence of any special allocation in the grant itself.

Held:
The Hon'ble Bench held that the purpose and object of the Scheme under which the subsidy is given is of more fundamental importance than the fact that the subsidy is received after the commencement of production or conditional upon it. It further, held that the Tribunal in the case of the assessee for the assessment year 1985-86 had correctly interpreted and understood the ratio of the judgment of the Supreme Court in Sahney Steel's case (supra) and disagreed with the opinion expressed in Bajaj Auto Ltd.'s case (supra). Accordingly, the assessee was justified in its claim that the sales tax incentive allowed to it during the previous year in terms of the relevant Government Order constituted capital receipt and was not to be taken into account in computation of total income.

Editorial Note: Department's appeal was dismissed by the Bombay High Court in 339 ITR 632 (Bom.), which followed the Supreme Court judgement in case of *CIT v. Ponni Sugars & Chemicals Ltd. 306 ITR 392/174 Taxman 87 (SC).* However, the Revenue's Civil Appeal No. 7769 OF 2011 (Arising out of S.L.P. (C) No.9860 of 2010) are allowed by the Supreme Court, and impugned orders are set aside and the cases are remitted to the High Court to decide the questions.

The Supreme Court in various decisions observed that it is the object for which the assistance is given which determines the nature of the incentive subsidy. The form or the mechanism through which the subsidy was given is irrelevant. It was, therefore, in the context of respective subsidy incentive schemes, the subsidy in *Sahney Steel v. CIT 228 ITR 253* was held as revenue receipt whereas the subsidy in *CIT v. Ponni Sugars and Chemicals Ltd. 306 ITR 392* was held as capital receipt. This test for taxability of Government Grants was further followed and upheld in subsequent apex Court decisions - *CIT v. Chaphalkar Brothers, Pune [2018] 400 ITR 279/252 Taxman 360/[2017] 88 taxmann.com 178 (SC) and CIT v. Shree Balaji Alloys [2017] 80 taxmann.com 239 (SC)* and remained somewhat settled until recently when this position was stirred on account of introduction and applicability of the Income Computation and Disclosure Standards,

commonly referred to as the ICDS and consequent amendment by Finance Act, 2015 in section 2(24) to include the term 'subsidy' in the definition of 'income' with effect from AY 2016-17. CBDT Circular No. 19 of 2015 containing explanatory notes to the Finance Act, 2015 states that the said amendment would apply to assessment year 2016-17 and subsequent years. It can therefore, be safely concluded that the taxability of Government Grants is no longer determined by their nature and purpose. Any kind of assistance or grant by the Government, be it of capital or revenue nature, is taxable as income or has to bear the tax charge in some way or the other. The revenue subsidy and capital subsidy not relatable to depreciable asset, will be governed by clause (xviii) of section 2(24) of the Act and capital subsidy relatable to depreciable asset i.e. reduced from the value of actual cost of the asset, also suffers reduced depreciation charge. The exclusion provided under section 2(24)(xviii) of the Act seeks to avoid double hit suffered by grant recipients in respect of depreciable assets in the pre-amendment era. If a subsidy is regarded as a revenue subsidy, it would be taxable besides the value of the subsidy getting reduced from actual cost of depreciable assets for the purpose of allowing depreciation.

Therefore, the principle of determining the 'purpose' for which subsidy is given to the assessee does not hold good anymore. With these strict provisions, is the Government really giving benefit in form of assistance/subsidies or is it just like another source of tax collection for the government, is something we need to ponder on!

CIT v. Reliance Industries Ltd. (SC) www.itatonline.org (CA NO 7769 of 2011 arising out of SLP (C) No 9860 of 2010 dt. 9-09-2011). Honourable Supreme Court referred back to the High Court to decide the question of law. Order in *CIT v. Reliance Industries Ltd. (2011) 339 ITR 632 (Bom.)(HC)* was set aside to High Court.

Dy. CIT v. Reliance Industries Ltd. (2004) 88 ITD 273 (SB)(Trib.)

Editorial : *CIT v. Reliance Industries Ltd. (SC) www.itatonline.org (CA NO 7769 of 2011 arising out of SLP (C) No 9860 of 2010 dt. 9-9-2011).* Honourable Supreme Court referred back to the High Court to decide the question of law. Order in *CIT v. Reliance Industries Ltd. (2011) 339 ITR 632 (Bom.)(HC)* was set aside to High Court

11. S. 4 : Charge of income-tax – In computing the profits attributable to PE in India Interest paid by an Indian branch of a foreign bank to its head office is neither deductible in hands of the branch nor chargeable to tax in the hands of the head office – Entities are one and the same – one cannot make profit out of himself - interest payment is treated as payment to self. [S. 2(24), 9, 40(a)(i), 90, 115A, 195]

Facts:
The assessee is a foreign bank incorporated and controlled from Japan. The assessee has two branch offices at Mumbai and Delhi from where it carries on banking business in India. Advances were given by the overseas head office to the branches in India on which interest was payable by the branches in India. AO observed that no tax was deducted on interest payment to the head office and disallowed the same under section 40(a)(i) of the Act.

Issues:
Question before the Special Bench were as under:-

Whether interest payable by Indian branch of the assessee to its Head office and other overseas branches is not deductible in computing its total income?

Whether interest income payable by the Indian branch of the assessee to its head office and branch offices abroad cannot be taken into account for computing total income of the head office to be liable to tax in India?

There was no dispute that such deduction would not be permissible under the Income tax Act being payment made to self and this issue was not contested by either of the parties. However, reliance was placed on the tax treaties for claiming deduction on account of interest payable to the head office while computing the profits attributable to the PE in India as per Article 7(2) and 7(3) of the India-Japan DTAA read with paragraph 8 of the protocol.

Views:
Interest payable to head office is to be factored in while computing the profits attributable to PE in India as PE is to be treated as a distinct and separate entity. The deduction thereof has to be allowed to the PE. It is true that Article 7(2) of the DTAA creates a fiction and thereby treats the PE as separate and independent entity, but this fiction does not extend to Article 11 so as to tax that interest in India. Specific provisions which allow for the taxability of interest paid by a PE to its head office and other branches are absent in the domestic law.

Held:
The issue with regard to taxability of interest in the hands of the head office was discussed first and the tribunal held that the branch office and head office are not assessed to tax separately in India as they are one taxable entity only and the branch is part of the non- resident head office. Hence, the only person assessable to tax in India is the non-resident head office. The Tribunal relied on the

decisions of *Sir Kikabhai Premchand v. CIT (24 ITR 506)(SC) and Betts Hartley Huett & Co. Ltd. v. CIT (116 ITR 425)(Cal HC)* to hold that one cannot make profit out of himself and payment of interest by Indian branches to head office is payment to self and cannot give rise to income chargeable to tax in India under the Act. Further, tribunal rejected AO's view of bringing the said income to tax under section 9(1)(v)(c) of the Act.

The Tribunal observed that Article 11(6) of the India-Japan DTAA was para materia to Article 11(4) of the OECD model convention. The Tribunal held that Article 11(6) has no application to the facts of the case as interest paid by the branch cannot be regarded as interest paid in respect to debt claims forming part of the permanent establishment. If Article 11(6) was found to be applicable to the facts of the case, the interest would be brought to tax under Article 7 by treating the said income as business profits attributable to the PE indirectly by force of attraction. However, such a situation did not arise and Article 11(6) had no application to the facts of this case.

The provision of the treaty, it was held, cannot be relied upon to bring to tax certain income which is otherwise not taxable as per the Act / domestic law. Relying on *UOI v. Azadi Bachao Andolan (263 ITR 706)(SC)*, the tribunal held that the treaty cannot impose tax which is otherwise not provided in the domestic law. Further, the tribunal rejected application of Article 23 of the Ind-Japan DTAA to the facts of the case.

It was further held that a combined reading of Article 7(2) and 7(3) of the DTAA along with paragraph no. 8 of the protocol makes it clear that for computing profits attributable to the branch offices in India they have to be treated as distinct and separate entities.

Sumitomo Mitsui Banking Corpn. v. DDIT(IT) (2012) 136 ITD 66 / 145 TTJ 649 / 16 ITR (T) 116 / 19 taxmann.com 364 (SB)(Mum.)(Trib.)

Editorial: This decision has been approved in *DIT (IT) v. Credit Agricole Indosuez (377 ITR 102) (Bom HC) and DIT (IT) v. Oman International Bank S.A.O.G. (386 ITR 151)(Bom HC).* Amendment by Finance Act, 2015 to Section 9(1)(v) of the Act in a treaty protected case cannot undo the decision of Sumitomo Mitsui Banking Corpn, unless the relevant treaty is re-negotiated on the lines of India-USA DTAA.

"The Income -Tax Appellate Tribunal, which is one of the premier bodies in the hierarchy of dispute resolution system, is going to complete 75 Years in its long and eventful journey. Though commenced prior to independence, i.e. in 1941, it remained steadfast and added new feathers to its cap, not because of its number of years of existence but by virtue of its unique blend of Judicial Member and Accountant Member-experts in their own fields, and also by following judicious approach in rendering judgements. It stood as mother of all Tribunals, allowing the Government to set up several other Tribunals on the same lines."

Hon'ble Shri D. V. Sadananda Gowda, Minister Law and Justice Government of India (ITAT Souvenir, 2016)

12. S. 5 : Scope of total income – Income – Accrual of Income – Time share membership fee – over the term of the contract.

Facts:
The assessee-company is in the business of selling timeshare units in its various resorts. It was noticed by the Assessing Officer that the relevant balance sheet showed an amount under the heading "Deferred income - advance towards members facilities". This figure represented the amount collected from timeshare members but not recognised as revenue for the current year.

The explanation of the assessee was that it had considered only 40 per cent of the membership fees collected as income and the balance 60 per cent was treated as deferred income. It was stated that the balance amount was to be spread over the next 33 years during which the assessee is expected to provide timeshare facilities to the members. It was also stated that in order to provide various facilities during the next 33 years, it has to incur many costs. Further explanation of the assessee was that the AMC was exclusively meant to cover the maintenance of various facilities which are an integral part of the timeshare property. These charges were for the maintenance of various electronic gadgets made available in the accommodation, furniture, kitchen equipments, central air-conditioning etc. On the other hand, the consideration for future obligations received in the initial stages is towards transfer facility from one resort to another, split, accumulation and advancing facility, domestic and international exchange, transmission, up-gradation etc.

The Assessing Officer observed that the assessee is following mercantile system of accounting and, hence, income has to be accounted for on accrual basis. He was of the view that the receipt was undisputedly income as the assessee itself had shown it as deferred income. However, the Act does not recognise the concept of deferred income and, hence, the assessee's explanation cannot be accepted.

Issue:
A Special Bench was constituted under section 255 (3) of the Act by the Hon'ble President to consider the following question:

Whether the entire amount of the time-share membership fee receivable by the assessee upfront at the time of enrolment of a member is the income chargeable to tax in the initial year when there is a contractual obligation fastened to the receipt to provide the services in future over the term of the contract?

Held:
The entire amount of timeshare membership fee receivable by the assessee up front at the time of enrolment of a member is not the income chargeable to tax in the initial year on account of contractual obligation that is fastened to the receipt to provide services in future over the term of contract. (AY. 1998-99, 1999-2003)

ACIT v. Mahindra Holidays & Resorts (India) Ltd. (2010) 3 ITR 600 / 40 DTR 1 / 131 TTJ 1 / 39 SOT 438 (SB)(Chennai)(Trib.)

Editorial: This decision of the Special Bench has been followed by the Tribunal in many cases where the accrual takes place after the contribution is received. Employer's as well as Employees contribution.

13. S. 5 : Scope of total income – Income – Accrual – Enhanced Compensation – Land acquired under land acquisition Act – enhanced compensation as well as interest thereon challenged before court – enhanced compensation is liable to be taxed in the year of receipt – however, interest on enhanced compensation is to be assessed on accrual basis from year to year and can be subjected to tax only after it is finally determined by courts. [S.4, 45(5), 145]

Facts:
The Assessee's agricultural land was acquired by the Land Acquisition Officer under the provisions of the Land Acquisition Act, 1894 and compensation was awarded to the assessee for such acquisition. The Assessee challenged the quantum of compensation before the competent court. The Additional District Judge being satisfied with the contentions raised on behalf of Assessee enhanced the amount of compensation along with interest. The Assessee while filing the returns for the previous year in which he had received the enhanced compensation and interest has not declared the same for taxation purposes on the ground that the decree/order of the civil court was challenged by the State in further appeal before the High Court. Thus, the amount of enhanced compensation could not be treated as final and that when the very right to receive enhanced compensation is in dispute, the same cannot be treated as a taxable receipt. The AO, however, invoked the provisions of section 45(5)(b) of the Act and assessed the enhanced compensation as well as interest on enhanced compensation on receipt basis.

The Assessee being aggrieved by the order of the AO preferred an appeal before the CIT(A). The CIT(A) after considering the facts of the case allowed the claim of the Assessee by observing that there is no absolute right to receive enhanced compensation and interest thereon and since the right held was inchoate, no income accrued during the previous year in which the enhanced compensation as well as interest is received. Hence, the amount of enhanced compensation and interest thereon is not taxable in the year under consideration.

The department being aggrieved by the order of the CIT(A) preferred an appeal before the Tribunal.

Issue:
The issue of taxability of compensation enhanced by courts, after it is awarded by Collector, under the Land Acquisition Act is referred for consideration of the Special Bench. Before the Special Bench the department contended that the issue before the Special Bench is covered by the ratio laid down by Third Member decision in the case of *Dy. CIT v. Bhim Singh Lather [2006] 99 ITD 46 (Delhi)*.

Views:
In the present case the Special Bench after considering the Supreme Court decision in the case of *CIT v. Hindustan Housing & Land Development Trust Ltd. [1986] 161 ITR 524 (SC)* and the amended provisions of section 45(5) of the Act decided the issue of taxability of enhanced compensation in the favour of revenue i.e. to be taxed in the year of receipt. With respect to the taxability of interest awarded on enhanced compensation, the Special Bench, in the absence of any change in the statutory provisions in section 56(2), applied the decision of Supreme Court in the case of Hindustan

Housing & Land Development Trust Ltd (supra) and allowed the same to be assessed on accrual basis from year to year subject to assessment of such interest in the year of final determination by courts.

Held:
Hon'ble Special Bench of the Tribunal held that with the introduction of sub-section (5) of section 45, a new scheme to tax enhanced or further enhanced compensation on receipt basis in the year of receipt has been introduced by adopting plain and unambiguous language. Thus, after insertion of sub-section (5), the scheme of assessment of enhanced or further enhanced compensation is to be taxed only in the year of the receipt. If it is not taxed in that year, but is held to be taxed in the year in which the amount of compensation is finally determined, then there is no provision to charge it to tax otherwise than in the year of receipt. Therefore special provision relating to taxability of amount in the year of receipt, cannot be disregarded.

The Tribunal further held that as far as taxation of interest income on enhanced compensation is concerned, the Legislature had made no change in the statutory provision and, therefore, decision of Supreme Court in the case of Hindustan Housing & Land Development Trust Ltd. (supra) as also decision of *Smt. Rama Bai v. CIT [1990] 181 ITR 400 1 (SC)* would apply. The interest is to be assessed on accrual basis from year to year. However, question of assessment of such interest on accrual basis would not arise unless it is finally determined by the court of law. (AY. 1995-96)

Dy. CIT v. Padam Prakash (HUF) (2007) 104 TTJ 989 / 10 SOT 1 (SB)(Delhi)(Trib.)

Editorial : The Special Bench of the Tribunal while deciding the issue had duly considered the decision of Hon'ble Supreme Court in the case of *CIT v. Hindustan Housing & Land Development Trust Ltd. [1986] 161 ITR 524 (SC)* wherein it has been held that there is no accrual of income unless right to receive compensation is finally determined by court. The legislature considering the difficulties faced by Department in realizing capital gains arising on compensation enhanced by Courts at different stages i.e., at the level of District Judge, High Court and the Supreme Court, amended section 45 by introducing sub-section (5) to section 45 with effect from 01.04.1988. Sub-section (5) of section 45 provides for taxation of compensation enhanced by court on compulsory acquisition in the year of receipt of such enhanced compensation. Sub-section (5) is a complete code as it provides not only for charging of enhanced compensation but also contains a machinery for computation of income by providing that cost of acquisition and cost of improvement in such a case would be nil. It further provides that in case of death, enhanced compensation shall be deemed to be the income of the person receiving it. Thus, this decision of the Special Bench of the Tribunal has settled the controversy which lasted for decades in taxation of Capital Gain with respect to the enhanced compensation awarded by the court.

The issue of taxability of interest on compensation or enhanced compensation has also been settled by the legislature with the introduction of section 56(2)(viii) w.e.f. 01.04.2010 and section 145B(1). According to the provisions of section 145B(1) r.w.s. 56(2)(viii) the interest received on enhanced compensation is to be taxed in the year of receipt. (AY. 1995-96)

The Decision of Special Bench of the Tribunal is upheld by the Hon'ble Punjab & Haryana High Court in *CIT v. Hardwari Lal HUF [2009] 312 ITR 151 (P&H).*

SLP filed by the department against the above decision of the Punjab & Haryana High Court is rejected by the Hon'ble Supreme Court vide order dated 02.03.2009 in SLP(C) No. 6289 of 2009.

14. S. 9(1)(i) : Income deemed to accrue or arise in India – Business Connection read with Article 7 and 15 of India UK DTAA – Whether legal consultancy services rendered by firm of Solicitors in connection with different projects in India, part of which was performed in India, would be income accruing from business connection in India under section 9(1)(i) and not under 9(i)(vii) as fees for technical services Consequently, whether profits of enterprise arising of out contracts was to be apportioned on the basis of contribution made by the PE to the relevant transactions. Whether profits apportioned to other parts of the enterprises which have contributed to transactions of the PE can be added to the profits of the PE as being indirectly attributable to that PE. – DTAA-India – United Kingdom (UK) [Art. 5, 7, 15]

First Issue:

Facts: The assessee is a firm of Solicitors resident in UK. During the years under consideration, it rendered legal consultancy services in in connection with different projects in India. It did not have an office in India and part of the work relating to the projects in India was performed in India by its partners and employees during their visits to India. The Assessee worked out income attributable to the services actually performed in India on the basis of Article 15 of India UK DTAA, which provides that income derived by an Individual, inter alia, as a member of a partnership firm, who is a resident of a Contracting State, may be taxed in that State. It further provides that income can also be taxed in other contracting state (India) if such services are performed in other state and, inter alia, if the individual is present in India for a period or periods aggregating 90 days. Relying on the aforesaid Article, assessee offered to tax income only in one year stating that the stay of its partners or employees exceeded 90 days in that year.

Issues/contentions:

AO took the view that Article 15 of DTAA was not applicable to the assessee, as it does not cover partnership firm within its ambit. It covered Individuals in their own capacity only. AO further held that in any case assessee was covered by Article 7 read with Article 5 of the DTAA. AO placed reliance on Article 5(2)(k) of the DTAA which provided that providing of managerial services other than those taxable under Article 13(Royalties and Fees for Technical Services) by an enterprise through its employees would be taxable in the contracting state in which the services were provided, but only if the activities continued for a period exceeding 90 days within 12 months. CIT(A), on appeal, allowed the appeal of the assessee by following order of the Tribunal in the assessee's own case for an earlier year in *Clifford Chance, UK v. DCIT (82 ITD 106) (Mum Trib)*, which was affirmed by the Bombay High Court in *Clifford Chance v. DCIT (318 ITR 237) (Bom HC)*. The CIT(A) held that Article 15 of the DTAA applies to the Assessee and that only in one year the stay of the employees and partners exceeded the threshold provided in the Article. On challenge to Tribunal by the Revenue, the Division Bench noticed that Co-ordinate Bench in the case of *Linklaters*

LLP v. ITO (40 SOT 51) (Mum Trib) had held that the decision of the Bombay High Court in the case of *Clifford Chance v. DCIT (supra)* no longer remained a good law in view of the amendment brought by Finance Act, 2010 by substituting explanation to section 9(1) retrospectively with effect from 01.06.1976. It noticed that the Co-ordinate Bench in the case of Linklaters (supra) held that the said amendment virtually negated the judicial precedents supporting the proposition that rendition of services in India is sine qua on for its taxability in India. The Division Bench being prima facie satisfied with the contention of the assessee that amendment made by Finance Act, 2010 with retrospective effect from 01.06.1976 was made only in relation to cases falling under section 9(1)(v), (vi) and (vii) and not in context of cases falling under section 9(1)(i), placed the matter before the President for constituting a Special Bench.

Held:

Explanation inserted by Finance Act, 2010 applied only in relation to clause (v), (vi) and (vii) of section 9(1). Reliance was placed on the decision of the Delhi High Court in the case of *DIT v. Ericsson A.B (343 ITR 470)*, wherein the Court held that amended explanation impacts only clauses (v) to (vii) of section 9(1). It was further observed that it was never the case of the AO that fees received by the assessee for the services rendered in relation to the projects in India is of the nature of Fees for Technical Services covered under section 9(1)(vii). Contention of the AO always had been that it is taxable as per Article 7 of DTAA. It further noted that even the Bombay High Court in Clifford Chance (supra) reiterated the settled principle laid down in the decisions of the Supreme Court in *Caborandum Co. v. CIT (108 ITR 335)* and *CIT v. Toshuku Ltd. (125 ITR 525)* (dealing with section 9(1)(i) itself) and held that profits and gains deemed to accrue in India through business connection in India shall be only such profits and gains as are reasonably attributable to that part of operation carried out in the taxable territories. Therefore, disagreeing with the view expressed in Linklaters (supra), it held that decision of the Bombay High Court in the case of Clifford Chance (supra) holds good even after the said amendment.

Second Issue:

Facts: AO after holding that the Assessee has a PE in India, in relation to determination of profits held that the amounts received by the Assessee for services utilised in India in relation to projects in India was to be taxed in India irrespective of the fact whether such services were rendered in India or outside. On appeal, the CIT(A) held that only income attributable to services rendered in India would be subject to tax in India. In appeal, the Division Bench noted the decision of Linklaters (supra), by placing reliance upon Article 7(1)(b) and (c) of UN Model convention, held that when enterprise sets up a PE in other Country, it brings itself within the fiscal jurisdiction of the other country to such an extent that the other country can tax all profits that the enterprise derived from it, whether the transactions are routed and performed through PE or not. The Division Bench noted that there were at least two other decisions of the co-ordinate Bench in the case of *Airlines Rotables Ltd. v. DIT (44 SOT 368) (Mum Trib)* and in the case of *DIT v. Set Satellite (Singapore) Pte. Ltd. (106 ITD 175) (Mum Trib)* wherein Article 7(1) of the DTAA was interpreted differently than the view taken in the case of Linklaters (supra). In view of the apparent conflicting views this issue also was placed before the President for constituting a Special Bench.

Held:
It was held that Article 7(1) read with 7(3) of India UK DTAA thereof are not at all akin to the Article 7(1)(b) and 7(1)(c) of the UN Model Convention and it would not be correct to say that the connotations of "profits indirectly attributable to permanent establishment" extend to two categories of income as specified in clause (b) and clause (c) of Article 7(1) of UN Model Convention and incorporate a force of attraction rule. The Special bench held that it was clear that no profits were "directly attributable" in India on account of the presence in excess of 90 days of the employees of the assessee. As far as the profits "indirectly attributable" were concerned they were clearly defined in Article 7(3) of the Indo Uk treaty, and therefore the UN model convention could not be relied on. (AY. 1998-99 to 2003-04).

ADIT(IT) v. Clifford Chance (2013) 143 ITD 1 / 24 ITR 1 / 87 DTR 210 / 154 TTJ 537 (SB) (Mum.)(Trib.)

Editorial: It is submitted that resubstituted Explanation 2A to Section 9 which are to come into effect from AY 2022-23 has created some ambiguity in relation to earlier understanding of business connection provided in 9(1)(i) read with Explanation 2. Clause 2 of Explanation 2A provides that any transaction in respect of goods, services or property carried out by a non-resident with any person in India would constitute Significant Economic Presence in India and it would constitute a business connection in India provided it exceeds such amounts as may be prescribed. First Proviso to Explanation 2A provides that transactions shall constitute significant economic presence, whether or not, inter alia, the non-resident has place of business in India or renders services in India. Followed in *DLF Ltd. v. ITO (111 taxmann.com 214) (Del Trib)*, *Linklaters LLP v. DCIT (185 TTJ 525) (Mum Trib)*, *Kotak Mahindra Bank v. ITO (161 ITD 304) Mum Trib to refer a few.*

"Having appeared in Income Tax Appellate Tribunal as a Departmental Representative and having dealt with several orders passed by the Hon'ble Tribunal in various capacities, I can confidently say that the Hon'ble Tribunal has been discharging the pious responsibility of maintaining a balance between the demands of the Revenue and the rights of the tax payers in an exemplary manner."

Shri K. V. Chowdary Central Vigilance Commissioner, Central Vigilance Commission. (ITAT Souvenir, 2016)

15. S.9(1)(i) : Income deemed to accrue or arise in India – Business Connection – Supply of Equipment – Existence of Permanent Establishment – Interpretation of Agreements between the Assessee and Other Parties – Supply contract – Not taxable in India – DTAA-India-USA. [Art. 5, 7, 13]

Facts:

The assessee, a non-resident company, supplies equipment to cellular operators in India. For the said supply the Assessee entered into a supply agreement with the Cellular Operators. Further for the installation, installation agreements were entered into between the Indian Cellular Operators and Other two companies associated / subsidiaries of the Assessee referred to as EFC and ECI who are in the business of installation of the equipment and granting marketing support to the assessee. For the first three months, the work of installation and marketing support was done by the EFC, and for the remaining nine months, the same work was done by ECL. The contracts undertaken by EFC, which were pending on 30th June, 1996 were assigned to ECL, which was incorporated in India. Further in order to ensure proper and smooth working of the abovementioned agreements another agreement called as an Overall Agreement was entered into by the aforesaid parties for the overall supervision of the Supply and Installation pursuant to the respective agrements. Before the contracts were signed in India, a number of employees of the assessee company and other associated companies visited India for the purpose of network survey and to negotiate the terms of the contract, which was a continuous process spread over a long period of time. During the visits of those employees, the branch office of EFC provided office, telephone and other facilities to the aforesaid employees. The employees of the branch office used to attend the meetings and undertook follow-up work with the customers afterwards. In this regard, there was a market support agreement entered into between the assessee and EFC. Further, the in accordance with the contract, the equipment was not to be accepted till it was finally tested through a test known as Acceptance Test (A.T.). Such Acceptance Test was to be carried out by EFC in the first three months and by the ECL in the last nine months of the relevant year. The contracts were signed in India and till delivery to the port in India was the responsibility of the supplier. The supply was on CIP basis and after supply, the defective parts were to be replaced by the assessee. On the aforesaid facts, the Assessing Officer after considering the provisions of the Income-Tax Act, 1961, and in particular Section 9 thereof, held that the assessee had a business connection in India and income of the assessee must be deemed to accrue or arise in India and as such was taxable in India. He further, considered whether the assessee's income was taxable in India in view of Article 7 read with Article 5 of the Double Taxation Avoidance Agreement between India and Sweden and concluded that the assessee has a permanent establishment in the form of a dependent agent establishment which is EFC and / or ECI. Further, the Assessee has PE in the form of a branch which was providing a fixed place of business to the assessee in the form of the office of ECI and also because the employees of the assessee company were coming to India and signing contracts and were staying in India and using various facilities which clearly shows that the assessee had a fixed place of business. The A.O. then proceeded to render detailed findings in respect of the software supply contract entered between the cellular operator and the assessee and Article 13 of the DTAA between India and Sweden dealing with royalties and fees for technical services. After considering the matter from all angles, the A.O. concluded that the assessee had provided the software to the cellular operators

under a license and the income which arose therefrom was to be taxed as royalty as per Article 12 of the Indo-Sweden treaty. Since, however, the assessee had a permanent establishment in India, the same was to be taxed as business profits at a flat rate of 30% as provided in the Indian Income-Tax Act. The said order of the AO was challenged before the Ld. CIT(A). The CIT(A) decided the aspect of business connection against the appellant, but the additional ground taken up by the assessee against existence of PE of the assessee in India, was decided in favour of the assessee. The CIT(A) further held that while no business profit can be computed in the absence of PE of the assessee in India, the assessee was liable to pay tax on royalties received by it from the operators in India. The CIT(A) further held that license fees received by the assessee are royalties. Against the said order of the Ld. CIT(A), the assessee filed an appeal before the Hon'ble Tribunal.

Issue:
The following question was referred to the Special Bench:

"Whether, on the facts and in the circumstances, the revenues earned by the appellant from supply of equipment and software to Indian Telecom Operators were taxable in India?"

Held:
In an extremely detailed order, the Tribunal held that no income arose to the Assessee on supply of telecom equipment to cellular operators in India and therefore no income in respect of supply of equipment was taxable in India in the hands of the Assessee. The basis of arriving at the said conclusion was on the following grounds:

"Non-existence of business Connection"

On this aspect after considering detailed arguments it was held that:

"In the present case, contracts are not undertaken by the same company. All the three companies are separate independent entities. Merely because they belong to the same group, they do not become one entity. Moreover, there is no evidence to show that one is dependent on the other either financially or in any other manner. Secondly, it is the finding of the CIT (Appeals) that various group concerns have been formed for the purpose of business and have been doing business independently as per their instruments of incorporation. This finding is not challenged by the revenue. Thirdly, the department has also recognized their independent status by assessing the Indian company (ECI) as well as the branch of the foreign company (EFC) separately and they have also been assessed separately. Assessment orders in the case of ECI are placed on record. Intimation under section 143(1)(a) in the case of EFC for the assessment year 1997-98 is also placed on record. In the assessment order for the assessment year 1997-98 in case of ECI, it is mentioned that the company is engaged in the business of telecommunications. It is further mentioned that the company is involved, inter alia, in the assembly, installation and construction of telephony networks and also in providing different information technology (software) solutions. Moreover, its income in respect of the installation contracts is assessed in its hands. Further, evidence that it is an independent entity is reflected from the assessment order for the assessment year 1998-99 wherein it is mentioned that the company has set up a unit in software technology park at Bangalore and has claimed its income of Rs. 91,39,921 as exempt under section 10A of the Act. Thus, in view of these facts, there is no reason to treat the three contracts as one works contract.

In the final analysis, it was held that:

(a) the three companies, viz. Ericsson Radio Systems AB (ERA, the assessee), Ericsson Telephone Corporation (India) AB (EFC) through its branch in India and Ericsson Communications Ltd. (ECI) are three independent entities doing business independently,

(b) the three contracts, viz. the supply contract, the installation contract and the marketing and business promotion agreement are separate and independent contracts and are not to be treated as one integrated works contract despite the overall agreement;

(c) the assessee had no business connection in India,

(d) the sales of GSM Mobile Telephone System by the assessee to the cellular operators in India took place outside India; and hence,

(e) no income accrued to the assessee in India from the sale of GSM Mobile Telephone System to various cellular operators in India.

"Non-existence of Permanent Establishment"

It was held that:

In the case of the Assessee, its main and primary interest ended once the GSM system was sold to the cellular operators. The responsibility of installing the system was not of the assessee. The responsibility it had under the overall agreement was akin to that of the Polish company in the case of Hindustan Shipyard Ltd. No income accrued to the assessee either from the overall agreement or from the installation agreement or from the marketing and business promotion agreement. Thus, it cannot be said that the assessee had any permanent establishment in India. Further since the transaction did not create an "intimate connection" between the assessee and EFC or ECI, the latter cannot be regarded as PE in India for the assessee.

Further the Hon'ble Tribunal relied on the decision of the Delhi Bench of the Tribunal in the case of *CIT v. Alcatel* wherein also the facts were similar. It was then held that almost identical arguments were advanced by the Department in that case as they are advanced in the present case, viz. (a) all the agreements should be seen as only one agreement, (b) it was like a works contract, (c) it was a turnkey contract, (d) title in the goods was not passed to the Indian party at France, (e) that acceptance certificate was the key to the supply contract, (f) that the assessee had a business connection in India and (g) that the assessee had a PE in India. The Tribunal rejected all the arguments of the department in the case of Alcatel except that about PE in India which came to be accepted on account of the concession made on behalf of the assessee. After considering the same it was held by the Hon'ble ITAT that there is no such agreement as was with MCPL in the case of Alcatel for support services. The employees of the Assessee merely came to India for negotiations and to conclude the contracts, in the course of which EFC/ECI extended their facilities but not enough to constitute a PE and hence the conduct of the parties was also not a pointer in that direction. It was further held that, in the case of Alcatel, despite there being a concession about PE, profit arising from the sale of equipment was held to be not taxable in India as the sale was completed outside India. However, it was held that the case of the Assessee was on a stronger footing since it has no PE in India. Acceptance test is also no criterion because even if the test is negative, the title in the goods is not to revert back to the supplier as is held in the case of Alcatel. As regards works contract, all contracts to be regarded as one, overall agreement etc., these

arguments were already dealt with in detail in the earlier part of the order and were rejected. Thus it was held that no income accrued to the assessee in India as it had no permanent establishment in India which could give rise to business profits taxable in India.

"Supply of Software was integral to supply of equipment as a whole and hence not taxable as Royalty"

After considering the provisions of the DTAA between India and Sweden, The Copyright Act and various commentaries on the subject of taxability of supply of software as Royalty it was held that the software supplied was a copyrighted article and not a copyright right, and the payment received by the assessee in respect of the software cannot be considered as royalty either under the Income-tax Act or the DTAA. (AY. 1997-98)

Motorola Inc. v. Dy. CIT (2005) 95 ITD 269 / 96 TTJ 1 (SB)(Delhi)(Trib.)

Editorial: The decision of the Hon'ble Special Bench of the Tribunal is affirmed by the Hon'ble Delhi High Court in the case of *DIT v. Ericsson AB – (2012) 343 ITR 470 (Delhi).* In the said judgement even the subsequent amendment to section 9(1)(vi) by Finance Act, 2010 broadening the scope of the said section was considered and still held to be non-applicable. Further SLP filed in the Hon'ble Supreme Court is admitted and pending in *DIT v. Ericsson Radio Systems AB – C.A. 006382 of 2016 (Diary No. 19647 of 2012).*

"Establishing the Income Tax Appellate Tribunal under the Income-tax Act 1922 i.e. prior to independence in 1947 and its continuation after the independence in 1947, without much change, itself, is an indication that functioning of the Tribunal has been a success. It has exhibited independence in its working, free from any pressure."

"The pendency in the Appellate Tribunal has come down by adopting Case Management System and on an average appeal are decided with in a period of one to two years."

Hon'ble Shri R.K Malhotra, Secretary Government of India Ministry of law & Justice Department of Legal Affairs. (ITAT Souvenir, 2016)

16. S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Income from offshore supply of equipment – Income not taxable in the absence of PE and business connection – DTAA-India-Finland. [S. 5, Art. 5, 7]

Facts:
The assessee was engaged in the business of manufacturing of GSM Equipment, which were used in fixed and mobile phone networks. It was also engaged in trading of telecommunication hardware and software. The assessee had earlier established a Liaison Office (LO) in India and later on a wholly owned subsidiary company was incorporated to inter alia carry out installation activities. The equipment manufactured by the assessee were sold to the Indian customers on a principal to principal basis and the title was transferred outside India.

Issue/contentions:
Whether the assessee had a permanent establishment (PE) in India under Article 5 of the India-Finland DTAA (DTAA) or a business connection under section 9 of the Act?

The Department argued that the Indian LO and subsequently the Indian subsidiary constituted a fixed place PE, a dependent agent PE and a business connection in India as the activities of the assessee were being carried out through such PE in India. The assessee, on the other hand, argued that the Indian LO/subsidiary were carrying out their independent activities on a principal to principal basis and that none of the assessee's revenue generating activities were performed in India.

Held:
The majority view of the special bench held that the installation and other activities performed by the Indian LO/subsidiary were being performed independently on a principal to principal basis and not behalf of the assessee. Therefore, the profits attributable to such activities could not be brought to tax in the assessee's hands by alleging the existence of a PE. Further, when the employees of the assessee visited India, they were assisting the Indian subsidiary in performing its functions and were not carrying out any revenue generating activities on behalf of the assessee. In any event, the assessee's activities performed in India such as negotiating and signing of the contract and network planning were in the nature of preparatory or auxiliary activities and could not result in the formation of a PE in view of Article 5(4) of the DTAA. Further, there was no material on record to suggest that the Indian subsidiary had negotiated or concluded any contract on behalf of the assessee so as to constitute a dependent agent PE in India. As per the supply contract, the title to the goods stood transferred outside India and no revenue generating activities were performed in India. Accordingly, there was no business connection in India under section 9 of the Act so as bring any part of the price for supply to tax in India. (AY. 1997-98, 1998-99)

Nokia Networks OY v. JCIT (2018) 65 ITR 23 / 167 DTR 137 / 195 TTJ 137 / 171 ITD 1 (SB) (Delhi)(Trib.)

Editorial: The decision has examined different aspects of a PE under Article 5 including fixed place PE, dependent agent PE and the exclusion under Article 5(4) for preparatory and auxiliary activities. The findings are relevant in analysing the taxability of offshore supply contracts. The ratio of this decision has been followed in several other decisions, including Hitachi High Technologies Singapore *Pte Ltd. v. DCIT (2020) (113 taxmann.com 327) (Delhi), Audi AG v. ADIT (2019) (111 taxmann.com 213) (Mum).*

17. S. 9(1)(i) : Income deemed to accrue or arise in India – Business connection – Where property in goods was transferred outside India, payment thereof could not be taxed in India – Further, if the employees of a foreign company had a right to enter office of an Indian Company for purpose of working for such foreign company in India, the place of business of such Indian Company constituted a Fixed Place PE. If the Fixed Place PE is only used for carrying out preparatory and auxiliary activities in India, then it could not be considered as permanent establishment in terms of Article 5.3(e) of DTAA between India and USA. [Art. 5, 7, 13]

Facts:

Assessee, a company incorporated in USA, entered into contract with Indian telecom operators for supply of equipments and software embedded in it. The Indian company, 'MINL' had entered into installation contract with these mobile operators for installation of equipments supplied by the assessee. Under the supply agreement, the title in the goods had passed outside India, though the risk in the goods was to pass in India. There was no right of disposal after the goods were handed over to a named carrier. Where the goods were described, delivery was effected and documents were given to the carrier at the time of delivery. Further, 70 per cent of the consideration had been paid by the time the goods were handed over to the carrier.

Issue/ contentions:

The AO held that the assessee had a fixed place in the form of the Indian company, MINL. Further, he also held that the assessee had Installation PE, Service PE and Dependent Agent PE in India. On appeal, the CIT(A) concurred with the AO that office of the Indian company 'MINL', was a fixed place of business of the assessee and thus, the assessee had a Fixed Place PE in India, However, the CIT(A) did not approve the existence of Installation PE, Service PE and Dependent Agent PE.

One of the questions before the Hon'ble Special bench was

"Whether, on the facts and in the circumstances, the revenues earned by the appellant from supply of equipment and software to Indian Telecom Operators were taxable in India?"

The assessee argued that the payment for supply of equipment where title had passed outside India was not taxable in India, irrespective of the fact that the risk of the goods had passed in India.

Held:

As regards taxability of revenue arising from supply of equipment, the Hon'ble Special Bench held that the title to the equipment passed outside India. The risk in the equipments, continued to remain with the assessee (seller) and the risk passed to the cellular operator only on delivery in India. Referring to sections 26 and 40 of the Sale of Goods Act, 1930, it observed that the passing of the title and the passing of the risk need not be simultaneous. They can be effected at different points of time. Under section 40 of the Sale of Goods Act, 1930, it was open to the parties to agree that even

where the property in the goods has passed, the seller may undertake the risk of deterioration in the goods necessarily incident to the course of transit. Therefore, it concluded that merely because the risk passed in India, it could not be said that the sale took place in India. Further, mere signing of the contracts in India does not give rise to any income in India.

As regards the impact of acceptance test on passing of property, the Hon'ble Special Bench held that in case the equipment does not pass the acceptance Test, the sale was not repudiated and the assessee was liable to replace the equipment in order to conform to the standards set by DOT. In other words, the sale was outside India and the assessee's responsibility continued thereunder which includes replacement of the equipment under the same sale contract. The fact that the GSM equipment had to pass the Acceptance Test did not mean that the sale was completed only in India.

As regards the permanent establishment, the Hon'ble Special Bench held that the assessee periodically sent its employees to the Indian company, MINL. These employees had used the office of the Indian company to carry out the work of the assessee in India. They were paid salaries by the assessee and perquisites were paid by the Indian Company. Subsequently, the assessee reimbursed the entire expenses including the perquisites paid to employees, incurred by the Indian company on a cost plus 5% basis. This according to the Special Bench showed that the employees worked only for assessee in India. Further, the use of the office of the Indian company was also a projection of assessee in India, for its Indian customers. Accordingly, there was a projection of the assessee in India in the form of the place of business of the Indian Company which constituted a fixed place PE of the assessee in India under Article 5.1 of the DTAA between India and U.S. However, the Bench also concluded that the maintenance of such fixed place of business was only for carrying out preparatory or auxiliary activities before the commencement of actual business of assessee in India. These activities could not be considered as activities in the course of the carrying on of the business by assessee in India. Further, the duration of the agreement is also a strong indication of the fact that the activities are only basic or preparatory in nature. Once the agreement comes to an end, there was no obligation on the part of the Indian company to perform the above activities. Therefore, the office of the Indian company was a fixed place PE of the assessee in terms of Article 5.1 of the DTAA but cannot be deemed to be so by virtue of Article 5.3(e) of the DTAA. (AY. 1997-98)

Motorola Inc. v. Dy. CIT (2005) 95 ITD 269 / 96 TTJ 1 (SB)(Delhi)(Trib.)

Editorial: Decision of the Hon'ble Special Bench approved in *Ericsson AB v. DDIT (2012) 343 ITR 470 (Del).* The Hon'ble Supreme Court in *Ishikawajma-Harima Heavy Industries Ltd. v. DIT (2007) 288 ITR 408* inter alia laid down that (i) the supply of goods had completed on the high seas, i.e. before the goods reached India, the profits on sale did not accrue or arise in India and (ii) The fact that the contract was signed in India is of no material consequence to determine whether any income can be taxed in India for a non-resident.

18. S. 9(1)(vi) : Income deemed to accrue or arise in India – Amount received by a satellite owning company for providing transponder facility is in the nature of 'royalty'.

Facts:
Assessee, a company incorporated in Netherlands, was engaged in the business of operating telecommunication satellites in the orbit. Assessee installed transponders on the satellites to receive uplinked data/images, amplify the same and then downlink it to the footprint area of the satellite. Assessee entered into agreements with telecasting companies/ telecom operators for providing them whole or part of the capacity of these transponders for a mutually decided consideration for the Indian customers. The assessee did not have any business operations in India and the equipments used were also owned, maintained and controlled by the assessee from outside India. Assessing Officer assessed these amounts received from telecasting companies/ telecom operators as "royalty" under the provisions of Income-tax Act, 1961 as well as under the Double Taxation Avoidance Agreement (DTAA) holding that there is a "process" involved in the satellite which has been used by the customers of the assessee.

Issue:
Whether consideration received by the assessee for providing space on its transponders was in the nature of 'royalty' as per the provisions of section 9(1)(vi) of the Act read with the provisions of the DTAA.

Views:
Explanation 2(iii) to section 9(1)(vi) covers within the scope of the term 'royalty' any consideration for use of any patent, invention, model, design, secret formula or process or trade mark. The India-Netherlands DTAA defined 'royalty' to mean payments for the use of, or the right to use "design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience." One of the submissions made by the assessee before the Special bench was that it had rendered services to its customers without granting them the 'right to use' the satellite or the transponders or the 'processes' in the satellite. It was also contended that, in any case, the amount could be taxed as 'royalty' only if the consideration was received for a "secret process" which was not so in the facts of the case.

Held:
Special bench held that the amount received by the assessee from its customers was on account of use of 'process' involved in the transponder bringing it within the ambit of 'royalty' under the Act as well as the DTAA and therefore chargeable to tax in India. Special bench observed that the act of transmission of voice, data and programs belonging to the customers is a 'process' that is made available for use by the telecasting companies. Special bench rejected the assessee's contention that the process should be "secret" in order to come within the scope of the term "royalty". Special bench held that the word "secret" was used in connection with "secret formula" and that it did not qualify the word "process". (AY. 2000-01 to 2004-05)

New Skies Satellites N.V. v. ADIT (IT) (2009) 319 ITR (AT) 269 / 121 ITD 1 / 126 TTJ 1 / 30 DTR 289 (SB)(Delhi)(Trib.)

Editorial: Delhi High Court in *Asia Satellite Telecommunications Co. Ltd. v. DIT (2011) 332 ITR 340 (Del)* held that the amount received by a satellite owning company for providing transponder facility cannot be held to be 'royalty' falling within the provisions of section 9(1)(vi) of the Act. In an appeal by the assessee – New Skies Satellites N.V. against the ratio laid down by the Special bench, the Delhi High Court (vide order dated 17 February 2011) set aside the decision of the Special bench and referred the matter back to the ITAT for fresh adjudication in light of the principles laid down by it in the case of Asia Satellite Telecommunications (supra). ITAT, thereafter, ruled in favor of New Skies Satellite vide its order dated 11 March 2011 holding that the revenue earned from satellite transmission services would not be taxable in India. Appeal filed by the Department before the Delhi High Court against the said order of the Tribunal dated 11th March 2011 was dismissed vide order dated 30th September 2011 (ITA 1122/2011). Special Leave Petition against the decision of Delhi High Court dated 30th September, 2011 in Asia Satellite Telecommunications Co. Ltd./ New Skies Satellite (supra) is admitted and is pending for final adjudication by the Supreme Court.

"Constituted as the first of its kind in 1941 it has been the chief architect of the development of the income-tax law in India, enriched by the wisdom and knowledge of legal luminaries such as Late Nani Palkhivala, R.J. Kolah, Ashok Sen, Radha Binod Pal, Subbararya Aiyar, P.R.Srinivasan, all of whom used to regularly appear before the Tribunal in its formative years. Its impartial functioning, the judicial spirit displayed in its orders and its capacity to read the evidence and arrive at accurate factual findings have all come in for praise by distinguished judges and jurists. "

"The volume and variety of cases which the Tribunal handles today are mind -boggling and it is a matter for great appreciation that the Members are able to deal with complex issues with consummate ease. A large part of the credit for this must go to the members of the legal and accountancy professions as well as to the officers of the IRS who assist the Tribunal."

Hon'ble Shri R.V. Easwar, Former Judge of the High Court of Delhi Hon'ble Shri R.V. Easwar, Former Judge of the High Court of Delhi (ITAT Souvenir, 2016)

19. S. 10A : Newly established undertakings – Free trade zone – Business losses of a non-10A unit cannot be set off against the profits of the undertaking eligible for deduction under section 10A.

Facts:
The assessee was carrying out business from two locations viz., Chennai (unit eligible for claiming deduction under section 10A) and Delhi (trading activities were carried out from this unit). Chennai unit (eligible unit) reported a profit while the Delhi unit (non-eligible unit) reported a loss. The assessee claimed deduction under section 10A.

Issue:
The AO recomputed the deduction by first setting off the trading losses of the non-eligible unit against the profits of the eligible unit, thereby restricting the deduction allowable under section 10A as well as the carry forward of business loss. The CIT(A) accepted that Delhi unit was not an eligible unit and was engaged only in trading activity. However, deduction under section 10A was restricted to the total income.

A Special Bench was constituted to decide as to whether the business losses of a non-eligible unit, whose income is not eligible for deduction under section 10A, have to be set off against the profits of the undertaking eligible for deduction under section 10A for the purposes of determining the allowable deduction under section 10A?

Held:
Deduction under section 10A is to be granted while computing income under the head Profits and Gains of Business and Profession and not while computing the Gross Total Income. Business losses of a non-eligible unit, whose income is not eligible for deduction under section 10A, cannot be set off against the profits of the undertaking eligible for deduction under section 10A for the purpose of determining deduction under section 10A. (AY. 2003-04, 2004-05)

Scientific Atlanta India Technology (P.) Ltd v. ACIT [2010] 38 SOT 252 / 129 TTJ 273 / 2 ITR(T) 66 (SB) (Chennai) (Trib.)

Editorial: The appeal filed by the Revenue authorities before the Hon'ble Madras High Court was dismissed as withdrawn [TCA No. 1170/2010] as the tax effect was below the monetary limits. Subsequently, Supreme Court in the case of *CIT v. Yokogawa India Ltd. [2017] 391 ITR 274 (SC)* has held that though Section 10A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV and not at the stage of computation of the total income under Chapter VI. It further held that deduction contemplated is qua the eligible unit on it own and without reference to other eligible or non-eligible units of the assessee. Also refer *PCIT v. Makino India (P.) Ltd. [2017] 393 ITR 291 (SC).* Finance Act, 2017 inserted an Explanation to Section 10AA(1) of the Income-tax Act, 1961 with effect from 01.04.2018 clarifying that the deduction is to be allowed from the total income before giving effect to section 10AA and the said deduction shall not exceed the said total income. The amendment takes effect from 01.04.2018 and applies to AY 2018-19 and subsequent AY's. This aspect has also been clarified in the CBDT Circular No. 2/2018 [F.NO.370142/15/2017-TPL], dated 15.02.2018

20. S. 10A : Newly established undertakings – Free trade zone – Delay in filing return – Mandatory – Denial of exemption – Assessee filed its return beyond the due date provided under section 139(1) and claimed exemption under section 10A of the Act – Assessee not entitled to exemption in view of proviso to sub section (1A) of section 10A of the Act. [S. 139, 234A]

Facts:

The assessee is a partnership firm. The Assessee for the previous year relevant to assessment year 2006-07 filed return of income on 31.01.2007. In the said return the Assessee has claimed exemption under section 10A of the Act in respect of profit derived from the export of articles produced in SEZ. The return filed by the Assessee was selected for scrutiny proceedings by issuing the statutory notices. During the course of scrutiny proceedings, the AO asked the Assessee to substantiate its claim made under section 10A of the Act. In reply to the said query the assessee submitted that it derived profit from export of articles produced in SEZ and the sale proceeds were brought to India in convertible foreign exchange. Hence, it is eligible to claim the exemption under section 10A of the Act. However, the AO rejected the claim of the Assessee on the ground that the assessee had filed its return of income on 31.01.2007 whereas extended due date for filing return of income as per the provisions of Section 139(1) of the Act was 31.12.2006. The AO further observed that as per the newly inserted proviso to section 10A of the Act, no deduction should be allowed to an assessee who does not furnish return of income on or before the due date specified under Section 139(1) of the Act. The Assessee being aggrieved by the assessment order passed by AO preferred an appeal before the CIT(A). The CIT(A) after considering the assessment order, arguments of the Assessee and newly inserted proviso to section 10A of the Act dismissed the appeal of the Assessee and upheld the assessment order passed by AO.

The Assessee being aggrieved by the order of the CIT(A) preferred an appeal before the Tribunal.

Issue:

The issue raised before the Special Bench of the Tribunal was whether the proviso to section 10A(1A) of the Act, which provides that no exemption under section 10A shall be allowed to an assessee who does not furnish its return of income on or before the due date specified under section 139(1), is mandatory or directory.

View:

The Special Bench of the Tribunal considering the proviso to section 10A(1A) of the Act r.w.s. section 139(1) and its 4th proviso is of the view that the Assessee is not eligible to the benefit of exemption under section 10A as a consequence of Assessee's failure to file its return of income within the time allowed under section 139(1) of the Act.

Held:

The Special Bench of the Tribunal held that the Assessee is required to file its return of income for the year under consideration before the due date provided under section 139(1) of the Act even if it is not having taxable income after giving effect to the provisions of section 10A of the Act. The

Assessee is liable to pay interest under section 234C of the Act as a consequence of non-filing of return within the due date prescribed under section 139(1) of the Act. It is now a settled position in law that charging of interest under section 234C of the Act is mandatory. Thus, when one of the consequences of not filing return of income within the due date prescribed under section 139(1) is mandatory then, the other consequence of the same failure of the assessee cannot be directory and the same is also mandatory. Thus, the proviso to section 10A(1A) is mandatory and not directory. The Special Bench of the Tribunal therefore held that the Assessee is not entitled to the exemption under section 10A of as a consequence of its failure to furnish its return within the due date provided under section 139(1) of the Act. (AY. 2006-07)

Saffire Garments v. ITO (2013) 140 ITD 6 / 151 TTJ 114 / 20 ITR 623 / 81 DTR 131 (SB) (Rajkot)(Trib.)

Editorial: There is no provision in the Income-tax Act, 1961 which confers power to the Tribunal to condone the delay in filing the return of income within the due date prescribed under section 139(1) of the Act. In the absence of such power, the Tribunal cannot direct to treat the return filed beyond the due date as a return filed within the due date under section 139(1) of the Act and allow the benefit of exemption under section 10A of the Act.

"My tenure of 14 years on the Tribunal was a very happy period. We, the Members of the Tribunal, derived great satisfaction from the discharge of our functions dispensing justice to the best of our ability. We were completely insulated from the tax department and there was no kind of interference from any branch of the administration in our judicial functioning. We functioned, in places where there was more than one Bench, as a cordial team – more or less like members of a family -and developed mutual regard and esteem for one another. I recall with pleasure the lunch meets that we used to have in Calcutta in the 1960s and in the 1970s and I am sure a similar spirit of bonhomie prevailed in other places as well. Dissenting opinions were there no doubt but these were incidental to the nature of our duties and created no ill will. It was truly the happiest time of my life."

Hon'ble Justice Mr. S. Ranganathan, Former Judge, Supreme Court of India, Member Law Commission of India & Chairman, Authority for Advance Rulings – The Income Tax Appellate Tribunal 1941 to 2016. (ITAT Souvenir, 2016)

21. S. 10A : Newly established undertakings – Free trade zone – Manufacture – Exemption – Definition of manufacturer – Blending and processing of tea – Assessees, who are in the business of blending & processing of tea and export, can be said to be "Manufacturer/Producer" of the tea for the purpose of Section 10A/10B. [S. 2(29BA), 10AA, 10B, Special Economic Zones Act, 2005 S. 2(r)]

Facts:

The assessee is engaged in the business of manufacturing, processing, exporting and dealing in various commodities, more particularly, tea, coffee, jute, pepper, chillies, cardamom, turmeric and similar other spices, etc. The assessee, as per its claim is a 100% export oriented undertaking within the meaning of section 10B of the Income-Tax Act, 1961 and claimed exemption under section 10B of the Act. During the course of assessment proceedings, the Assessing Officer, observed that the assessee was not entitled to any exemption under section 10B. CIT(A) upheld the view of the Assessing Officer by following the decisions of Calcutta High Court in case of *Apeejay (P) Ltd v. CIT 206 ITR 367* and *Brook Bond India Ltd v. CIT 269 ITR 232* holding that the assessee is not entitled to deduction Under Section 80 J and 32A respectively on the ground that blending of different brands of tea does not constitute 'manufacture' or 'Production' for the purpose of deduction.

On a reference made by a Division Bench of the Tribunal, Special Bench was formed by referring the following question for consideration and decision:

"Whether, on the facts and in the circumstances of the case, the Assessees, who are in the business of blending & processing of tea and export thereof, can be said to be "Manufacturer/Producer" of the tea for the purpose of Section 10A/10B of the I.T. Act, 1961?"

Views:

The object is to grant benefits of tax exemption u/s 10B to exporters carrying out their operations in FTZ, EOU, EPZ & SEZ areas in accordance with the Exim Policy declared by the Government of India in Parliament and in the light of allied and governing laws e.g. The Tea Act, 1953, The Prevention of Food Adulteration Act, 1953 read with Prevention of Food Adulteration Rules, 1955, The Tea (Marketing) Control Order, 2003, The tea (Distribution & Export) Control Order, 2005 as well as the Rules and Regulations framed by the Tea Board and also Calcutta Tea Traders Association from time to time.

For the purpose of Section 10A, 10AA and 10B, the definition of the word "manufacture" as defined in Section 2(r) of SEZ Act, Exim Policy, Food Adulteration Rules, 1955, Tea (Marketing) Control Order, 2003 is to be seen. The definition of 'manufacture' as per Section 2(r) of the SEZ Act, 2005 is incorporated in Section 10AA of the Income-tax act with effect from 10.02.2006. Kerala High Court in the case of *Girnar Industries v. CIT 338 ITR 277* and *Tata Tea Ltd v. ACIT 338 ITR 285* held such amendment in Section 10AA to be clarificatory in nature. The definition of 'manufacture' under the SEZ Act, Exim Policy, Food Adulteration Rules and Tea (Marketing) Control Order is much wider than what is the meaning of the term 'manufacture' under the common parlance, and it includes processing, blending, packaging etc.

Held:
The assessees who are in the business of blending and processing of tea and export thereof, in 100% EOUs are manufacturer/ producer of the tea for the purpose of claiming exemption u/s.10B of the Act. Further, assessees who are in the business of blending and processing of tea in respect of undertakings in free trade zones are manufacturer/producer of tea for the purpose of claiming exemption u/s. 10A and 10B of the Act. (AY 2003-04 to 2005-06)

Madhu Jayanti International Ltd. v. Dy. CIT (2012) 137 ITD 377 / 148 TTJ 1 / 74 DTR 401 / 18 ITR 1 (SB.)(Kol.)(Trib.)

Narendra Tea Co. (P) Ltd. v. JCIT (2012) 148 TTJ 1 / 74 DTR 401 / 18 ITR 1 (SB.)(Kol.)(Trib.)

Rajrani Exports (P) Ltd. v. Dy. CIT (2012) 148 TTJ 1 / 74 DTR 401 / 18 ITR 1 (SB.)(Kol.)(Trib.)

Tea Promoters (India) (P) Ltd. v. Dy. CIT (2012) 148 TTJ 1 / 74 DTR 401 / 18 ITR 1 (SB.)(Kol.)(Trib.)

Editorial: Ratio of the Special Bench that business of blending and processing of tea and export thereof, in 100% EOUs are manufacturer/ producer of the tea, needs to be understood only in the context of exemptions under Sections 10A, 10AA and 10B. The Department heavily relied upon the Finance Act 2000, by which the definition of 'manufacture' which included 'processing' contained in section 10B of the Act was deleted w.e.f. 01.04.2001 and further relied upon Supreme Court decision in case of CIT V Tara Agencies wherein it is held that Assessee engaged in purchase of tea of diverse grades and brands and blending the same by mixing different kinds of tea is engaged in 'processing' and not 'manufacture' or 'production' of goods, hence not entitled to weighted deduction under s. 35B(1A).

This decision in the case of Tara Agencies has been distinguished in Kerala High Court in case of *Girnar Industries v. CIT 338 ITR 277* on the ground that the same is not applicable for exemptions under sections 10A, 10AA and 10B.

The terms Processing, Production and Manufacture have been given different meanings by Courts. In *CIT v. Sesa Goa Ltd. (2004) 271 ITR 331 (SC)*, Supreme Court again considered the wider connotation of the word 'production' as compared to the meaning of the word 'manufacture in the context of section 32A(2)(b)(iii) of the Income Tax Act, 1961.

The insertion of Section 2(29BA) defining manufacture wef 1st April 2009 has been taken note of by the Special Bench and referred to the Supreme Court decision in *ITO v. Arihant Tiles and Marbles Pvt. Ltd. (2010) 320 ITR 79, 82 (SC)* that applied the provision to AY 2001-02 on the ground that Parliament had taken note of ground reality in inserting section 2(29BA) in the Income Tax Law. The said definition was again applied by the Hon'ble Supreme Court in *CIT v. Emptee Poly-Yarn Pvt. Ltd.*

22. S. 11 : Property held for charitable purposes – Charitable purpose – Scope and applicability – General public utility. [S. 2(15)]

Facts

The assessee-trust was engaged in the activity of publication of newspapers and periodicals. In AY 1943-44, the Tribunal held that the trust existed for charitable purposes. Accordingly, the trust was held to be entitled to exemption under section 4(3)(i) of the Indian Income-tax Act, 1922 in which the limitation of 'not involving the carrying on of any activity of profit' did not exist. Said limitation was brought in the corresponding section of the 1961 Act, namely, section 2(15). In view of this, exemption was denied to the assessee for AY 1962-63 onwards.

With effect from 1-4-1984, section 2(15) was amended and the words 'not involving the carrying on of any activity of profit' were deleted therefrom. At the same time, section 11(4A) was also inserted.

In view of the above amendment, the issue as to the assessee's entitlement to exemption arose once again. The issue of assessee's claim for exemption under section 11 was referred to the Special Bench. In the first round, the Special Bench held that the assessee was engaged in carrying on the activity for profit. It was held that the profits and gains from business and profession earned by the assessee would attract the disability clause set out in section 11(4A). However, the plea of the assessee regarding income under the heads other than 'Profits and gains from business or profession' remained to be disposed of.

On a rectification petition filed by the assessee, the Special Bench was once again required to consider the question of whether the object of the assessee was an object of general public utility under section 2(15). If so, the next issue was whether the earning of substantial profit by the assessee affected its status as existing for an object of general public utility. Finally, the claim for exemption under section 11 was also required to be considered in light of the judgment of the Supreme Court in the case of ACIT v. Surat Art Silk Cloth Manufacturers Association [1980] 121 ITR 1.

Issues:

The following specific questions were considered by the Special Bench:

- Whether the object of the assessee-trust is an object of general public utility under section 2(15) of the Income-tax Act, 1961?

- If the answer to the first question is in affirmative, does the earning of substantial profit by the assessee affect its status as a trust existing for an object of general public utility and consequently the claim for exemption under section 11, and if so, to what extent, in the light of the judgment of Supreme Court in the case of *ACIT v. Surat Art Silk Cloth Manufacturers Association [1980] 121 ITR 1"*

Views:

Insofar as whether the assessee-trust's object fell within the scope of "object of general public utility", it was noted that this position was accepted even under the 1922 Act. The claim under section 11 was denied under the 1961 Act not because of any change in object, but because of the inclusion of the words "not involving the carrying on of any activity of profit." In 1984, this disability was removed from section 2(15) and a new sub-section (4A) was introduced in Section

11. Accordingly, the object of the assessee remained to be of general public utility; and the real issue was whether the disability clause under sub-section (4A) of Section 11 would stand attracted.

The ITAT considered the legislative history, and reasoned that the disability clause under section 11(4A) "clearly and unambiguously refers to the income which can be taxed as business income". In view of this, the plain reading of the provision suggested that so far as income under other heads is concerned, the same will be eligible for exemption under section 11. The Tribunal explained the net effect of the amendments in section 2(15) and insertion of section 11(4A), with effect from 1-4-1984, in the following words:

"even when a trust or institution is held to be carrying out an activity for profit, and unless the business is incidental to the attainment of main objects and unless the separate books of account are maintained in respect of such business activity, the exemption of income under section 11 will not be available in respect of profits from such an activity. This disability clause, however, does not affect the incomes which may be taxable under a head of income other than the profits and gains from business or profession..."

Held :

Accordingly, the ITAT held that the earning of substantial profit would not affect the assessee's status as a trust existing for an object of general utility'. Insofar as business income is concerned, earning of substantial profits would attract disqualification under section 11(4A) of the Act. However, the exemption of income under the heads of income other than 'profits and gains from business or profession' would not be affected. (AY. 1984-85, 1986-87, 1990-91)

IAC & Ors. v. Saurashtra Trust (2007) 107 TTJ 297 / 106 ITD 1 (SB)(Mum.)(Trib.)

Editorial: The scheme of section 2(15) is again changed by introduction of a proviso with effect from 1.4.2016, through the Finance Act 2015. It is provided that the advancement of any other object of general public utility shall not be a charitable purpose if it involves the carrying on of any activity in the nature of trade, commerce or business etc. (subject to certain limitations).

"Brotherhood is the first and foremost thing that has been imprinted deep in my memory. Each member was unique, coming from different parts of the country, speaking different languages at home, educated in different institutions and having varied interests. Yet we were brothers in in siting that the Government does the right thing for its citizens. The camaraderie was so great that once Justice Fathima Beevi, a siting judge of the Supreme Court, was visiting the place where I was posted and came directly to my home and went straight to the kitchen to ask for lunch disregarding all protocol. She said she felt more at home in the Tribunal, where she had worked earlier, than any other institution which she was associated."

Hon'ble Justice Mr. T.N.C. Rangarajan, Former Judge High Courts of Madras and Andhra Pradesh, Former Vice-President Income Tax Appellate Tribunal – In and About ITAT – 20 thinks I learnt in twenty years. (ITAT Souvenir, 2016)

23. S. 17(2) : Perquisite – Salary – Charge of Income-tax – Non compete fee – Profits in lieu of salary – Compensation received for undertaking restrictive covenant for not competing with business of the company – Adversely affected assessee's earning potential by exploiting entrepreneur skill, knowledge etc. – Capital receipt - Not taxable under any head of income [S. 4,15, 17(3), 28(ii), 28(iv), 45]

Facts: Assessee was a promoter, founder and managing director of a software company, IISIL. On 04.12.1997, a U.K. Company acquired 76% of subscribed equity capital of IISIL, from the assessee and other shareholders. On the same date, a non-compete agreement was also entered whereby the assessee was restrained from carrying out any software development activity for any other person who directly competed with the U.K. company and its associate and subsidiary companies, for a period of 18 months. In consideration thereof, the assessee received a non-compete fee. After the acquisition of IISIL, on 24-2-1998, the assessee entered into a new service agreement with IISIL whereby the assessee was employed as Managing Director.

In the return of income, the assessee did not offer to tax receipt of non-compete fee claiming that the non-compete agreement put a restriction on carrying on any software development activity for any other person and, therefore, the said amount was a capital receipt.

The AO brought to tax the subject non-compete fee by holding that (a) assessee continued to be managing director of IISIL; (b) restrictions were not absolute restrictions on running any business activity by the assessee and imposed for limited period of 18 months and; (c) the only limitation undertaken by the assessee was not to harm the business interest of the U.K. Company. On appeal, the CIT(A) upheld the action of the AO.

Issue/contentions:
Question before the Hon'ble Special Bench:

"Whether the non-compete fees is a capital receipt or a revenue receipt? If it is a revenue receipt, under what section, it would be taxable?"

The Assessee contended that the non-compete fees received was for undertaking restrictive covenant to compete with the business, directly or indirectly and these were not linked with the services rendered, as managing director, either in the past or to be rendered in future. Further, it was argued such payments did not spring from relationship of an employer and employee and therefore, not taxable as 'Income from salary'. This receipt also did not arise from any business carried on by the assessee and were not linked to termination of assessee from management of IISIL. Accordingly, it was contended that the same was not taxable under section 28. Such receipt was also submitted as not taxable under the head 'Capital Gains' or 'Income from other sources'. Hence, the assessee contended that the amounts for undertaking restrictive covenants was a 'capital receipt', not chargeable to tax in his hands.

Held:
The restrictive covenants imposed on the assessee adversely affected the income-earning potential by exploiting his entrepreneur skill, knowledge, experience etc. Therefore, the non-compete fees was capital receipt.

The non-compete agreement shows that the certain restrictive covenants were imposed on assessee for refraining from competingwith the business of IISIL and associate companies, up to a period of 18 months. This agreement was an independent, distinct and separate agreement from the service agreement. Further, the payment of non-compete fees was neither dependent upon the assessee continuing the employment with IISIL after takeover, nor it arose/sprung from their employer-employee relationship. Accordingly, the payment of compensation was neither 'profits in lieu of salary' nor could it be taxed under 'Income from salary' head.

Further, it held that the assessee was not carrying on any business or profession and therefore, non-compete fees did not arise during any business carried on by the assessee. It observed that the assessee continued to be the managing director even after takeover. The payment of non-compete fee was, directly or indirectly linked to termination of management, as envisaged under section 28.

On the point as to whether the non-compete fee being a capital receipt, can be brought to tax as 'capital gain' u/s. 45 of the Act, the Hon'ble Special Bench held that the assessee did not 'transfer' any capital asset. Further, the amount was also held to be not taxable as 'income from other sources'. (AY 1998-99)

Saurabh Srivastava v. Dy. CIT (2008) 1 DTR 126 / 113 TTJ 1 / 111 ITD 287 (SB)(Delhi)(Trib.)

Editorial: The receipt of any amount under a non-compete agreement has been made taxable under clause (va) of section 28 inserted by the Finance Act, 2002 with effect from 1-4-2003.

"When the number of Benches increased, there was dearth of space and we were forced to think in terms of housing the additional benches in a different locations, a move which would have caused extreme hardship to all the stakeholders had it materialized. But the ITAT Bar of Bombay came to the rescue and a PIL was promptly filed in the Bombay High Court for securing space vacated in the same floor of Old CGO Complex (as it was then called) by the I& B Ministry.

The ITAT Bar, Bombay also questioned the removal of the powers of Transfer of Members from the President and giving it to the Law Ministry as an intrusion in to the independence of a judicial body. Several other ITAT Bars also joined the proceedings and ultimately the Supreme Court thwarted the move and restored the power to the President with guidelines such as the formation of a collegium and other norms. I shudder to think what would have happened to the Tribunal had the move had not been challenged, and full credit should go to the ITAT Bar of Bombay which took the lead in the matter. The Tribunal is also beholden to the late Nani Palkhivala who initially appeared in the matter before Bombay High Court, in one of his last appearances on account of his failing health, to Mr.Iqbal Chagla who took over from later and to the late Mr. T.V. Rajagopala Rao, then President of the Tribunal, who placed a 90 page affidavit before the High Court making out a strong defence against the usurpation of the powers. I understand that he was advised some against fling the affidavit as (according to them) it may annoy the Governmnt which may augur well for him, but he took no notice of that and did what he thought was his duty. I doff my hat to his sense of duty and moral courage. I want the members of the Tribunal who have joined recently and perhaps aware of this phase in the evolution of the Tribunal they serve, to reflect upon the courage and moral conviction that are required to take such a position with nothing but independence of the Tribunal in mind. Mr. Rajagopala Rao had this in abundance and went on undeterred. Please spare a thought for him. The full independence you enjoy now because of his action."

Hon'ble Justice Mr. R.V.Easwar, Former Judge High Court of Delhi, Ex-Officiating, President, ITAT – My Ramblings. (ITAT Souvenir, 2016)

24. S. 22 : Income from house property – Business income – Rental income – The rental income received by the Assessee in capacity of an owner of the property and not a businessman – Earning rental income is not business object of the Assessee – the rental income is chargeable to tax under the head 'Income from house property' and not 'Business Income'. [S. 28(i)]

Facts:

The Assessee Company has incorporated on 19.12.1978 with the main object to purchase, sell, deal and traffic in lands, estates, houses or other landed properties. On 31.01.1979, the Assessee entered into an "agreement to sell" with the owner thereof to purchase a double storied building known as "Scindia House" situated at Connaught Place, New Delhi for total consideration of Rs.75,00,000 and also received the possession of the same on execution of an agreement. At that time the entire property was tenanted and the Assessee became entitled to receive the rent from tenants as per the terms of an agreement. In the assessment year 1980-81, the Assessee received total rental income of Rs.2,30,397 which was shown as "Business Income" in its return. In the course of assessment proceedings for that year, JCIT (AO) treated the rental income as "Income from Other Sources". On appeal, the CIT(A) confirmed the action of the AO. On further appeal to ITAT, the Assessee contended that the intention of acquiring the said property was not to enjoy a meagre rental income but to earn profit by exploiting a commercial asset in pursuance of its main business activity. Further, it was contended that the said asset was held as stock in trade with a purpose to construct the flats on third storey of the said building for which advances has also been received from the prospective buyers. On the other hand, the department contended that the Assessee was not allowed to raise construction of flats on the third storey of the property and therefore, it cannot be treated as stock in trade. Further, there was no commencement of business of the Assessee and thus, the question of assessing rental income as "business income" does not arise. It was further contended by the department that since, the Assessee had not become the owner of the said building in the assessment year 1980-81, the rental income could not be assessed under the head "Income from house property" and the same was chargeable to tax only under the residuary head "Income from other sources" as held by the AO as well as by the CIT(A). The limited issue before ITAT was whether the rental income was chargeable to tax under the head "Income from Business" as claimed by the Assessee or under the head "Income from other sources" as held by the revenue authorities. In this context, the ITAT agreed with the submission made by the Assessee and held that the letting out portion of the said property was only incidental to the main business of the Assessee and thus, the rental income earned during the assessment year 1980-81 is assessable under section 28 as "Business Income".

Further, during the course of assessment proceedings for the assessment year 1982-83, the AO observed that a sale deed in respect of the "Scindia House" was executed on 31.05.1980 through which the Assessee became the owner of the property. The AO therefore, taxed the entire rental income of Rs.6,92,795/- received in that year was taxed under the head "Income from House Property" rejecting the claim of the Assessee that the said income is "Business Income". On appeal, the CIT(A) confirmed the action of the AO. On further appeal, the ITAT followed its order in Assessee's own case for the assessment year 1980-81 and allowed the appeal of the Assessee by

holding that facts involved in the assessment year 1982-83 are identical with the facts involved in the assessment year 1980-81. Further, following the decisions for the assessment year 1980-81 and 1982-83 the ITAT allowed the claim of the Assessee in the subsequent assessment years i.e. 1983-84, 1984-85, 1985-86, 1986-87, 1987-88, 1989-90, 1990-91 and 1991-92 and held that the rental income received by the Assessee in respect of the said property is chargeable to tax under the head "Business Income".

Further, the same controversy arose in the assessment year 1992-93. When the matter travelled to ITAT, it was observed by the ITAT that there is a material change in the facts involved in the Assessee's case for the Assessment year 1981-82 onwards. The ITAT held that in the assessment year 1980-81, the assessee was not the owner of the property and became owner on execution and registration of sale deed on 31.05.1980 i.e. in assessment year 1981-82. According to the ITAT, this material change in the factual position escaped its attention which resulted in inadvertent acceptance of the claim of the Assessee that the rental income was chargeable to tax under the head "Business Income" in the subsequent years holding that this issue was covered by the order of ITAT for assessment year 1980-81. The ITAT, therefore, proceeded to examine the issue afresh in assessment year 1992-93 in the light of this change in the factual position and held that the property in question is not a stock in trade and even if the same is to be held as stock in trade, the rental income received from the said property is chargeable to tax under the head "Income from house property" and not "Business Income". To arrive at this conclusion, the ITAT relied on the decisions of Hon'ble Supreme Court in the case of *CIT v. Chugandas & Co. [1965] 55 ITR 17 (SC) and S.G. Mercantile Corporation (P.) Ltd. v. CIT [1972] 83 ITR 700 (SC).* This view taken by the ITAT in assessment year 1992-93 is contrary to its view taken on a similar issue in the earlier years in Assessee's own case. Thus, taking a note of the same, the said issue referred to the Special Bench for fresh consideration.

Issue:
The Special Bench was constituted under section 255 (3) to decide the following issue arising out of the appeals for the assessment years 1993-94 to 1998-99 which is as follow

"On the facts and circumstances of the case, the CIT(A) has erred in confirming the AO's action in holding that the Assessee was assessable in relation to rental income from Scindia House under the head 'Income from house property' and not 'Business Income' as claimed by the Assessee and further erred in disallowing the expenses claimed by the Assessee for carrying on the said business. The finding of the AO and confirmed by the CIT(A) are contrary to the Tribunal order for the assessment years 1980-81, 1982-83 and order dated 29th April, 1993 for the assessment years 1983-84 to 1987-88 and subsequent years?"

Views:
The ITAT was of the view that the property under dispute which was let out by the Assessee was undisputedly owned by it. Thus, it was a case of letting out of a property owned by the Assessee simplicitor and not a case of exploitation of the property by way of complex commercial activity. Thus, rental income earned from letting out the said property is therefore, chargeable to tax under the head "Income from house property" and not under the head "Profits and gains of business or profession" as claimed by the Assessee.

Held:

After appreciating the facts and circumstances of the case and analysing the various case laws by the Hon'ble Supreme court and High Courts, the ITAT Special Bench held as follows

i. The ITAT, referring to the decision of Hon'ble Supreme Court in the case of *Universal Plast Ltd. v. CIT [1999] 237 ITR 454 (SC*), held that no precise test can be laid down to ascertain whether rental income received by the Assessee from letting out of assets would fall under the head "Income from house property" or "Profit and gains of business or profession". Further, referring to the decision of Hon'ble Gujrat High Court in the case of *CIT v. New India Industries Ltd. [1993] 201 ITR 208 (Guj.)*, it held that no general principle can be laid down which is applicable to all cases and each case has to be decided on its own facts and circumstances.

ii. In the facts under consideration, the Assessee was not in position to use the property in dispute owned by it for the purpose of its business as it could not receive the permission from the local authority i.e. NDMC and the said property was already occupied by the tenants. In light of the same, the rental income was earned by the Assessee because of the ownership of the property and not because of its business or commercial activity. The Assessee received rental income in the capacity of owner and not of businessman. Further, the effort on part of the Assessee to evacuate the tenants and get the possession thereof so as to turn the same into account in the ordinary course of its business which again goes to show that the rental income was being received as an owner and not because of any commercial activity undertaken by it. As submitted by the Assessee, acquiring and holding the said property to earn rental income was never intention of the Assessee going by meagre income vis-a-vis the huge investment made in the property and therefore, the decision to let out the said property cannot be said to have been taken by the Assessee as a businessman.

iii. The Assessee laid heavy emphasis on the nature of said property held as stock in trade of its business of acquiring, developing and selling of the said property. However, this aspect is hardly of any relevance to decide under which head the rental income received from the said property is to be assessed. Even if the said property was held by the Assessee as a stock in trade, the rental income was not earned in the capacity of trader. On the other hand, when the vacant possession of the tenements was obtained by the Assessee and sold to the different parties from time to time in the capacity of businessman, the income arising out of such transaction was rightly assessed to tax under the head "Profits and gains of business or profession". However, when it comes to the rental income, the said income was earned by the Assessee not as a trader but as the owner of the said property. Hence, there was no business connection between the tenants and the Assessee and it was merely a case of tenant owner relationship.

iv. In the present case, the Assessee found to be the owner of the property in dispute and thus, the rental income earned from letting out the said property will be assessable under the head "Income from House Property" and not "Business income". What is let out should be predominantly the said property inasmuch as the rental income should be from the bare letting of the tenements or from letting accompanied by incidental services or facilities. The subject hired out should not be a complex one and the income obtained should not be so much because of the facilities and services rendered than because of their letting of the tenements. If such a situation is found to be obtained, the other aspects such as nature of the

property being commercial/business asset, etc. in the hands of the Assessee as well as nature of the business of the Assessee do not change the character of the income and the rental income does not become income from trade or business.

While coming to the aforesaid conclusion, the ITAT referred to the various decisions in the case of *East India Housing & Land Development Trust Ltd. v. CIT [1961] 42 ITR 49 (SC), Shambhu Investment (P.) Ltd. v. CIT [2003] 263 ITR 1431 (SC), Karnani Properties Ltd. v. CIT [1971] 82 ITR 547 (SC), CIT v. Chugandas & Co. [1965] 55 ITR 17 (SC) S.G. Mercantile Corpn. (P.) Ltd. v. CIT [1972] 83 ITR 700 (SC), CIT v. New India Industries Ltd. [1993] 201 ITR 208 (Guj), Madras Silk & Rayon Mills (P.) Ltd. v. ITO [2003] 262 ITR 122 (Mad.), CIT v. Bhoopalam Commercial Complex & Industries (P.) Ltd. [2003] 262 ITR 517 (Kar.), CIT vs. Chennai properties & Investments Ltd. [2004] 266 ITR 685 (Mad)* etc. (AY. 1993-94 to 1998-99)

Atma Ram Properties (P) Ltd. v. Jt. CIT (2006) 102 TTJ 345 / 8 SOT 741 (SB)(Delhi)(Trib.)

Editorial:
This decision of Special Bench is affirmed by the High Court in *Commissioner of Wealth Tax v. Atma Ram Properties (P.) Ltd [2017] 399 ITR 380 (Delhi)*. The decision of Madras High Court in *CIT v. Chennai properties & Investments Ltd. [2004] 266 ITR 685 (Mad)* referred to by the Special Bench is reversed in the case of *Chennai properties & Investments Ltd. v. CIT [2015] 373 ITR 673 (SC)* laying down the proposition that when the main object of business of the Assessee is to acquire the properties and receive rental income letting out the same then, the said income is chargeable to tax under the head 'business income' and not 'Income from House Property'. The said ratio was further fortified by the Supreme Court in the case of *Rayala Corporation (P.) Ltd. v. ACIT [2016] 386 ITR 500 (SC)*.

Further, in the case of *Raj Dadarkar & Associates v. ACIT [2017] 394 ITR 592 (SC)*, the Supreme Court has taken a view that income from subletting the flats/shops is to be taxed under 'Income from House Property' as it was not the main object of the business of the Assessee therein.

The nature of rental income can be identified based on the circumstances under which it is received. If a person receives rental income consequent of the business activity carried on by him then, the same can be taxed under the head "business income" and if it is received in the capacity of an owner of the property without having any business objective of receiving rental income then, the same can be taxed under the head "Income from house property".

"The Tribunal is a vital link between the courts and the average citizen of the State and is playing a crucial role in dispending inexpensive, easy and quick justice through its Benches all over India. Its role has been widely appreciated."

Hon'ble Krishna Kant, Vice-President, Government of India. (Diamond Jubilee – Souvenir - 60th Anniversary - (24th and 25th January 2001)

25. S. 28(i) : Business loss – Exchange fluctuation loss on pending forward contract is an "accrued" loss – Losses on account of valuation of unmatured foreign exchange forward contract is allowed as a deduction. [S. 37(1), 145]

Facts:
The assessee, a non-resident company, was carrying on banking business in India. It entered into forward contracts with its clients to buy and sell foreign exchange at an agreed price on a future date. Forward contracts which were maturing beyond the end of the accounting period was valued by the assessee on the basis of exchange rate prevailing on the last day of the accounting year and accordingly, profit or loss was booked. This practice was adopted keeping in view the guidelines laid down by the RBI as per rates notified by Foreign Exchange Dealers Association of India.

Issue:
The AO held that the method of accounting was incorrect and there could not be any loss prior to the date of maturity of the contract. Accordingly, the loss was disallowed. The CIT(A) allowed the claim of the assessee.

A Special Bench was constituted to decide as to whether the loss on account of valuation of unmatured forward contract at the end of the year was an "accrued loss" and hence was allowable as a deduction?

Held:
Binding obligation accrued on the assessee at the time when the forward contract was entered into. Liability is crystallized when a pending obligation on the balance sheet date is determinable with reasonable certainty. Accounting Standard-11 issued by the ICAI mandates that when the exchange rate difference arises over more than one accounting period, the effect of exchange rate difference has to be recorded on 31 March. When profits in respect of unmatured forward foreign exchange contracts were taxed, then loss on the same contracts should also be allowed as a deduction. Accordingly, the loss was allowed as a deduction. (AY. 1998-99, 1999-2000)

DCIT v. Bank of Bahrain & Kuwait [2010] 41 SOT 290 / 132 TTJ 505 / 5 ITR(T) 301 (SB) (Mum.) (Trib.)

Editorial: No further appeal has been filed by the Revenue authorities before the Hon'ble Bombay High Court against the Special Bench decision. This fact was confirmed by Revenue authorities in the case of *DIT(IT) v. Citibank N.A (ITA No. 330 of 2013) (Bombay)* and hence, the appeal filed by the revenue authorities was not entertained by the High Court in the case of Citibank (supra) too.

> *"As a quasi -judicial body, the Income Tax Appellate Tribunal has been fulfilling an important duty ever since it was set up in January 1941. On this occasion, I urge everybody associated with the Income Tax Appellate Tribunal to rededicate themselves to their motto "Easy and Quick Justice."*
>
> ***Hon'ble Shri A. B. Vajpayee, Prime Minster of India. (Diamond Jubilee – Souvenir - 60th Anniversary - (24th and 25th January 2001)***

26. S. 28(i) : Business loss – Notional Loss of an assessee on account of fluctuation in rate of foreign exchange is a revenue loss and not a capital loss. Adjustment to the cost of capital asset on account of difference in foreign exchange on capital account loans as an increased liability under section 43A for the purposes of depreciation. [S. 32, 37(1), 43A]

Facts:

The assessee was engaged in capital intensive exploration and production of petroleum products for which it had to heavily depend on foreign loans to cover up its expenses, both capital and revenue, for import of machinery on capital account and for payment to non-resident contractors in foreign currency for various services rendered. It had taken three types of foreign exchange borrowings : - (i) in revenue account; (ii) in capital account and (iii) for general purposes, partly utilised in revenue account and partly in capital account. As per terms and conditions of the foreign exchange borrowings, some of the loans became repayable in the year under consideration, but date of payment of some loans fell after the end of the relevant accounting year. The assessee revalued all its foreign exchange loans outstanding as on 31-3-1991 in the Indian currency and claimed the difference between their respective amounts as on 31-3-1990 and on 31-3-1991 as revenue loss under section 37(1) in respect of loans used in revenue account. It also took into consideration the similar difference in foreign exchange on capital account loans as an increased liability under section 43A for the purposes of depreciation. The AO disallowed, inter alia, the claim of loss on accrual basis on revenue account on account of fluctuation of foreign exchange rate on the basis of following the earlier assessment order, wherein it was held that such loss was a notional loss. Therefore, the AO disallowed the assessee's claim on both the counts on the ground that such a loss could be allowed to the assessee on discharge of liability at the time of actual repayment of those loans. On appeal, the CIT(A) affirmed the view taken by the AO on the ground that it was a notional liability and the same had not crystallised or accrued in the relevant assessment year. However, as regards the adjustment for increased liability made by the assessee for the purpose of section 43A in respect of foreign exchange loans in capital account, which were outstanding as on 31-3-1991, he accepted the stand of the assessee and directed the Assessing Officer to allow the benefit of such increased liability for computation of depreciation allowance on plant and machinery purchased out of such foreign exchange loans for the assessment year under consideration. The cross appeals were filed, and Special Bench was constituted at instance of assessee's request. The Tribunal allowed the assessee's appeal and dismissed the revenue's appeal.

Issue:

A Special Bench was constituted by the Hon'ble President, Tribunal, wherein the question formulated was:

"Whether on the facts and circumstances of the case and in law, the additional liability arising on account of fluctuations in the rate of exchange in respect of loans taken for revenue purposes could be allowed as deduction in the year of fluctuations in the rate of exchange or the same could only be allowed in the year of repayment of such loans."

Views:
The Tribunal observed that the assessee had been keeping its accounts on mercantile basis from AY 1982-83, and thereafter, till AY 1986-87 it had been consistently claiming the losses suffered by it on account of fluctuation in foreign currency rates only on accrual basis, which was also allowed by the AO. Up to the AY 1981-82 the loss was claimed in the year in which the loans or part thereof were repaid. Thus, the assessee had changed its method of accounting from the assessment year 1982-83 but the bonafides of the change were not doubted or disputed by the department. The Tribunal noted that the assessee had followed the Accounting Standards-II on 'Accounting for the effects of Changes in Foreign Exchange Rates' issued by the ICAI and had offered a gain of Rs. 293.37 crores, during the assessment year 1997-98 because the Indian rupee appreciated as compared to foreign currency, and the Department had taxed the same. Therefore, they observed that in one year the Department was denying the claim; in another year when there was a profit, the Department was taxing the same. Further, nothing was brought by the Department on record even to whisper that the system adopted by the assessee for claiming fluctuation losses or gains was a device to reduce the incidence of taxation. Moreover, when assessee is a wholly-owned Government of India Undertaking, its accounts were prepared as per the provisions of the Companies Act, and were duly audited by the Accountant General of India and further approved and endorsed by the Parliament.

Held:
The Hon'ble Bench held that the assessee's claim for loss arising as a result of fluctuation in foreign exchange rates on the closing day of the year has been disallowed by the AO, inter alia, on the ground that this liability was a contingent liability and the loss was a notional one. The main ingredient of a contingent liability is that it depends upon happening of a certain event, and in the case of the assessee, the "event" i.e., the change in the value of foreign currency in relation to Indian currency has already taken place in the current year. Therefore, the loss incurred by the assessee is a fate accompli and not a notional one. Hence, on careful examination of the decisions of the various Benches of the Tribunal, High Courts and Supreme Court, it held that the assessee's claim of loss on account of fluctuation in foreign currency rate is allowable. (AY. 1991-92)

Oil & Natural Gas Corporation Ltd v. Dy CIT (2002) 83 ITD 151 / 77 TTJ 387 (SB) (Delhi) (Trib.)

Editorial: The High Court in 301 ITR 415 (Uttarakhand) reversed the decision of the Tribunal on both the issues. Nonetheless, the assessee's appeal was allowed by the Supreme Court in 322 ITR 180, and therefore, the loss claimed by the assessee on account of fluctuation in the rate of foreign exchange as on the date of balance-sheet is allowable as expenditure under section 37(1) of the Act. The assessee was also entitled to adjust the actual cost of the imported capital assets, acquired in foreign currency, on account of fluctuation in the rate of exchange at each of the relevant balance-sheet dates pending actual payment of the varied liability as all the assessment years in question were prior to the amendment in section 43A of the Act with effect from 1-4-2003. *CIT v. Woodward Governor India (P.) Ltd. [2009] 312 ITR 254* was followed and relied upon by the Apex Court.

Prior to insertion of S. 43AA in 2018, on perusal of the existing provisions of the Act, it was clear that there is no specific provision to allow gain or losses on account of foreign exchange fluctuations except for S. 43A.

27. S. 32 : Depreciation – Block of assets – A single asset can itself form a block of asset – Capital gains in case of depreciable assets – Provisions of section 50 would apply in case of transfer of an asset on which depreciation was claimed at any time during its lifetime even though no business was carried on by the assessee when the asset was sold. [S. 2(11), 45, 50]

Facts:
The assessee-trust was carrying on business of manufacturing car accessories prior to AY 1985-86. Thereafter, it ceased to carry on the business, though it continued to remain in possession of the assets. One of the assets owned by the assessee-trust, being factory building, acquired in the year 1978, was let out and the income therefrom was shown under the head "income from other sources".

The concept of block of asset was introduced for the first time with effect from AY 1988-89. Prior to that, depreciation was allowed on each asset separately. For the AY 1988-89, no depreciation was claimed by the assessee.

During the year under consideration, the assessee sold the said premises and declared the income of Rs. 2,24,751 arising therefrom as long-term capital gains. The AO was of the view that since assessee had claimed depreciation on the said asset in the earlier years, the transaction was covered by section 50 of the Act and the profit arising out of the sale of the said premises was to be taxed as short-term capital gains. The learned CIT(A) upheld the order of the AO.

Issues:
The Special bench had to consider two issues

(i) Whether the single asset can itself form a block of assets within the meaning of "block of assets" as per section 2(11) of the Act?

(ii) Whether, on the facts and in the circumstances of the case, the provisions of section 50 are applicable in respect of premises sold by the assessee during the previous year relevant to AY 1988-89 when the assessee has ceased to carry on the business from AY 1985-86?

Views:
The Special Bench held that if a single asset is outside the purview of block of assets, then assessee owning single asset and using it for the purpose of business would not be entitled to depreciation at all, because section 32 only provides for depreciation on block of assets. This interpretation would lead to absurd result and this can never be the intention of the legislature.

Further, the Special Bench held that section 2(11) prescribes neither explicitly nor impliedly any condition that the asset should be used for the purpose of business during the year under consideration. The user of the asset is important for the purpose of actual allowability of the depreciation, but not for determining whether the asset falls within the block of assets or not.

Also, for the purpose of section 50, the allowability of depreciation is relevant but it is not necessary that the depreciation should be allowed for the year under consideration. If the depreciation is allowed in any of the year either under the Income-tax Act, 1961, or under the Income-tax Act, 1922, section 50 would become applicable.

Held:
Held by the Special Bench:

A single asset can itself form a block of asset within the meaning of section 2(11) of the Income-tax Act, 1961.

Once depreciation has been claimed on any asset in any previous year, section 50 would apply while computing capital gains on its transfer, and it is not necessary that the depreciation is allowed for the very year under consideration nor is it necessary that the assessee is carrying on any business for that year. (AY. 1988-89)

Chhabria Trust v. ACIT (2003) 87 ITD 181 / 80 TTJ 861 (SB)(Mum.)(Trib.)

Editorial: The issues varied in this case have wide verifications many assessee faces there issues. This decision of the Special Bench has reached -- as no further appeal was preferred against their decision. Practically, many assessees are facing the issue of computation of capital gains on sale of assets used for the purpose of their already ceased business, especially where such asset is an immovable property where the fair market value is much more than the written down value. This Special Bench Judgment is a complete solution to such issues.

> *"The Income Tax Appellate Tribunal, one of the oldest quasi -judicial institutions in this country is completing 60 years of its existence. This Tribunal has been earning accolades from various sections of the society more particularly from the litigant public for rendering quick and inexpensive justice in an extremely complicated area of law.i.e. direct taxes."*
>
> ***Hon'ble Justice Dr. Adarsh Sein Anand, Chief Justice of India. (Diamond Jubilee – Souvenir - 60th Anniversary - (24th and 25th January 2001)***

28. S. 32 : Depreciation – 'Router' and 'Switches' can be classified as a computer hardware when they are used along with a computer and when their functions are integrated with a computer – Routers and Switches are to be included in block of'computer' for purpose of determining rate of depreciation applicable to them.

Facts:
Assessee was engaged in data communication, design, development, purchase and sale of networking products, their maintenance and installation etc. Ld. AO did not accept the assessee's stand of including the routers and switches in the block of computers on which depreciation was allowable at the rate of 60 per cent. Ld. AO held that routers and switches were entitled to depreciation at the 25 % as applicable to machine. On appeal, the CIT (A) allowed the assessee's claim.

Issue:
Due to conflicting decisions, the matter was referred to the placed before Hon'ble President for constitution of a Special Bench on the following question:-

Whether routers and switches can be classified as computer entitled to depreciation at 60 per cent or have to be classified as general plant and machine entitled to depreciation only at 25 per cent?

Held:
Section 32, which grants depreciation allowance, does not define the word 'computer'. It is an admitted position that the word 'computer' has not been defined in the Act or the Rules. Thus, in order to determine whether a particular machine can be classified as a computer or not, the predominant function, usage and common parlance understanding would have to be taken into account. Any machine or equipment cannot be described as computer, if its principal output or function is the result of some sort of 'computer function' in conjunction with some non-computer function. In order to be called as computer, it is sine qua non that the principal output/object/function of such machine should be achievable only through 'computer functions'.

'Router' is a hardware device that routes data (hence the name) from a Local Area Network (LAN) to another network connection. A router acts like a coin sorting machine, allowing only authorized machines to connect to other computer systems. Most routers also keep log files about the local network activity. Now the question is whether this 'machine' can be used independent of computer. If yes, then it cannot be called 'computer hardware'.

When 'computer hardware' is used as a component of the computer, it becomes part and parcel of the computer, as in the case of operating software in the computer. In such a situation, hardware in question can be considered as a part of a computer and, hence, a 'computer'. Per contra, when the machine is not used as a necessary accessory or in combination with a computer, it cannot be called as a 'computer component'. Coming to the routers, it is seen that these can also be used with a television and in such use, no computer is required. These are also called T.V. routers. Similarly, 'Internet service providers', give connectivity by installing a router in the premises of the persons/

institutions availing of the internet connection. In these cases, the router is not used along with a computer. In such a situation, it would be a 'Standalone' equipment. In such cases this cannot be considered a component of a computer or computer hardware. Giving another example, a computer software can be used in many devices including washing machines, televisions, telephone equipments, etc. When such software is used in those devices, it integrates with that particular device. The predominant function of the device determines its classification. Only if the computer software resides in a computer, then it becomes a part and parcel of a computer and as long as it is as an integral part of a computer, it is classified as a 'computer'.

In view of the discussion, it can be said that router and switches can be classified as computer hardware when they are used along with a computer and when their functions are integrated with a 'computer'. In other words, when a device is used as a part of the computer in its functions, then it would be termed as a computer and is therefore to be included in the block of 'computer' entitled to depreciation at the rate of 60 per cent. (AY. 2002-03, 2003-04)

Dy. CIT v. Datacraft India Ltd. (2010) 40 SOT 295 / 45 DTR 121 / 133 TTJ 377 / 9 ITR (T) 712 (SB) (Mum. Trib.)

Editorial: Delhi High Court in case of *CIT v. BSES Yamuna Powers Ltd. (358 ITR 47/220 Taxman 51)* has held that Computer accessories and peripherals being an integral part of computer systems are eligible for depreciation at higher rate of 60 %. Said view has also been affirmed by Bombay High Court in case of *PCIT v. Goa Tourism Development Ltd. (261 Taxman 500/102 taxmann.com 437)*

"The Income Tax Appellate Tribunal is giving a great service to the assessee by their objective, independent and unbiased approach. It is a common experience that many officers are hesitant to take stand against the revenue and their approaches are more prone to revenue for certain reasons, the approach of the Tribunal is dynamic, objective and unbiased which provides great relief to the assesses."

Hon'ble Justice Mr Ashok Kumar Mathur, Chief Justice Calcutta High Court. (Diamond Jubilee – Souvenir - 60th Anniversary -(24th and 25th January 2001)

29. S. 32 : Depreciation – Expenditure incurred by assessee for construction of road under BOT contract by Government of India, had given rise to intangible asset as defined under Explanation 3(b) r/w section 32(1)(ii), thus assessee was eligible to claim depreciation on such asset at specified rate – When there is no exempt income during the relevant year no disallowance can be made. [S.14A, S 32(1)(ii), R.8D]

Facts:

Assessee is a company engaged in executing civil contract work. In course of the assessment proceedings, the Assessing Officer noticing that assessee has claimed depreciation of Rs.40,07,94,526 at the rate of 25% on the opening written down value (WDV) of built, operate and transfer (BOT) bridge at Rs.160,31,78,103 examined the matter further. The Assessing Officer found that as per the terms of the agreement, assessee was to complete the work at its own cost and maintain the same for a period of 11 years and after conclusion of the said period the road was to be handed over on "as is where is" basis to NHAI. As per the terms of agreement assessee is entitled to collect toll from vehicles using the road as mentioned in National Highways (Rate of Fee) Rules, 1997, during the concession period. Referring to different clauses of the concession agreement the Assessing Officer formed an opinion that as the assessee has no right on the road, except, for maintaining the road and receiving toll collections during the concession period as per the rates specified by the Government and entire rights over the road are with National Highway Authority of India, including collection of toll, the asset on which the assessee had claimed depreciation is neither a building nor a plant and machinery. The Assessing Officer, therefore, rejected the assessee's claim on the reasoning that assessee is not the owner of the asset and secondly, only roads within a factory premises linking various buildings and approach roads are eligible for depreciation. The assessing officer also noted that assessee has no consistency in its claim as in assessment year 2010-2011, assessee had claimed depreciation on the BOT-bridge by treating it as intangible asset. Accordingly, the assessing officer disallowed assessee's claim of depreciation.

Issue:

The Special Bench was constituted and decided the following question:-

"Whether on the facts and in the circumstances of the case, the expenditure incurred by the assessee for construction of a road under BOT contract with Government Of India gives rise to an asset and if so, whether it is an intangible asset or tangible asset? In case it is held to be a tangible asset, whether it is building or plant or machinery?"

Views:

Assessee has acquired the right to operate the project and collect toll charges, which is a valuable business or commercial right because through such means, the assessee is going to recoup not only the cost incurred in executing the project but also some amount of profit. It is an intangible asset created for the enduring benefit.

The use of words "business or commercial rights of similar nature", after the specified intangible assets in Section 32(1)(ii) clearly demonstrates that the legislature did not intend to provide for depreciation only in respect of specified intangible assets but also to other categories of intangible assets which were neither visible nor possible to exhaustively enumerate. By applying the principles of ejusdem generis, the nature of business or commercial right cannot be restricted only to knowhow, patents, trademarks, copyrights, licence or franchise. Any intangible assets which are invaluable and result in smoothly carrying on the business as part of the tool of the trade of the assessee would come within the expression "any other business or commercial right of similar nature.

The Special Bench referred to the decision of Supreme Court in *CIT v. Smifs Securities (2012) 348 ITR 302* holding that 'goodwill' will come within the expression "any other business or commercial rights of similar nature and the decision in case of *Techno Shares and Stocks Ltd. v. CIT, [2010] 327 ITR 323* holding that BSE Membership Card, allows a member to participate in a trading session on the floor of the exchange, such membership is a business or commercial right, hence, similar to license or franchise.

Held:
Expenditure incurred by assessee for construction of road under BOT contract by Government of India had given rise to intangible asset as defined under Explanation 3(b) r/w section 32(1)(ii), thus assessee is eligible to claim depreciation on such asset at specified rate.

Tribunal also held that, when there is no exempt income during the relevant assessment year, no disallowance can be made, even otherwise the assessee had sufficient surplus interest-free funds to make investment in exempt yielding assets. (AY. 2011-12)

ACIT v. Progressive Constructions Ltd (2018) 161 DTR 289/ 63 ITR 516/ 191 TTJ 549 (SB)(Hyd) (Trib).

Editorial: Gujarat High Court in the case of *PCIT v. Ferromatik Milacron India (P.) Limited, (2018) 99 taxmann.com 154* and Bombay High Court in *PCIT v. Piramal Glass Ltd (2019) 105 CCH 34* held that expenditure pursuant to the non-compete agreement is a commercial right entitled to depreciation u/s 32(1)(ii).

30. S. 32 : Depreciation – Carry forward and set off – Effect of amendment – Period – Due to amendment made by Finance Act, 2001, unabsorbed depreciation relating to assessment years 1997-98 to 1999-2000 cannot be set off in 2003-04 and 2004-05 against income from other sources as per the amended provisions of. [S. 32(2)]

Facts:
The assessee Times Guaranty Ltd was a company deriving its income from the business of merchant banking. For Assessment Years 2003-04 and 2004-05,the assessee claimed set off of unabsorbed depreciation pertaining to assessment years 1997-98 to 1999-2000 against income under the head 'Income from other sources'.

The Learned assessing officer denied the claim of the assessee. The learned CIT(A) held that unabsorbed depreciation was available to an assessee perpetually for set off against the gross total income relying on the case of Virmani Industries (P.) Ltd. [1995] 216 ITR 607 (SC).

Issues:
The matter was placed before the Special Bench for the following question:

Whether the unabsorbed depreciation relating to assessment years 1997-98 to 1999-2000 was to be dealt with in accordance with the Provisions of section 32(2) as applicable for assessment years 1997-98 to 1999-2000 as claimed by the revenue or the same has to be dealt with in accordance with the said provisions as applicable to assessment years 2003-04 and 2004-05 as claimed by the assessee"

Views:
The Departmental Representative was of the view that learned CIT(A) erred in allowing set off of unabsorbed depreciation against 'Income from other sources' despite the fact that an amendment to law took place by the Finance Act, 2001 with effect from 1-4-2002 substituting the old section 32(2). It was pointed out that according to the provisions applicable with effect from assessment year 2002-03, the assessee could not claim set-off of unabsorbed depreciation relating to the assessment years 1997-98 to 2001-02 against the income under any head except "Profits and gains of business or profession". He also stated that section 32(2), as substituted with effect from assessment year 2002-03, was a deeming provision and as such its role could not have been extended beyond what was precisely mandated.

The Supreme Court in the case of Virmani Industries (P.) Ltd(supra) had held that the scope of expression 'profits or gains chargeable' employed under section 32(2) extends not only to 'Business income' but also to other heads of income as given in section 14.The Special Bench observed that in order to neutralize the effect of the above judgment, the Legislature substituted sub-section (2) of section 32 by the Finance (No. 2) Act, 1996 with effect from 1-4-1997. By virtue of such substitution, the scope of set off of the brought forward unabsorbed depreciation allowance was restricted to the income under the head 'Profits and gains of business or profession' by making a little departure in the language of the later part of the substituted provision.

Held:
It was apparent from clause (i) of substituted sub-section (2) for the assessment years 1997-98 to 2001-02, that the unabsorbed depreciation allowance be set off against 'profits and gains' of any business or profession carried on by the assessee for that assessment year. Unabsorbed depreciation allowance which arose in the assessment years 1997-98 to 1999-2000 and could not be adjusted against the income under the head 'Profits and gains of business or profession' up to the assessment year 2002-03, can not be set-off against income under any head other than 'Profits and gains of business or profession' in the years under consideration. As the assessee was seeking to claim the set-off of such brought forward unabsorbed depreciation allowance against income under the head 'Income from other sources', the same was not accepted. (AY. 2003-04, 2004-05)

Dy. CIT v. Times Guaranty Ltd. (2010) 4 ITR 210 / 41 DTR 193 / 131 TTJ 257 / 40 SOT 14 (SB) (Mum.) (Trib.)

Editorial : In *Times Guaranty Ltd v. Dy CIT ITA No 841 of 2011 / 842 of 2011 dt 3-08-2018*, High Court reversed the finding of the Special Bench following the decision in *CIT v. Hindustan Unilever Pvt Ltd. (2017) 394 ITR 73 (Bom) (HC)*

"As a matter of fact, I had the opportunity to associate myself with this Tribunal when I became a Member in 1980 and continued till 1990. In this long span of 10 years or so, I had witnessed the confidence the Tribunal acquired of all concerned. It has glorious past and maintaining the same status, the Income -Tax Appellate Tribunal has now made a name itself and it is a matter of great pleasure that this Tribunal has become a model for all other Tribunals in the country."

Hon'ble Justice Mr. Y. R. Meena, Calcutta High Court (Later became Chief Justice of Gujarat High Court) (Diamond Jubilee – Souvenir - 60th Anniversary - (24th and 25th January 2001)

31. S. 36(1)(iii) : Interest on borrowed capital – Deductions – Interest on borrowed capital – Interest free advances to sister concern – Notional interest – Can't be disallowed as given out of own funds and on grounds of commercial expediency.

Facts :
During the assessment year 1997-98, the assessee borrowed certain money and claimed deduction of interest paid thereon. The assessee had also made interest-free advances to its subsidiaries. The Assessing Officer disallowed certain amount of interest by calculating notional interest at the rate of 18 per cent per annum on loans to subsidiaries observing that interest-free advances were made to the subsidiaries out of borrowed funds. The observation of Assessing Officer is based on the facts that such advances were made out of cash credit account maintained by the Bank. The assessee has pleaded that it had sufficient own fund to make interest-free loans to its subsidiaries and has also submitted that such advancement of interest-free loans to the subsidiaries is a regular feature in case of assessee-company. The Commissioner (Appeals) accepted the submission of the assessee and deleted the impugned disallowance.

Issue :
"That on the facts and circumstances of the case, the Hon'ble CIT(A) has erred in deleting addition of Rs.4.78 crore made by the Assessing Officer by disallowing interest on borrowed money which have been utilised by the assessee in giving interest free loans to subsidiaries."

Held :
In the instant case, admittedly advances were made to sister concerns out of cash credit account with the bank but the Assessing Officer did not make out a case that these advances were not made by the assessee during the course of business due to commercial expediency or for the purpose of business. The assessee was making such interest-free advances to its sister concerns since long during the regular course of business. The assessee had also disclosed a profit of more than hundred crores which justified the claim of the assessee to have made advances out of its own fund. Therefore, considering the facts and circumstances of the case, it could be said that the revenue had failed to make out a case that borrowed funds were utilized for advancing interest-free loan to sister concern whereas the assessee had duly exhibited as to the availability of own fund to enable it to make interest-free advance to its sister concern during the course of its normal business. The tribunal relied on the decision of the Supreme Court in *S.A. Builders Ltd. v. CIT [2007] 288 ITR 1(SC) & Calcutta High Court in CIT v. Britannia Industries Ltd. [2006] 280 ITR 525 (Cal)(HC)* (AY. 1997-98)

Jt.CIT v. ITC Ltd. (2008) 112 ITD 57 / 115 TTJ 45 / 5 DTR 59 / 299 ITR (AT) 341 (SB)(Kol.)(Trib.)

32. S. 36(1)(vii) : Bad debts – Share broker – Amount receivable by share broker assessee from his clients against transactions of purchase of shares on their behalf constitutes trading debt – brokerage/commission income arising from such transactions form part of said trading debt and when amount of such brokerage/commission has been taken into account in computation of income of assessee of relevant previous year or any earlier year, it satisfies condition stipulated in section 36(2)(i) and, thus, assessee is entitled to deduction under section 36(1)(vii) by way of bad debts after having written off said debts from his books of account. [S. 36(2)]

Facts in the case:

1. The assessee was a share broker and the return of income for the assessment year 1998-99 was filed by him declaring total income of Rs. 67,797. In the said return, deduction of Rs. 28,24,296 was claimed by the assessee on account of business loss emanating out of the amount due to him by his clients on account of transactions of shares effected by him on their behalf. The assessee stated that the said amount had become irrecoverable and the same was claimed as deduction after having written it off as irrecoverable from the books of account.

2. During the assessment proceedings, the copies of ledger accounts of the concerned parties were filed by the assessee before the Assessing Officer ('A.O.') in support. According to the A.O., there was no other evidence filed by the assessee except the said copies of the ledger accounts to show that any action was taken against the concerned parties to recover the amounts due from them and it was also noted that the Bombay Stock Exchange Card held by the assessee was already sold by him and the business in respect of which the debts in question had arisen had ceased to exist in the year under consideration. The A.O., therefore, disallowed the deduction claimed by the assessee on account of bad debts and made the addition of Rs. 28,34,096 to the total income of the assessee.

3. In appeal before the ld. CIT(A), it was held that even though the BSE Membership Card was sold by the assessee, he continued to carry on the business as a sub-broker and there being hardly any distinction between the business of share broker and sub-broker, the business of the assessee had not ceased to exist on transfer of BSE Membership Card but the same was continued during the year under consideration. It was also held that the failure on the part of the assessee to initiate recovery proceedings against the concerned agents could not be a ground for denying the assessee's claim for bad debt under section 36(1)(vii) of the Act. Accordingly, the claim of the assessee for deduction on account of bad debt was allowed by the ld. CIT(A).

4. Aggrieved by the order of the ld. CIT(A), the revenue filed an appeal before the Tribunal and during the course of hearing of the said appeal before the Division Bench, it was sought to be contended on behalf of the revenue that the assessee having credited only the brokerage amount to the P&L Account, the amount of bad debts claimed was not taken into account in computing the total income of the relevant previous year or even of any earlier previous year. It was contended

that the condition stipulated in section 36(2) of the Act was not satisfied and the assessee was not entitled to claim deduction in respect of the said bad debts under section 36(1)(vii) of the Act. Keeping in view these contrary views expressed by the co-ordinate Benches on the issue, the following question was sought to be referred by the Division Bench in the present case to the Special Bench to decide the said question.

Issue:
"Whether on the facts and circumstances of the case and in law, the assessee, who is a share broker, is entitled to deduction by way of bad debts under section 36(1) (vii), read with section 36(2), of the Income-tax Act, 1961 in respect of the amount which could not be recovered from its clients in respect of transactions effected by him on behalf of his client apart from the commission earned by him."

Views:
5. The revenue forwarded following arguments for disallowing the claim of the assessee of bad debt sustained on account of transactions of shares effected on behalf of his clients:

a) the deduction provided in section 36(1)(vii) on account of bad debts is subject to the fulfillment of condition as laid down in section 36(2).

b) as per section 36(2) of the Act, no deduction on account of bad debt can be allowed unless such debt or part thereof has been taken into account in computing the income of the assessee of the relevant previous year or of any earlier previous year. The meaning of words "taking into account in computing the income of the assessee" has to be understood in the right perspective in as much as such amount should have been reflected on the credit side of the P&L account so that the net amount after deducting the corresponding expenses is included in the total income of the assessee chargeable to tax. In the case of a share broker what is credited in the P&L account is only brokerage amount and not the value of shares purchased on behalf of the clients and the amount of such shares which has been claimed to be deductible as bad debts, therefore, cannot be considered to have been taken into account in computation of income of the assessee.

b) the transactions of sale/purchase of shares actually do not belong to the share brokers but the same belong entirely to the clients and it is also not necessary that brokerage is always relatable to the value of share transaction.

c) it is only on the settlement day which is later in point of time that the client becomes debtor of the broker in case the former fails to pay the amount against purchase of shares and the broker has to make the said payment on behalf of the client. The debt representing the amount receivable by the broker against purchase of shares on behalf of clients is not taken to the credit of the P&L account of the broker as income and the condition stipulated in section 36(2) of the Act, thus, cannot be said to be satisfied.

d) as per the provisions of section 36(2) of the Act there is only one specific exception provided from satisfying the condition stipulated therein and that is in respect of money-lending/ banking business and the assessee, being a share broker, does not fall under the said exception.

e) the assessee was a share broker and share trader and there is qualitative difference between he said two functions.

f) keeping in view the relevant Circular issued by SEBI in this context, the various guidelines laid down therein and the restrictions imposed and safeguards provided to protect the interest of the broker, a broker would never put himself in such a situation where he has an irrecoverable debt from his clients and consequently, there will be no occasion to claim deduction on account of bad debts.

g) only when the said guidelines are violated by a broker that he may have the risk of suffering loss as a result of bad debts and such loss would rise only when there is infraction of law laid down by SEBI under SEBI Act.

Relying on the various decisions of the Tribunal on a similar issue, it was contended that the amount receivable by the assessee as share broker from his clients against purchase of shares could not be described as a debt and deduction under section 36(1)(vii) of the Act could not be allowed.

6. In reply to the revenue's arguments, the counsel for the assessee submitted the following arguments:

a) the expression used in section 36(2) of the Act is "taken into account in computing the income of the assessee". A reference to the Hon'ble Supreme Court decision in the case of *CIT v. T. Veerabhadra Rao K. Koteshwar Rao & Co. [1985] 155 ITR 152*, wherein it was held that when the interest income accrued on a debt was taxed in the hands of the assessee in the earlier year, the said debt was to be considered as taken into account in computing the income of the assessee, would suggest that interest was taxed as income because it represented an accretion accruing during the earlier year on money owed to the assessee by the debtor and the item constituted income because it represented interest on loan.

b) as regards the arguments that only one exception is specifically provided from the satisfaction of condition under section 36(2) in respect of money-lending business, there is a possibility in the case of money-lending business that interest is not taken into account in computing the income of the assessee but still the amount of corresponding loan is claimed as bad debts. Exception provided in respect of money-lending business cannot be used to draw any adverse inference in relation to the claim of the assessee for deduction of bad debts in respect of any other business.

c) the Hon'ble Delhi High Court in the case of D.B. (India) Securities Ltd. had held that, the amount receivable by the assessee as a broker from his clients against purchase of shares made on their behalf represent his debts and the brokerage which was received in the said transactions having been shown as income by the assessee in the previous year and it was taxed as such by the assessing authority, he was entitled to deduction under section 36(1)(vii) for the said debts after having written off the same as bad or irrecoverable. The Hon'ble Delhi High Court in the case of Bonanza Portfolio Ltd. (supra) had held that the money receivable by the share broker from his clients against purchase of shares had to be treated as debt and since it became bad, it was rightly considered as bad debt and claimed as such by the assessee in the books of account. It was also held that since the brokerage payable by the client was a part of the debt and that debt had been taken into account in the computation of income of the assessee, the conditions stipulated in section 36(1)(vii) and 36(2) stood satisfied. The said

two decisions rendered by the Hon'ble Delhi High Court were directly applicable to the issue under consideration and there being no decision of Hon'ble jurisdictional High Court or any other High Courts cited by the ld. D.R. taking a contrary view in favour of the revenue, the same were required to be followed by this Special Bench.

d) the benefit of these decisions rendered subsequently by the Hon'ble Delhi High Court was not available to the Tribunal while deciding a similar issue in some of the cases against the assessee which have been relied upon by the ld. D.R. Even the decision of Hon'ble Supreme Court in the case of T. Veerabhadra Rao K. Koteshwar Rao & Co., the ratio of which is squarely applicable to the issue under consideration, has not been taken into consideration by the Tribunal in the said cases while deciding the similar issue against the assessee.

e) the decision of Hon'ble Supreme Court in the case of A.V. Thomas & Co. Ltd. (supra) and that of Hon'ble Bombay High Court in the case of *CIT v. Pranlal Kesurdas [1963] 49 ITR 931* further support the case of the assessee on the issue under consideration.

f) as regards the SEBI guidelines relied upon by the ld. D.R., whether loss was suffered by the assessee as a result of not following the SEBI guidelines or even after following the said guidelines, was not relevant and what was relevant was whether he has actually suffered such loss or not. It was not the case of the A.O. that there was no loss actually suffered by the assessee on account of non-recovery of debt representing amount receivable by the assessee from his clients against purchase of shares.

Held:

7. In the case of T. Veerabhadra Rao K. Koteshwar Rao & Co. the Hon'ble Supreme Court had clearly laid down that in order to satisfy the condition stipulated in section 36(2)(i), it was not necessary that the entire amount of debt had to be taken into account in computing the income of the assessee and it would be sufficient even if part of such debt was taken into account in computing the income of the assessee.

8. Whether the gross amount was reflected in the credit side of the P&L account and only the net amount was finally reflected as profit after deducting the corresponding expenses or only the net amount say of brokerage received by the share broker was reflected in the credit side of the P&L account, the ultimate effect was one and the same and it was that the net amount gets included in the total income of the assessee chargeable to tax. It was just a different way of recording the relevant transactions in the books of account and their reflection finally in the P&L account. But insofar as the ultimate effect on the total income of the assessee was concerned, the same remains one and the same. It, therefore, could not be said that such different treatment given in the books of account and reflection thereof in the P&L account was a material aspect having any bearing on the issue under consideration. As held by the Hon'ble Supreme Court in the case of T. Veerabhadra Rao K. Koteshwar Rao & Co., interest was taxed as income because it represented an accretion accruing during the relevant year on money owed to the assessee by the debtor and the nature of such income indicates the transaction from which it emerged. It, therefore, followed that even if accrual of brokerage income and accrual of debt against client in respect of share purchase were two different events which happen at two different times, brokerage income accrued to the share broker as a result of transaction of purchase of shares on behalf of the clients and that nature of brokerage income indicated that it emerged from the transaction of purchase of shares by the

assessee on behalf of his clients in the capacity of share broker. The amount receivable by the assessee on account of brokerage, thus, was a part of debt receivable by the share broker from his clients against purchase of shares and once such brokerage was credited to the P&L account of the broker and the same was taken into account in computing his income, the condition stipulated in section 36(2)(i) got satisfied.

9. Whether loss suffered by the assessee as a result of not following the SEBI guidelines or even after following such guidelines was not going to change the fact that the assessee had suffered such loss. If the assesse broker had not followed such guidelines in a particular case, it was a decision taken by him as a businessman taking into consideration all the relevant facts and circumstances including his business relations with the concerned clients. That aspect might have been relevant for quantification of loss, however, it would not change the fact situation that the assessee had suffered a loss as a result of non-recovery of amounts receivable from clients against purchase of shares during the course of his business and the admissibility or otherwise of the said loss was required to be considered in accordance with the relevant provisions of law governing the claim of bad debts.

10. The reason for providing such exception in section 36(2)(i) in respect of debt representing money lent in the ordinary course of business of banking or money-lending was entirely different than what had been sought to be assigned by the revenue. As was held by the Hon'ble Supreme Court in the case of *Madan Gopal Bagla v. CIT [1956] 30 ITR 174*, a debt in order to fall within the provisions of section 36(1)(vii) must be one which could properly be called a trading debt, i.e., a debt of a trade, the profits of which were being computed. The rationale behind the exception provided in the second limb of section 36(2)(i) was in respect of banking/money-lending business and no adverse inference on the basis of the said exception can be drawn against the assessee carrying on the business of share broking as sought by the revenue.

11. The revenue had also relied on the decision of Hon'ble Supreme Court in the case of A.V. Thomas & Co. Ltd., which actually supported the case of the assessee in so far as it explained the term 'debt' used in the context of deduction. In that case it was held by the Hon'ble Supreme Court that the debt, in order to be a debt proper, had to be one which if good would have swelled the taxable profits. These conditions got satisfied in the case of a share broker because the amount receivable by him from the clients against purchase of shares on their behalf was certainly related to its business of share broking and it resulted from such business. Moreover, the said debt if good would have swelled a taxable profit of the assessee broker in the form of brokerage income.

12. A reference to the case of *CIT v. City Motor Service Ltd. [1966] 61 ITR 418* decided by the Hon'ble Madras High Court where while dealing with the section 10(2)(xi) of the 1922 Act equivalent to the section 36(2)(i) of the 1961 Act, it was held that there was no condition that the debt should have been taken into account in computing the income of the assessee for the relevant assessment year or any earlier year. Despite this, Hon'ble Madras High Court held that such a condition must be read into the section in as much as in the previous assessment years, the revenue brought to charge the interest due from advances made by the assessee to a Limited company demonstrates that the debt did go to swell the business profits of the assessee and the interest so due to the assessee was treated by the revenue itself throughout as business income. It could not, therefore, be pretended that the debt was not one which if realized would not have gone to swell the business profits of the assessee.

In the case in hand, such brokerage had already been taxed in the hands of the assessee under the head 'Business income' and that being so, the condition prescribed in section 36(2)(i) had been satisfied and the write off of the debt representing amount receivable by the assessee from his clients against purchase of shares on their behalf must be held allowable as a bad debt.

13. Ratio of the decisions of the Hon'ble Delhi High Court in the case of D.B. (India) Securities Ltd. and in the case of Bonanza Portfolio Ltd., relied on by the assessee, were squarely applicable to the issue in the assessee's case.

14. As regards the rules and regulations of stock exchange governing relations between broker and his clients as well as the guidelines issued by the SEBI were not relevant in the context of issue referred to the Special Bench which raised a specific question of law. It was not in dispute that the assessee had actually suffered the loss as a result of the amount in question representing debt becoming irrecoverable and, therefore, it was not relevant whether such loss has been incurred by the assessee as a result of not following the relevant rules and regulations and guidelines or even after following the same.

15. The amount receivable by the assessee, who was a share broker, from his clients against the transactions of purchase of shares on their behalf constitutes debt which was a trading debt. The brokerage/commission income arising from such transactions very much formed part of the said debt and when the amount of such brokerage/commission had been taken into account in computation of income of the assessee of the relevant previous year or any earlier year, it satisfied the condition stipulated in section 36(2)(i) and the assessee was entitled to deduction under section 36(1)(vii) by way of bad debts after having written of the said debts from his books of account as irrecoverable.

16. The question referred to the Special Bench was accordingly answered affirmative in favour of the assessee. (AY. 1998-99)

Dy. CIT v. Shreyas S. Morakhia (2010) 42 DTR 320 / 5 ITR 1 / 40 SOT 432 / 131 TTJ 641 (SB)(Mum.) (Trib.)

Editorial: The revenue had filed an appeal before the Bombay High Court against the decision of the Special Bench. The Hon'ble Bombay High Court affirming the decision of the Special Court and ruling the appeal in favour of the assessee has held that the value of shares transacted by the assessee as a stock broker on behalf of its clients is as much a part of the debt as is the brokerage which was charged by the assessee on the transaction. *CIT v. Shreyas S. Morakhia [(2012) 19 taxmann. com 64 (Bombay)/(2012) 206 Taxman 32 (Bombay)/(2012) 342 ITR 285 (Bombay)/(2012) 249 CTR 30 (Bombay)*]

Pertinently the Hon'ble Bombay High Court in its decision has referred to the Delhi High Court decision in the case of the *CIT v. Bonanza Portfolio Ltd. [(2010) 320 ITR 178]* where on similar facts the decision was held in favour of the assessee. Against the said decision of the Delhi High Court, the revenue had filed an Special Leave Petition before the Supreme Court in appeal number CC/10928/2010 and the same was dismissed by the Apex Court vide order 30.07.2010 after agreeing with the view taken by the Delhi High Court.

33. S. 37(1) : Business expenditure – Capital or revenue - of the Income Tax Act – Capital or revenue – Expenditure on acquisition of software – ownership test, enduring benefit test and functional test have to be applied – depreciation – enhanced rate of depreciation of 60% allowable prospectively from 1.4.2003 [S.32]

Facts:
The assessee had incurred expenditures for acquiring certain software licenses. It was claimed by the assessee that the software was in the nature of application software, which only facilitated in its day to day operations. It was also claimed by the assessee that the expenditure for acquiring the software did not result in enduring benefit, as the life of application software is invariably short; and that the software was bound to become technically obsolete very fast. Accordingly, the expenditure was claimed to be revenue in nature. This claim was rejected by the Revenue. According to the AO, the software was part of the plant and machinery of the assessee and gave enduring benefit. Hence, the AO held that the expenditure would be capital in nature; and that depreciation would be allowable at normal rate of 25%. The action of treating the expenditure as capital was upheld by the CIT(A), but the CIT(A) directed that depreciation be allowed at the rate of 60%. This was so ordered, considering that the rate of depreciation provided on computers for AYs 1999-2000 to 2002-03 was 60 % and from assessment years 2003-04 onwards, even the computer software was included in the computers to be eligible to claim the depreciation at this higher rate.

The assessee argued before the ITAT that the expenditure was incurred for acquiring only the licenses and there was no outright purchase of any capital asset at all. The said claim was resisted by the Revenue on the basis that licensing transactions were the usual mode of acquisition of the software. Both sides relied on various judgments of the co-ordinate Benches, and hence, the matter was required to be referred to a Special Bench for its authoritative pronouncement.

Issues:
The Special Bench was constituted to dispose off the following questions involved in the matter:

- Whether, in the facts and circumstances of the case, the expenditure incurred by the assessee on account of computer software is of revenue nature or capital nature?

- If the expenditure incurred on computer software is held to be of capital nature, what would be the rate of depreciation applicable thereon?

Views:
The Special Bench considered the general principles of law pertaining to the distinction between capital and revenue expenditures, and noted, that there is "no single definitive criterion which by itself is determinative as to whether a particular outlay is capital or revenue and what is relevant is the purpose of the outlay and its intended object and effect considered in a common sense way having regard to the business realities..." Relying on the decision of the Supreme Court in Tata Consultancy Services, it was held that the argument that the assessee has merely acquired a "license" cannot be accepted; particularly because the medium in which the software is delivered

(eg. the disk) itself amounts to 'goods'. Further, the test in this connection ought to be applied from the view of the functional role that the software plays in the business of the assessee. The general mode of acquisition through a license would not, on its own, suffice to hold that the expenditure must be revenue in every case. In order to decide the issue, stress was laid on the functional test, which requires an analysis of the nature of business, the relative expensive nature of the software, the degree of associated organisational change required to implement the software solution, the necessity of upgradation of softwares etc. Applying these tests, the ITAT reasoned that the following general tests could be applied: (a) the assessee who pays for and acquired a license can be treated as acquiring a tangible asset and becomes the owner thereof; (b) if the life of the software is extremely short, eg. less that two years, the same can be treated as revenue; (c) if the test of "enduring benefit" is satisfied, the question must be seen from the point of view of the utility to the businessperson and how important an economic or functional role the software plays in the business.

Held:

Accordingly, having laid down these tests, the Special Bench held that matters would have to be remanded to the Assessing Officer for considering the individual facts and circumstances pertaining to each item of software. On the issue of rate of depreciation, the ITAT held that the rate of depreciation was enhanced to 60% with effect from 1.4.2003, and this was a prospective change. Accordingly, from that date, enhanced depreciation at 60% would be allowable. For the earlier period, however, depreciation would be allowed at 25%. (AY. 2001-02, 2002-03)

Amway India Enterprises v. Dy. CIT (2008) 111 ITD 112/21 SOT 1/114 TTJ 476/301 ITR (AT) 1 (Delhi) [SB]

Editorial: Issue as to whether the expenditure is capital or revenue in nature was ultimately decided in favour of the assessee by the Delhi High Court in *CIT v. Amway 346 ITR 341 (Del)*.

In some of the matters before the Special Bench, the Special Bench gave its opinion on the aforesaid issues and the matters were then placed before the Division Bench. The Division Bench remanded the issue of allowability of expenditure to the Assessing Officer, to decide in light of the tests laid down by the Special Bench. However, in appeals preferred before the Delhi High Court by the assessee as well as the Revenue, the issue is decided in favour of the assessee in *CIT v. Amway India Enterprises (2012) 346 ITR 341 (Delhi) (HC)*. The Delhi High Court followed its earlier decision in the case of *CIT v. Asahi Glass 203 Taxman 277 (Del)*. Insofar as enterprise resource planning (ERP) software used for day-to-day functionality is concerned, the Bombay High Court has also affirmed the ITAT's views that even on an application of the functional test as laid down by the Special Bench, the expenditure on the acquiring ERP software is revenue in nature: *CIT v. Raychem RPG Ltd. 346 ITR 138 (Bom)(HC)*.

34. S. 37(1) : Business expenditure – Discount on ESOPs is allowable as expenditure over the period of vesting, subject to necessary adjustments at the time of grant of shares. [S.145]

Facts:
The assessee floated an ESOP scheme under which options were granted to the eligible employees to purchase shares at the face value of Rs. 10 per share as compared to the market price of Rs. 919, resulting in a discount per share of Rs. 909. The assessee claimed the deduction of the discount under section 37 of the Act over the vesting period of the options.

Issue/contentions:
Whether the discount on ESOPs could be spread over and claimed as a deduction under section 37 of the Act in the vesting period of the options?

The Department argued that prior to the exercise of options and the consequential issue of shares, the liability on the company was contingent in nature. Accordingly, the deduction could not be claimed over the vesting period. The assessee argued that the factum of liability was certain in the vesting period itself, what remained was its quantification, which happened in the subsequent years. Accordingly, the deduction was allowable over the period of vesting.

Held:
The Special Bench held that the objective of floating an ESOP scheme is not to raise any share capital, but to earn profits by incentivising the employees. Therefore, the discount cannot be held to be capital in nature. The Tribunal also rejected the Department's argument that expenditure requires an outflow of money by holding that section 37 does not talk of any payment of cash for claiming a deduction. The Bench further held that the liability arises as and when service is rendered by the eligible employees and it is only the actual issue of shares which is deferred till the exercise of options. Simply because the quantification of such liability is not possible at the time of vesting does not mean that the liability is contingent in nature. Accordingly, it was held that the discount on ESOPs is allowable over the vesting period. This was, however, subject to an eventual adjustment at the time of exercise of the options. If the exercise was less than the grant of options, the excess deduction claimed over the period of vesting would have to be reversed and offered as income in such year. Lastly, it was held that the discount which is allowable over the vesting period would be calculated as the difference between the exercise price and the market price on the date of grant of options. However, the same would be subject to adjustments depending upon the market price at time of exercise of options. (AY. 2003-04, 2004-05, 2005-06, 2007-08)

Biocon Ltd. v. DCIT (LTU) (2013) 25 ITR 602 / 144 ITD 21 / 155 TTJ 649 / 90 DTR 289 (SB)(Bang.)(Trib.)

Editorial: The decision of the Special Bench has recently been upheld by the Karnataka High Court in *CIT v. Biocon Ltd. (2020) (121 taxmann.com 351)*. The decision of the Special Bench, as upheld by the High Court, is of great relevance and impacts the deductibility of discount on ESOPs issued by every company in every industry since the vesting period is always atleast a few years prior to the exercise and this decision supports the claiming of an early deduction of the discount.

35. S. 37(1) : Business expenditure – Expenditure resulting in an Advantage consisting of facilitating assessee's business to be carried on more efficiently or more profitably without disturbing the fixed capital would be revenue expenditure even if advantage may be for an indefinite future – Expenditure on initial outlay or for acquiring or bringing into existence of an asset would be on capital account but if the purpose for acquiring an asset is for running the business more profitably it would be revenue expenditure

Facts: Assessee was engaged in the business of share trading and stock broking. The assessee had made payment to various stock exchanges which was claimed as a deduction. AO observed that the expenditure was capital in nature and could not be allowed under section 37(1) of the Act.

Issues:
Whether expenditure incurred towards the following could be treated as revenue or capital expenditure ?

Amount paid to Calcutta Stock Exchange Association towards:-

development fee; and

fees for operating on the floor

Amount paid to OTC Exchange of India towards:-

admission fee; and

technology cost

Amount paid to National Stock Exchange of India towards:-

non-adjustable deposit for membership subscription; and

deposit for Very Small Aperture Terminal (VSAT)

Views:
In *DCIT v. Khandwala Finance Ltd (22 SOT 1)(Mum) (Trib.)* it was held that refundable deposit placed with the stock exchange does not constitute expenditure and cannot be allowed as a deduction under section 37(1) of the Act. In *Amway India Enterprises v. DCIT (111 ITD 112)(Del trib)* it was held that in order to decide the nature of expenditure being capital or revenue three tests are to be applied namely ownership test, enduring benefit test and functional test.

Held:
The special bench of the Tribunal held that one of the foremost and general test was to examine whether the expenditure resulted in bringing into existence an asset or advantage of enduring benefit. Such a test however is not a certain or conclusive test and cannot be applied blindly and

mechanically, and can at best be a guide to determine whether expenditure forms part of revenue or capital expenditure. The nature of expenditure is relevant and not the name or description or treatment given by the assessee in the books of account.

Where the test of enduring benefit is not decisive, the test of fixed or circulating capital can be applied to ascertain whether the expenditure incurred was part of fixed capital of the business or a part of the circulating capital. However, this test also may break down due to various forms of expenditure which do not fall within these two categories.

The test of initial expenditure / outlay is to be applied with care and generally initial expenditure is regarded as capital in nature as it is incurred in setting up profit earning machinery.

The tribunal held that payment of development fee was capital in nature relying on the jurisdictional High Court in *Rajendra Kumar Bacchawat v. CIT (ITA No. 44 of 2002)*. Fees for operating on the floor of the exchange was considered as revenue expenditure as payment was to facilitate assessee's trading business. Further, admission fees and technology cost was necessary for assessee's day to day business and were held to be of revenue in nature. Non-adjustable deposit for trading membership and expenditure towards VSAT applying all the above tests and criteria were held to be revenue in nature. (AY. 1996-97)

Peerless Securities Ltd. v. JCIT (2005) 94 ITD 89 / 93 TTJ 325 (Kol SB)

Editorial: The principle decided by the Special bench has been applied in various other decisions. The test for bringing into existence an asset or advantage of enduring benefit, test of fixed capital and circulating capital, initial expenditure and expenses incurred before business is set up are relevant tests while claiming deduction of expenses under section 37(1) of the Act. This decision has been referred in *ACIT v. Upper India Steel Mfg. & Engg. Co. (150 Taxman 51)(Chd. Trib.)*

"I am personally aware of the excellent work done by the Income Tax Appellate Tribunal. It has proved its worthiness by its thought provoking judgements from its inception, up to date. The impeccable character of the members of the Tribunal has earned name and fame for the Tribunal and both the Government and tax payers are enjoying the impartiality shown by the Tribunal in the administration of justice."

Hon'ble Mr. Justice P. R. Gokulakrishnan Former Chief Justice Gujarat High Court. (Diamond Jubilee – Souvenir - 60th Anniversary - (24th and 25th January 2001)

36. S. 41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Sales tax deferral Scheme – Payment of deferred tax liability at net present value equivalent to the future value of the sum does not amount to remission or cessation – difference between the deferred sum and net present value not taxable under section 41(1) of the Act. [S.43B, Bombay Sales tax Act, 1959, S.38]

Facts:
The assessee company obtained incentives by way of deferral of sales-tax under the Package scheme of incentives, 1983 and Package scheme of incentives, 1988 notified by the Government of Maharashtra. Under the scheme, the payment of sales-tax collected by the assessee was deferred and the same was to be paid to the Government after 12 years. Before the end of the 12 year period for making the sales tax payment, assessee accepted an option under the scheme to settle the deferred sales-tax liability by making an immediate one-time payment at Net Present Value. The difference between the deferred sales-tax collected till date (Rs. 7,52,01,378) and its net present value (Rs. 3,37,13,393) amounting to Rs. 4,14,87,795 was treated as a capital receipt by the assessee. Assessing officer taxed the difference of Rs. 4,14,87,985 under s. 41(1) of the Act. Assessing officer held that since the sales-tax liability was allowed as a deduction against assessee's business income in the earlier years, remission of such trading liability was assessable as business income.

Issue:
Whether payment of deferred tax liability at net present value amounts to remission or cessation of the deferred sales tax liability and therefore chargeable to tax as business income under section 41(1).

Views:
Section 41(1) of the Act applies when (i) an allowance or deduction has been made in respect of loss, expenditure or the trading liability incurred by the assessee in the assessment for any year and (ii) the assessee has subsequently obtained in cash or in any other manner (a) any amount in respect of such loss or expenditure or (b) any benefit in respect of such trading liability by way of remission or cessation thereof. If the above requirements are met, the amount obtained or the value of benefit accruing to the assessee shall be deemed to be profits and gains of business or profession.

Held:
Special bench held that the sum of Rs. 4,14,87,984 being the difference between the deferred future sales tax liability and the Net present value cannot be brought to tax under the provisions of section 41(1) of the Act. Special bench held that the first requirement of section 41(1) was not satisfied in the present case as the benefit of deduction was allowed for the purpose of section 43B of the Act as provided in CBDT Circular No. 496 and not under any other provisions of the Act. Special bench held that even the second requirement of section 41(1) was not satisfied because no benefit was obtained as there was no remission or cessation of any liability. Special bench observed that the amount which the assessee was required to repay after 12 years was repaid at net present value which is equivalent to the future value of the sum. (AY. 2003-04)

Sulzer India Ltd. v. Jt. CIT (2010) 47 DTR 329 / 42 SOT 457/6 ITR 604/ 134 TTJ 385(2012) 138 ITD 137 (SB)(Mum.)(Trib.)

Editorial: Affirmed in *CIT v. Sulzer India Ltd (2014) 369 ITR 717 (Bom) / (2015) 273 CTR (Bom) 400 / (2015) 113 DTR (Bom) 267*. Order of the Bombay High Court affirmed by the Supreme Court in *CIT v. Balkrishna Industries Ltd (2018) 300 CTR (SC) 209 / (2018) 161 DTR (SC) 185 / (2018) 252 Taxman 375 (SC)*

37. S. 43B : Deductions on actual payment – Central Excise – MODVAT credit – Business disallowance – Deduction under section 43B of the Act is allowable in respect of payment of tax, excise duty, etc., on payment basis before incurring liability to pay such amounts – However, unexpired Modvat Credit available on last day of previous year will not be eligible for deduction under section 43B of the Act. [S. 37(1), 145]

Facts:
The assessee is a company. For the previous year relevant to assessment year 2001-02, the total central excise deposits in the current account of the assessee and the unutilized Modvat Credit was Rs.10,99,72,355. Further, the balance on the last day of the immediately preceding previous year was Rs.9,96,24,284. The differential amount of Rs.1,03,48,071 represented the excess amount of credit available for adjustment as and when the payments of excise duty would become due. The Assessee in the return of income for assessment year 2001-02 deducted this differential amount as excise duty payments. The AO while finalizing the assessment order for the year under consideration disallowed the assessee's claim under section 43B of the Act. The Assessee being aggrieved by the assessment order, preferred an appeal before the CIT(A). The CIT(A) after considering the submissions of the Assessee allowed the assessee's claim.

The department being aggrieved by the order passed by first appellate authority preferred an appeal before the Tribunal.

Issue:
Following two questions arises for the determination of Special Bench of the Tribunal:

whether deduction for tax, duty, etc., is allowable under section 43B, on payment basis before incurring the liability to pay such amounts?

whether unexpired Modvat credit available to the assessee as on the last day of the previous year amounts to payment of central excise duty under section 43B of the Act?

View:
The provisions of section 43B of the Act provides for deduction of expense based on the accounting method followed by an assessee. Thus, as per the provisions of section 43B of the Act, deduction of sums payable mentioned in clauses (a) to (f) is allowable only if actually paid. However, the same is allowed irrespective of the previous year in which the liability to pay such sum was incurred by the assessee.

Held:
The Special Bench of the Appellate Tribunal held that the payments of Central Excise duty are not provisional or refundable. Provisions of section 43B provides that such payments are to be allowed as deductions in the year of payment. Section 43B does not provide any rule that the liability to pay the duty must incur first and only after the payment of such duty the Assessee is eligible to

claim deduction under section 43B of the Act. Hence, deduction for tax, duty etc. is allowable under section 43B of the Act on payment basis before incurring the liability to pay such amounts. With respect to unexpired Modvat Credit the Tribunal held that the same is in the nature of a future entitlement which cannot be considered as equivalent to advance payment of duty. Hence, Modvat Credit available to the assessee as on the last day of the previous year does not amount to payment of Central Excise duty under section 43B of the Act. (AY. 2001-02)

Dy. CIT v. Glaxo SmithKline Consumer Healthcare Ltd(2007) 107 ITD 343/110 TTJ 183/ 16 SOT 134/ (2008) 299 ITR (AT) 1 (SB)(Chd.)(Trib.)

Editorial: The department has challenged the impugned order of the Special Bench before the Hon'ble Punjab & Haryana High Court being ITA No. 150 of 2008. However, the same was withdrawn by the department on account of low tax effect. The Hon'ble High Court allowed the department to withdraw the appeal vide its order dated 07.11.2019. However, for the assessment year 1997-98, Hon'ble Punjab & Haryana High Court in the Assessee's own case decided the similar issue in favour of the Assessee and thereby upheld the view of the Special Bench of the Tribunal that advance deposit of central excise duty constitutes actual payment of duty within meaning of section 43B and, therefore, assessee would be entitled to benefit of deduction of said amount. The same is reported as *Glaxo Smithkline Consumer Healthcare Ltd v. ACIT [2019] 413 ITR 104 (P&H)*.

"It must be remembered that this is the only Tribunal which has stood the test of time as a career oriented institution. Members serve for more than decades and acquire an expertise unequaled in any sphere. They deal with a constant flow of cases. Clearing the arrears will not solve the problem. The focus should therefore be shifted just clearing arrears to seeing that no taxpayer has to wait more than six months to know his tax liability.

This can be done by taking three steps.

Clearing repetitive appeals by identifying the question of law and getting it settled by a special bench in a fast track.

Making use of the latest technology for this purpose by networking the benches

Getting cases of Government undertaking referred to arbitration or lok adalat so that they are decided on a case to case basis without becoming a precedent."

Hon'ble Justice T.N.C. Rangarajan Former Judge, High Courts of Madras & Andhra Pradesh. (Diamond Jubilee – Souvenir - 60th Anniversary - (24th and 25th January 2001)

38. S. 45 : Capital gains – Computation – Tenancy rights – When smaller estate merges into a bigger estate capital gains to be calculated by taking market value of smaller estate as on the date of merger with bigger estate as cost of acquisition. [S. 2(14), Transfer of Property Act, 1882, S. 111(d)]

Facts:
The Assessee and his mother had tenancy rights in the flats. The Assessee and the Mother later on acquired the flat from the owner in January 1976. The Flat was subsequently transferred in May 1976.

Issue/contentions:
AO treated transfer of flat as a short term capital asset and calculated the capital gains accordingly, which was affirmed by the CIT(A). The Tribunal noticed that Division Bench in the case of *A.B.C. v. Third ITO (1 ITD 724) (Mum Trib)* took the view that in a case where assessee was the owner of Occupancy right and later on ownership rights were acquired and, thereafter, entire bundle of rights were transferred, in such situation sale price would have to be apportioned between Occupancy right and the balance right and the difference between sale price of occupancy right and cost would be treated as a long term capital gain and difference between sale price of balance right and its cost would be treated as short term capital asset. While dealing with an identical issue in the case of Jai Hind Rubber Industry vs. First ITO (2 ITD 303) (Mum Trib), the matter was referred to the Third Member ('TM') and TM took the view that when tenant in occupation purchased the remaining rights, his rights as a tenant merges and became extinct and at the time of sale there was only one asset, i.e. the flat. Therefore, excess of sale over the purchase price of flat was held taxable as income as short term capital gains, on the basis of facts of that case. Considering these conflicting views, matter was referred to the President for constitution of a Special Bench.

Held:
In view of section 111(d) of Transfer of Property Act, 1882, tenancy right, i.e. smaller estate, and the remaining interest of the landlord over the property including title, i.e. the bigger estate, merges and together become full ownership rights i.e. a composite estate. Composite estate is different from the smaller estate as well as the bigger estate. As the sale consideration is not capable of being apportioned in law, the bigger estate is to be taken as the main estate, the market value of the smaller estate as on the date of acquisition of bigger estate will have to be taken as cost of acquisition for determining the surplus. Accordingly, on transfer of bigger estate being a short term capital asset, short term capital gain has to be computed by taking market value of the tenancy right as a cost of acquisition. (AY. 1977-78)

Dr. D. A. Irani v. ITO (1994) 7 ITD 160/ 18 TTJ 402 (SB) (Mum) (Trib)

Editorial: Decision has been reversed by the Bombay High Court in the case of *CIT v. D. A. Irani (1998) 234 ITR 850 (Bom) (HC)*, where in the Court held that once the lessee purchases the leased property from the owner, the lease is extinguished as the same person cannot be the owner and the lessee at the same time. The flat was acquired from the owner with all its right and interest including the occupancy right. The Assessee transferred that flat as a short term capital asset and consequently short term capital gain has to be computed.

39. S. 45 : Capital gains – Capital loss – Loss on pro-rata reduction of share capital is "Notional" – In absence of consideration, capital gains provisions do not apply – Notional loss or income is subjected to income-tax – Loss is held to be not allowable as capital loss. [S. 45, 48, 55(2)(iv), 55(2)(v)]

Facts:
The assessee had made an investment of Rs. 2484.02 lacs in equity shares of a group company viz., Times Guarantee Limited [for short TGL]. Under sec. 100 of the Companies Act, 1956 TGL applied for reduction of equity share capital and approached the Hon'ble Bombay High Court for approval of the same. The Hon'ble High Court approved the petition of TGL and allowed reduction in its share capital by 50% by reducing the face value of each equity share from Rs. 10/- to Rs. 5/- . Consequently, assessee's investment in TGL got reduced from Rs. 2484.02 lacs to Rs. 1242 lacs. After applying the indexation a sum of Rs. 22,21,85,693/- was claimed as long term capital loss relying on the decision of the Hon'ble Supreme Court in the case of *Kartikeya V. Sarabhai v. CIT – (1997) 228 ITR 163 (SC) / 94 Taxman 164* - wherein it was held that reduction in face value of shares would amount to transfer & such loss was allowable. Reliance was also placed on the decision of the Hon'ble Supreme Court in the case of *CIT v. G. Narasimhan [1999] 236 ITR 327 / 102 Taxman 66*, wherein similar view was taken. However, the same was rejected by the Assessing Officer and the Judgement in the case of Karthikeya Sarabhai (supra) was distinguished by him. On further appeal even the Ld. CIT(A) rejected the appeal of the Assessee on this ground. The Assessee further appealed before the Tribunal.

Issue:
This Special Bench has been constituted by the Hon'ble President to consider the following question:

"Whether on the facts and in the circumstances of the case, the CIT(A) was justified in declaring long term capital loss of Rs. 22,21,85,693/- on account of reduction in paid up equity share capital?"

Held:
The Tribunal considered various judgements and also gave certain illustrations to hold that the loss was only notional and not actual and was therefore not allowable to be set-off / carried forward as a long term capital loss. It was held that:

The argument of the assessee that the original shares got extinguished and, in fact, new shares have been issued by TGL was repelled by holding that it would be merely a case of substitution of one kind of share with another kind of share which has been received by the assessee because of its rights to the original shares on the reduction of capital. It was further held that it is a settled law that even if a transfer had taken place, unless and until some consideration is received, the transfer of such asset would not attract the provisions of section 45 and since the assessee had not received any consideration for reduction of share capital nothing could be charged u/s 45 since only the number of shares held by the assessee have been reduced to 50 per cent and despite this the assessee's percentage of shareholding, immediately before reduction of share capital and immediately after such reduction, remained the same. A parallel was drawn from the fact that when the profits of the company which have been distributed to the shareholders by way of

bonus shares cannot be assessed, on the same principle losses of the company which have been adjusted by reducing the capital cannot be allowed. It was further held that the value of asset of a company immediately before and after reduction of share capital remained the same and, therefore, by reducing the amount and number of shares the assessee's proportionate share in such assets remained the same. Moreover, the value of assets even after reduction of capital remained the same and, therefore, loss, if any, at best can be called notional loss which cannot be allowed. Further as per sec. 55(v) the cost of acquisition of shares even after conversion etc. has to be taken with reference to the cost of original shares. Therefore, after reduction of share capital the cost of acquisition of the remaining shares would be reckoned with references to the original cost. Though at this stage assessee has not obtained any benefit because loss has been computed with reference to the actual cost, but, in future, if assessee decides to sell its shareholding in TGL then assessee has the right, under section 55(v), to substitute the cost of acquisition with reference to the original shareholding and in that case it may amount to double benefit later on which is not permissible under the law. Ultimately, it was held that the loss arising on account of reduction in share capital cannot be subjected to provisions of section 45 read with section 48 and, accordingly, such loss is not allowable as capital loss. At best such loss can be described as notional loss and it is settled principle that no notional loss or income can be subjected to the provisions of the Act. (AY. 2002-03)

Bennett Coleman & Co. Ltd. v. ACIT (2011) 12 ITR 97 / 62 DTR 106 / 141 TTJ 777 / 133 ITD 1 (SB) (Mum.)(Trib.)

Editorial Note: The Hon'ble Tribunal has not clearly stated as to whether the said loss would be allowable to the Assessee at the time of actual transfer of the said shares. It is also worth noting that the Hon'ble Supreme Court in the case of Karthikeya Sarabhai (supra) held that the amount received by a Shareholder on Capital Reduction is chargeable to tax as Capital Gains. However, the coverse situation in this case is not upheld by the Hon'ble Tribunal. The appeal against the said order is admitted before the Hon'ble High Court in *Bennett Coleman & Co. Ltd. v. Addl. CIT – ITXA 401 of 2012*.

"My association with the Tribunal has been quite long. I started practice as an Advocate at Calcutta in the year 1954. I had my first appearance before the Tribunal. The Tribunal had even then tradition of encouraging juniors and I have no hesitation in admitting that I have been the beneficiary tradition in my first appearance.

It was soon after this conference (Members conference 1986) that a long standing demand of the tax paying public and Chartered accountants was met in that on authorized weekly publication of the orders of the Income Tax Appellate Tribunal, by the name ITD was started. Till then a few orders of the Tribunal used to be published in some Tax magazines. However those would be the orders of Tax counsel would to the publishers for publication.

During my tenure, I had the fortune of going around the Country, many a times as a member of the Selection Board for the members of the Tribunal. The Selection Board was then constituted Senior sitting Judge of the Supreme Court as Chairman and the Secretary, Ministry of Law, Government of India, and the President of the Tribunal as member. I had the privilege of the being the member of the Selection Board with three different Law Secretaries and more than one Supreme Court Judge. I can say without fear of contradiction ensured selection of members with best available Talent. The Tribunal has, it may be stated deserved rich tributes and encomiums paid to it due largely to this method of selection." ***Hon'ble Justice Mr. T.D. Sugla, Former Judge Bombay High Court and former President of ITAT – A Former President looks back. (Diamond Jubilee – Souvenir - 60 th Anniversary - (24th and 25th January 2001)***

40. S. 48 : Capital gains – Computation – Cost of acquisition – Gift – Indexed Cost - for purpose of computing long-term capital gains in hands of an assessee who has acquired an asset under a gift, indexed cost of acquisition of such capital asset is to be computed with reference to year in which previous owner first held asset. [S.2(42A), 45, 49(1)]

Facts:
The assessee had sold a flat received by her as a gift from her daughter in 2003. The said flat was purchased by the previous owner in 1993. The assessee adopted the cost inflation index applicable to the financial year 1992-93 for working out the indexed cost of acquisition and computed long-term capital gain. The AO worked out the indexed cost of acquisition by taking the cost inflation index applicable to the financial year 2002-03, being the first year in which the asset was held by the assessee and computed long-term capital gain. On first appeal, the CIT(A) held that the assessee was entitled to the benefit of indexation with effect from 1993 and, accordingly, directed the AO to recompute the long-term capital gain by allowing the said benefit.

Issue:
This Special Bench has been constituted by the Hon'ble President for considering and deciding the following question as a result of the divergent views expressed by the Division Benches. The said question which incorporates the solitary issue arising from the Revenue's appeal preferred against the order of CIT(A) is stated as under:

"While computing the capital gains in the hands of an assessee who had acquired the asset transferred under gift whether indexed cost of acquisition was to be computed with reference to the year in which the previous owner first held the asset or the year in which the assessee became the owner of the asset."

Held:
Relying on the language of Sections 48 and 2(42A), on combined reading, the assessee contended that indexed cost of acquisition has to be determined with reference to cost inflation index for the year in which the cost of acquisition was incurred. In the present case, the cost of acquisition was incurred on 29.01.1993 and, hence, cost inflation index for 1993-94 would be applicable. The Hon'ble Bench held that for the purpose of computing long-term capital gain arising from the transfer of a capital asset which had become property of the assessee under gift, the first year in which the capital asset was held by the assessee had to be determined to work out the indexed cost of acquisition, as envisaged in the Explanation (iii) to section 48 after taking into account the period for which the said capital asset was held by the previous owner. Hence, it was held that the indexed cost of acquisition of such capital asset had to be computed with reference to the year in which the previous owner first held the asset. (AY. 2004-05)

Dy. CIT v. Manjula Shah (2010) 35 SOT 105 / (2009) 30 DTR 601 / 126 TTJ 145 / 318 ITR (AT) 417 (SB) (Mum.)(Trib.)

Editorial: Department's appeal was dismissed by the Bombay High Court in *CIT v. Manjula Shah (2013) 355 ITR 474 (Bom.)(HC)* , SLP filed by the Revenue before the Supreme Court against the decision has been dismissed by the Supreme Court, as the tax effect was less than 50 lakhs in view of Circular dated 11-07-2018 (2018) 405 ITR 29 (St.) as amended circular dated 20-08-2018 (2018) 407 ITR 7 (St.) (SLP No. 19924/2012 dt.18-9-2018). With the dismissal of SLP on said issue by the Supreme Court, hopefully, the said controversy can now be considered to be settled. Indeed, not attributing indexed cost to the period of holding of the previous owner has huge ramifications on the capital gains tax liability of the assessee.

41. S. 50 : Capital gains – Depreciable assets – Block of assets – Bottles – Assets costing less than Rs 5,000 for which entire cost has been allowed as a deduction in the year of purchase would still form part of 'block of assets' as contemplated under section 2(11) and capital gains on sale of such assets would be taxed as per the provisions of section 50 [S. 2(11), 32(1)(ii), 45]

Facts:
The assessee carried on the business of bottling products of Parle. First proviso to section 32(1)(ii), as then applicable, provided that the actual cost of any plant and machinery which did not exceed Rs. 5,000 would be allowed as a deduction in the previous year in which such plant or machinery was first put to use by the assessee. During the year, assessee sold certain bottles for Rs. 7,82,388 on which 100% depreciation had been claimed in the earlier years. Assessee contended that the amount of Rs. 7,82,388 could not be considered as short-term capital gains under section 50. Assessee submitted that section 50 was applicable only in respect of a capital asset forming part of 'block of assets' which was defined to mean a group of assets in respect of which same percentage of depreciation is prescribed by the rules made under the Act. Assessee contended that in respect of assets costing less than Rs. 5,000, no rate of depreciation was prescribed by the Income-tax Rules as 100% deduction was granted by section 32. Accordingly, as per the assessee, there was no block of assets in existence in respect of bottles for which 100% depreciation was allowed and therefore the gains could not be brought within the scope of section 50. Assessee also submitted that the gains were not taxable under section 28. Assessing officer held that the gain on sale of bottles was taxable as per the provisions of section 50. In an appeal against the order of the assessing officer, CIT(A) held that the gains on sale of bottles was taxable as business income under section 28.

Issue:
Whether plant and machinery having a cost of less than Rs. 5000 on which 100% depreciation has been allowed in the year of purchase would constitute part of 'block of assets' as contemplated under section 2(11) and whether the provisions of section 50 would be attracted at the time of sale of such assets.

Held:
Special bench held that the assets on which 100 percent depreciation has been allowed under section 32(1)(ii) would also constitute a part of the 'block of assets' defined in section 2(11) and would therefore attract the provisions of section 50. Special bench observed that section 2 starts with the words 'unless the context otherwise requires' and therefore the items for which 100% deduction is prescribed in section 32 itself and not in the Rules would also bring these assets within the term 'block of assets'. Special bench observed that once the entire cost has been allowed as a deduction in the year of purchase, the written down value of the block of such assets would become nil. (AY. 1990-91 to 1992-93)

Jaihind Bottling Co (P) Ltd. v. ACIT (2005) 51 SOT 1 / 142 Taxman 55 (SB)(Mum.)(Trib.)

Editorial : First proviso to section 32(1)(ii) was deleted by the Finance Act, 1995.

42. S. 50B : Capital gains – Slump sale – Negative net worth – For computing the capital gains for section 50B "Slump Sale", liabilities reflected in "negative net worth" cannot be treated as "consideration" but the resultant "negative net worth" has to be added to the "consideration" [S. 2(42C)]

Facts:

The assessee was engaged in the business of real estate, investment activities, manufacturing of transmission line towers and undertaking turnkey projects in India and abroad. It transferred its entire Power Transmission Business (PTB) to another company, for a sale consideration of its business at Rs. 143 crore and there was negative 'net worth' of Rs. 157 crore as per section 50B, i.e. the value of liabilities or Rs. 1517 crore was in excess of aggregate value of assets of Rs. 1360 crore. The assessee's case was that the capital gain should be computed at Rs. 143 crore by adopting the figure of sale consideration at Rs. 143 crore and that of net worth as per section 50B at Rs. Nil. The AO considering the net worth of the assessee at a negative figure of Rs. 157 crores, came to hold that the total consideration ought to have been received of Rs. 300 crore (Rs. 143 crore + Rs. 157 crore) on slump sale, which was to be treated as long term capital gains on slump sale. On first appeal, the CIT(A) accepted the contention of the assessee that the 'Net worth' as defined under section 50B cannot be a negative figure and accordingly for the purposes of computing capital gain under section 48, the net worth would be considered as Nil. This view was taken by relying on the decisions of *Zuari Industries Ltd. v. ACIT 105 ITD 569 (Mum.) and Paper Base Co. Ltd. v. CIT 19 SOT 163 (Del.)* He thus, held that it was not permissible to compute sale consideration of Rs. 300 crore as against the actual sale consideration of Rs. 143 crore. The revenue, aggrieved by this order, filed the instant appeal contending that the capital gain be computed at Rs. 300 crore by either taking the sale consideration at Rs. 300 crore (Rs. 143 crore plus Rs. 157 crore) or by taking the amount of sale consideration at Rs. 143 crore but adding to it the negative net worth of Rs. 157 crore.

Issue:

Due to contradictory views of the various Tribunals, a reference was made to the Hon'ble President for the constitution of Special Bench, who constituted the present Special Bench to consider and decide the following question:

"Whether in the facts and circumstances of the case, the Assessing Officer was right in adding the amount of liabilities being reflected in the negative net worth ascertained by the auditors of the assessee to the sale consideration for determining the capital gains on account of slump sale?"

Views:

In appeal, the Assessee's contention broadly were: (1) cost of acquisition cannot be negative; (2) Addition should be done of entire liabilities and not only negative net worth; (3) Section 48 uses the words 'deducting from' and not 'adding to'; (4) Capital gains cannot be more than full value of consideration; and (5) The words 'as reduced by' pre-suppose that preceding figure must be higher than the succeeding. The sum and substance of assessee's submissions was that in case the 'value of liabilities' is more than 'the aggregate value of the total asset' then such value of liabilities should be restricted to the aggregate value of total assets thereby giving the amount of net worth at Rs. Nil.

Held:
The Hon'ble Bench held that the amount of liabilities should not be added to the sale consideration for determining capital gains on account of the slump sale. The Tribunal also affirmed that negative net worth should be added to the sale consideration, thereby negating the views expressed in the case of Zuari Industries Ltd. (supra) and Paper Base Co. Ltd. (supra). (AY. 1998-99)

Dy. CIT v. Summit Securities Ltd. (2012) 135 ITD 99/ 68 DTR 201/ 15 ITR 1/145 TTJ 273(SB)(Mum.) (Trib.)

Editorial: The Bombay High Court admitted the assessee's appeal, Income Tax Appeal No. 859 of 2012, on 19th September, 2014, against the Special Bench decision of Tribunal. This appeal is to be tagged along with the Income Tax Appeal No. 491 of 2006 of M/s. Zuari Industries Ltd. which is pending for final hearing before the High Court.

"… Income-tax is a major source of revenue. It is also a direct token of the citizen's contribution to the development of the country. Over the years, tax laws have grown in complexity and with it has grown the need for fair and dispassionate interpretation of the laws. The Income-tax Appellate Tribunal has made a useful contribution in this filed."

Honourable Shri Rajiv Gandhi, Former Prime Minster of India. (4-3-1985)

43. S. 50C : Capital gains – Full value of consideration – Stamp valuation – Depreciable assets – Computing capital gains stamp duty valuation is applicable Both the deeming fictions operate in different fields and in case of transfer of depreciable asset, section 50 and Section 50C co-exist. [S. 2(11), 2(42A), 45, 48, 49, 50]

Facts:
The assessee, during the year, sold office building for consideration of Rs. 49 lakhs. The assessee was claiming depreciation of such office building and the WDV of which in the year prior to its transfer was Rs. 49 lakhs. By applying section 50, no short-term capital gain was offered by assessee in its return.

During the assessment, the Assessing Officer noticed that the value of the sold property as per stamp duty valuation was Rs. 76 lakhs and accordingly replaced that value with the sale consideration of Rs. 49 lakhs by relying on the deeming provisions of section 50C. Thus, difference between sale consideration adopted as per valuation of stamp authority of building and written down value of the said asset adopted as cost of acquisition, was treated as short-term capital gain. The Commissioner (Appeals) set aside the order of the Assessing Officer.

Issues:
The question before the Hon'ble Special Bench was:

"On a proper interpretation of sections 48, 50 and 50C of the Income-tax Act, 1961, was the Assessing Officer right in law in applying section 50C to capital assets covered by section 50 (depreciable assets) and in computing the capital gains on the sale of depreciable assets by adopting the Stamp Duty valuation?"

Held:
The deeming fiction created in section 50 modifies the term 'cost of acquisition' used in section 48 for the purpose of computing the capital gains arising from transfer of depreciable assets, whereas the deeming fiction created in section 50C modifies the term 'full value of the consideration received or accruing as a result of transfer of the capital asset' used in section 48 for the purpose of computing the capital gains arising from the transfer of capital asset being land or building or both. Thus, both deeming fictions operate in different and specific fields. There is no conflict between them and both are to be read harmoniously. It is not a case where any supposition was sought to be imposed on another supposition of law. (AY 2003-04)

ITO v. United Marine Academy (2011) 138 TTJ 129 / 9 ITR 639 / 130 ITD 113 / 54 DTR 177 (SB)(Mum.) (Trib.)

Editorial: Followed in *Rallis India Ltd. v. Addl. CIT (2013) 55 SOT 288 (Mum), Smita Conductors Ltd. v. DCIT (2015) 152 ITD 417 (Mum) and ACIT v. ETC Industries Ltd. (2012) 52 SOT 159 (Indore)*. However the application of 50C to section 50 is limited to the computation mechanism. The assessee would still be entitled to the exemption under section 54E/54EC. *CIT v. Ace Builders 281 ITR 210 (Bom)*

44. S.54E : Capital gains – Investment in specified asset – Deduction on investment in specified assets – Period of six months for investment in specified assets is to be reckoned from the date of transfer in contrast to the date of receipt of consideration. [S.45]

Facts:
Assessee had sold two plots of land vide sale deed executed and registered on 7.08.1982 for Rs. 8,98,775. Assessee has claimed deduction under section 54E of the Act on the basis of investment of Rs. 1,89,400 made in NRDB on 20.02.1987, within six months of the receipt of final instalment. The AO, inter alia, held that the investment was not made within six months from the date of transfer, and therefore, he disallowed the deduction claimed under section 54E. CIT(A) confirmed the said addition. On appeal to the ITAT, the President constituted a special bench.

Issues:
Whether benefit under s. 54E of Income-tax Act, 1961 is allowable on investment made beyond six months from the date of transfer of the asset though made within six months from the date of receipt of the consideration?

Views:
Assessee must strictly satisfy all the conditions which are provided in section 54E to claim deduction. One of the condition of the section is that assessee is to deposit whole or any part of the net consideration in any specified assets within a period of six months from the date of transfer. Further, proviso to section 54E(1) specifically provides for time period of six months from the date of receipt of the consideration but only in case of compulsory acquisition of the asset. If the case does not fall within the proviso, then in view of clear language of the section, six months' time period has to be construed from the date of transfer and not date of receipt.

Held:
The Special Bench of the ITAT held that for the purposes of availing the deduction under section 54E(1), investment/deposit in the specified asset has to be made within the statutory stipulated period of six months from the date of transfer not from the date of receipt of the consideration. (AY. 1984-85)

Jyotindra H. Shodhan v. ITO (2003) 81 TTJ 1(SB) (Ahd)(Trib.)

Editorial: Order of Special Bench is affirmed by Gujarat High Court in Jyotindra H Shodhan v. ITO (2015) 229 Taxman 299/ 278 CTR 98 (Guj) (HC) With effect from AY 1992-93, section 54H has been inserted in the Act, to extend the time limit for investment in various assets under sections 54, 54B, 54D, 54EC and 54F, where the transfer of original asset is by way of compulsory acquisition and the consideration on such transfer is not received on the date of transfer. In such case, the period for making investment/ deposit is to be computed from the date of receipt of the consideration. In the context of section 54EC, the co-ordinate benches of ITAT have taken a view that the time limit for making investment should be reckoned from the date of receipt [See *Chanchal Kumar Sircar v. ITO (2012) 50 SOT 0289 / (2012) 16 ITR 0091 (Kol)(ITAT); Mahesh Nemichandra Ganeshwade & Ors. v. ITO (2012) 147 TTJ 0488 / (2012) 51 SOT 0155 (URO) / (2012) 17 ITR 0116 (Pune)(ITAT)*]. Incidentally, both the above judgments have not considered the judgment of the Special Bench of the ITAT.

45. S. 54EC : Capital gains – Investment in bonds Income Tax Act does not define the term "month" and the definition of month given under section 3(35) of the General Clauses Act, 1897 must be adopted in such a case. Period of six months as mentioned under section 54EC must be considered as six British Calendar months. [S. 45, 54E 54EA, 54EB, General Clauses Act, 1897, S. 3(35)]

Facts:

Assessee (Mrs. Alkaben Patel) had sold a residential house on 10.06.2008 for a consideration of Rs. 64 lakhs and derived capital gains of Rs. 56,65,767. Out of the said capital gains, the assessee invested Rs. 45 lacs in NHAI bond on 17.12.2008 in order to avail a deduction under section 54EC of the Income Tax Act, 1961 (the Act) and deposited a sum of Rs. 12 lakhs in "capital gain account scheme". During the course of the assessment proceedings, the AO was of the view that the required investment was not made within a period of six month from the date of transfer and asked the assessee as to why such a deduction should not be denied. Pursuantly, the assessee pointed out that a cheque for the aforesaid investment was tendered on 08.12.2008. It was further submitted by the assessee that a "month" for the purpose of section 54EC denotes a full calendar month and an investment made till 31.12.2008 must be considered to be eligible for a deduction under the said section. However, the AO did not agree with the said submissions of the assessee and concluded the assessee ought to have invested on or before 10.12.2008 (i.e. within a period of 6 months from the date of transfer) for availing a deduction under section 54EC of the Act. Being aggrieved, the assessee preferred an appeal before the CIT(A) but did not succeed. The CIT(A) rejected the contentions of the assessee and opined that the assessee could not establish the date of investment as 08.12.2008 since the seal/stamp and the date was not clear on the said application. The CIT(A) concurred with the view of the AO which prompted the assessee to file an appeal before the ITAT. To resolve the controversy pertaining to the interpretation of the phrase "within a period of six months from the date of transfer" as employed under section 54EC of the Act, the special bench was constituted to adjudicate on the following question:

Issue:

"Whether for the purpose of Section 54EC of IT Act, 1961, the period of investment of six months should be reckoned after the date of transfer or from the end of the month in which transfer of capital asset took place?"

Views:

The special bench at the outset observed that the Act does not define the term "month" and thus, it is required to be interpreted in the light of the definition given in General Clauses Act, 1897 which reads as "Section 3 defines - (35) "month" shall mean a month reckoned according to the British calendar." It further observed that the existing controversy of the interpretation of the term "month" came up before the higher forums on numerous occasions wherein it was consistently held that "the question whether "month" means a "lunar month" or a "calendar month" would depend on intention for the usage of the term " month". In British Calendar, a month is a unit of

period used in a Calendar. It may not be out of context to mention that this system was invented by Mesopotamia. An average length of a month is 29.53 days; but in a calendar year there are 7 months with 31 days, 4 months having 30 days and one month has 28/29 days". The special bench thereafter considered the decision of the jurisdictional Gujarat High Court in the case of "*CIT v. SLM Maneklal Industries Ltd. [2005] 274 ITR 485 (Guj.)*" in which the High Court observed the controversy of the interpretation of "month" as no longer res integra and held that it must be reckoned according to British calendar. In order to delve upon the core controversy as to whether for the purpose of section 54EC, a period of 6 months means six calendar months or 180 days, the special bench referred to a decision of the Allahabad High Court in the case of "*CIT v. Munnalal Shrikishan[1987] 167 ITR 415*" wherein the Court while deciding the issue of period of limitation in the context of section 256(2), held that a period of six months means "six calendar months" and not 180 days. From a perusal of different sections of the Act, the special bench observed that on some occasions like the first proviso to section 254(2A), the legislature had categorically prescribed a period in days and not in months and it reached a conclusion that the legislature for the purpose of reckoning a period of limitation under section 54EC of the Act in its own wisdom deliberately chose the word "month" instead of "days", that too keeping in mind the definition of the month as prescribed in General Clauses Act, 1857.

Held:

In the light of the aforesaid observations, the special bench held that when there is a specific language employed in the section for reckoning a period of limitation in months, the definition of "month" as prescribed in General clauses Act, 1857 must be adhered to and "a period of six months "should be computed as six British calendar months. Coming to the facts of the case, the special bench noted that since the required investment was made in the month of December, 2008, the assessee has rightly claimed a deduction under section 54EC of the Act.

Alkaben B. Patel v. ITO (2014) 148 ITD 31 / 101 DTR 251 / 161 TTJ 417 / 31 ITR 231/ 43 taxmann.com 333 (SB)(Ahd.)(Trib.)

> *"The Income Tax Appellate Tribunal, with its branches spread all over the country has an important role. It has to preserve the interests of revenues to the State, to prevent harassment to the tax -payers and to render better service and quicker justice to the citizen and State alike.".*
>
> ***Mrs Indira Gandhi Former Prime Minster of India (Ruby Jubilee Souvenir - 1981 (40th Anniversary)***

46. S. 71 : Loss Set Off – Tax avoidance – Transaction in securities – Applicability of s. 94(7) – Assessee, a share broker having purchased cum-dividend units of mutual funds and sold these units ex-dividends within two days after collecting tax-free dividend and the transactions between the mutual funds and the assessee being at arms length, the transactions are to be regarded as trading transactions and cannot be ignored as colourable device – Provisions of s. 94(7) not being retrospective in operation and not applicable in the relevant years, assessee was entitled to set off of loss from sale of units against its other income. [S.45, 94 (7)]

Facts:

The assessee-company purchased on 18th Dec., 2000 and sold on 21st Dec., 2000 units of Mutual Fund. It had incurred loss in the aforesaid transaction in the normal course of its business of trading in shares and securities amounting to Rs. 21,314,942. The said loss was claimed as a business loss. The learned AO held that the assessee had entered into a pre-meditated agreement with the mutual fund with the sole purpose of avoidance of tax. All transactions occurred within two days. The units were purchased just before the book closure of the mutual fund and were redeemed as soon as dividend was paid out.

The learned counsel contended before the Special Bench that the assessee's transaction of investing and redemption of units was a simple transaction as in *Griffiths (Inspector of Taxes) v. J.P. Harrison (Watford) Ltd. (1965) 58 ITR 328 (PC)* case as compared to the complex ones involved in the case of *Finsbury Securities Ltd. v Bishop (Inspector of Taxes) 43 Tax Cases 591 (HL)* or In re F.A. & A.B. Ltd. 47 Tax Cases 580 (HL) and the loss or gain arising out of the transaction was to the account of the assessee and was not effected or shared with anyone else i.e., it was not in the nature of a scheme for the mutual benefit of parties. It was further contended that this transaction could not be regarded as a dividend stripping transaction as understood in F.A. & A.B. Ltd.'s case.

The Revenue contended before the Special Bench that purchase and sale of units was a mere pretence, as the sole objective was only to produce an artificial loss and not to acquire or dispose of the units of the mutual fund. In that view of the matter the loss claimed by the assessee was required to be ignored as not being real or incidental to any source of income.

Issue:

Three major questions considered based on the arguments by both the parties, in relation to the dispute before the Special Bench were as follows :

First question

Whether these are business transactions ?

Second question

If the answer to the first question is in the affirmative, what is the net result of the computation ?

Third question

If the net result of the computation is a loss, whether the assessee is disentitled or disqualified to have it set off against his income from any other transaction or source ?

Held:
First Question:

The Special Bench held that the facts of the case of the assessee were falling in the category of Griffiths vs. J.P. Harrison Ltd. Even though the mutual funds knew that the scheme being marketed by them would serve as a tool for dividend-stripping by interested parties, the transactions between the mutual funds and the assessee were at arms length. None of these mutual funds acted in any manner different from what they were normally doing in the ordinary course of their business. These mutual funds sold units to buyers and redeemed them in accordance with certain set rules. Conduct of Mutual Fund remained the same for a dividend-stripper or a serious investor who bought units, earned dividend and continued to hold the units. Mere knowledge of the mutual fund that their units may be purchased and redeemed by dividend-strippers also does not clothe the mutual fund as a party to tax avoidance.

The word "business" has much wider scope and connotation than the word "trade". In order to determine whether there was a business or not, the issue cannot be decided from the narrow angle as to whether or not the object was to sell the commodity at enhanced price. In a business transaction there could be several considerations. The tax effect is surely one of them and a very important one for that matter.

Second question:

Dividend declared by these mutual funds represent only return on investment and do not amount to either the recovery of purchase cost of the units or realization of sale consideration of the units. Dividend income cannot be considered as recovery of cost or reduced expenditure on purchase in the computation of income of the businessman holding shares as a dealer.

The expenditure on purchase of units was relatable only to the sale proceeds of units and not to the receipt of income distributed by mutual fund. Provision of Section 14A has no application as there is no expenditure incurred in respect of the income from units.

Third question:

There is no information whatsoever as to the identity of money that went into dividend or income payments made by Mutual Fund. Principles laid down in Ramsay or McDowell do not apply at all. There was no scheme or collusion between the assessee and the Mutual Fund. The transactions are to be accepted as genuine considering the stand of the Department that these funds prominently advertised the record date and the amount of dividend and there is no material to show that these mutual funds consulted the assessee before doing so. They operated under the regulatory control of SEBI.

The provisions of s. 94(7) have been brought on the statute book by the Finance Act, 2001, w.e.f. 1st April, 2002 and hence not applicable. (AY. 2000-01, 2001-02)

Wallfort Shares & Stock Brokers Ltd v. ITO (2005) 3 SOT 879/ 96 ITD 1/ 96 TTJ 673 (SB) (Mum.) (Trib.)

Editorial: Order of the Special Bench is affirmed by the High Court and Supreme Court in *CIT v. Walfort Share & Stock Brokers (P) Ltd. (2010) 41 DTR 233 / 326 ITR 1 / 192 Taxman 211 / 233 CTR 42 / (2010) 8 SCC 137 (SC) and CIT v. Walfort Share & Stock Brokers (P) Ltd. (2009) 310 ITR 421(Bom)(HC)*

".. The Income-tax Appellate Tribunal is a model administrative Tribunal whose illustrious example and commendable performance may well be emulated by similar other Tribunals in different disciplines. There is uniform praise of the manner in which the Tribunal functions and I suppose it is one of the few quasi-legal institutions which is not plagued by the problem of arrears."

Hon'ble Shri Y.V. Chandrachud Former Chief Justice of India. (Ruby Jubilee Souvenir - 1981 (40th Anniversary)

47. S. 72 : Carry forward and set off – Capital gains – Gains arising from sale of capital assets – Can not be set-off against brought forward business loss. [S.28(i), 45]

Facts :
The assessee-company was engaged in the business of manufacture/production of Iron and Steel. During the previous year relevant to the assessment year 2003-04, the assessee sold the land, building and bore well used for its business purposes for a consideration of Rs. 1,55,00,000. The assessee had claimed depreciation in the earlier years on the building and the bore well. According to it, the factory building and plant and machinery stood on the same land and since these assets were connected to the business of the assessee, the gain from sale of these assets was to be set-off against the carried forward business loss from the earlier years. According to it, the long term capital gains on transfer of business assets had the character of business income and, therefore, business loss brought forward from earlier years was to be set-off against such income though, it was not computed under the head 'profits and gains of business or profession'. The department, however, held that the assets sold by the assessee were in fact capital assets and, therefore, the assessee by itself offered the income from the sale of these assets under the head 'capital gains' and had also paid taxes at the rate at which 'capital gains' were to be taxed. Taking note of the decision of the Hon'ble Supreme Court in the case of *Killick Nixon & Co., v. CIT [1967] 66 ITR 714*, wherein it was held that only income which is earned by carrying on business is entitled to be set off, it was held that the carry forward business loss cannot be set off against the income from capital gains, as it is against the provisions of law.

Issue :
"whether the brought forward loss from the earlier years can be set off against the income from capital gains ,under section 72"

Views :
Section 72(1) allows brought forward business loss to be set-off against the "profits & gains of any business or profession" of the subsequent year. The expression "profits & gains of business" means income earned out of business carried on by the assessee and not just income connected in some way to the business or profession carried on by the assessee. The land & building were fixed & capital assets used by the assessee for its business purposes. The gains arising there from were assessable as capital gains and were not eligible for set-off against the brought forward business loss under section 72 [*CIT v. Express Newspapers Ltd. (1964) 53 ITR 250 (SC) followed; CIT v. Cocanada Radhaswami Bank Ltd. (1965) 57 ITR 306 (SC)* distinguished.(AY. 2003-04)

Held :
(i) Much stress has been laid by both the parties on the term "profits and gains if any, of any business or profession" mentioned in sub-clause -(i) of sub-sec.(1) of sec.72 of the IT Act. What are the profits and gains of business or profession ?. Whether it should be the income earned out of the business carried on by the assessee or it may be the income in any way connected to the business or profession carried on by the assessee ?. The answer to this question entirely depends on the interpretation to be given to the term "of any business or profession carried on by the assessee and assessable for that assessment year".

(ii) The capital is to be used for the purpose of carrying on the business of the assessee and it shall remain in the business of the assessee till it is either converted into stock-in-trade or is disposed off. The income earned by the assessee by carrying on the business by use of the stock in trade only is the business income of the assessee. Likewise, any expenditure incurred by the assessee for carrying on of business and for earning the income from such business or profession is only allowable as deduction. After taking into account the receipts and payments for carrying on the business of the assessee only the profit or gain or loss from the business is computed. If the profit or loss relate to the same assessment year from one source then it can be set off from another source under the same head of income u/s 70 Act, and it can be set off against the income from any other head of income u/s 71 of the Act. Sec.72 of the Act however, permits the carry forward business loss to subsequent assessment years and allows it to be set off against profit & gains, if any, of any business or profession carried on by the assessee and assessable for the relevant assessment year. Thus, it is clear that it is only the business loss that can be carried forward u/s 72 of the Act and it can also be set off only against the business income of the assessee, be it from the same business or from any other business.

(iii) The Hon'ble Supreme Court in Cocanada Radhaswami Bank Ltd. (supra). was dealing with the case of the assessee whose business was dealing in securities also and it was thus held that these securities were trading assets and therefore, the income therefrom though to be computed under the head "income from securities" does not lose the character of "business income". But in the case of Express Newspapers Ltd. (supra) the facts of the case are little different and after taking into consideration the facts of the case therein, the Hon'ble Supreme Court has held that the capital gains on sale of capital assets is not to be set off against the brought forward loss of earlier years. In our opinion, the decision of the Hon'ble Supreme Court in the case of Express Newspapers Ltd. (supra), is fairly applicable to the facts of the case before us. The Coordinate Bench of the Tribunal in the case of Steelcon Industries (P.) Ltd. (supra) has misplaced its reliance upon the decision of the Apex Court in the cases of United Commercial Bank Ltd., and Cocanada Radhaswami Bank Ltd. (supra). (AY. 2003-04)

Nandi Steels Ltd v. ACIT (2012) 66 DTR 1 / 13 ITR 494 / 143 TTJ 521 / 134 ITD 73 (SB)(Bang.)(Trib.)

Editorial : In *CIT v. Shriram Chits & Investments (P.) Ltd [2018] 257 Taxman 395 (Mad)(HC)* it was held that Carried forward business loss could be set off against dividend income earned from business investments as even though dividend was classified under separate head but same was very much part of income from business. The assessee in this case also was carrying on the business of share trading.

48. S. 73 : Losses – Speculation business – Purchase and sale of shares – Gross total income – Dividend income – Income from other sources – Applicability of Explanation to S. 73 – Loss on account of Share Trading whether speculation business loss – Necessary conditions for applicability of the said section and the Explanation thereto [S.56, 71]

Facts:

The assessee company was earning income from business of trading in Steel, Yarn and Fabrics and also from Service Charges. It was also engaged in buying and selling of shares and holding them as Stock-in-Trade. It had disclosed a gross total income of Rs. 9,21,556 in its computation of income for the impugned assessment year 1989- 90 which comprised of negative Income from business (Rs.97,358/-) and positive income from dividend chargeable as Income from other sources Rs. 10,18,914 thereby leading to a gross total income of Rs. 9,21,556/-. The assessee-company had purchased and sold shares during the relevant previous year and had incurred a loss of Rs. 2,84,26,411/- which was set off against positive income from business of sales and service thereby arriving at a negative income of Rs. 97,358 (loss) under the head "income from business". In the assessment proceedings, the Assessing Officer held that the share trading loss of Rs. 2,84,26,411 was in the nature of speculation loss within the meaning of Explanation to section 73 of the Income-tax Act and therefore it was not permissible to set off the above share trading loss against other items of business income of the assessee on the ground that the provisions of section 43(5) do not have application in this case as the present case is governed by Explanation to section 73 which is an independent and deeming provision. Finally in the course of assessment the Ld. AO rejected the claim of the Assessee and denied the set-off of loss from share trading against other business income. The same was carried in appeal before the Ld. CIT(A) who allowed the appeal of the Assessee holding that the appellant's income is mainly from other sources, and since the appellant's losses from share dealings would have to be set off against the other business incomes, the provisions of section 73 and the Explanation thereto would not apply in the appellant's case. This was challenged by the Revenue in appeal before the Hon'ble Tribunal.

Issue:

The following issue was referred to the Hon'ble Special Bench:

"On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in holding that provision of section 73 read with explanation thereto are not applicable in the assessee company and thereby further erred in directing to allow the set off of losses incurred in the business of purchase and sale of shares against the other income. The said view is well supported by the decided case by Hon'ble Calcutta High Court in the case of *Eastern Aviation & Industries Ltd. v. CIT reported at 208 ITR 1023.*"

Held:

After considering detailed arguments and numerous judgements on the issue of allowability of loss and the applicability of Explanation to section 73 in the given situation the Hon'ble Tribunal held as follows:

(a) Explanation to section 73 is not applicable to a company falling under any of the following two categories :—

(i)A company whose gross total income consisted mainly of income which is chargeable under the heads "interest on securities", "income from house property", "capital gains" and "income from other sources".

(ii)A company, the principal business of which is the business of banking or the granting of loans and advances.

(b) That, the tests necessary for determining whether a company falls under any of the above two exceptions are provided in the Explanation itself.

(c) That, in the case of a company falling under the first category above the test is to examine whether gross total income of that company consists mainly of income which is chargeable under the heads "interest on securities", "income from house property", "capital gains" and "income from other sources". The composition of gross total income alone need to be looked into.

(d) That, in the case of a company falling under the second category above, the test is to examine the principal business carried on by the company to ascertain whether the principal business is that of banking or the granting of loans and advances. The nature of the principal business carried on by the company alone need to be looked into.

The order of the Ld. CIT(A) was ultimately upheld by the Hon'ble ITAT. (AY. 1989-90)

ACIT v. Concord Commercials (P.) Ltd. (2005) 95 ITD 117 / 94 TTJ 913 / 2 SOT 276/ 146 taxman 64 (SB) (Mum.)(Trib.)

Editorial : The Hon'ble High Court affirmed the said view of the Special Bench in *CIT v. Concord Commercials Pvt Ltd - ITA No. 853 of 2007* vide order dated 18-03-2008. The ratio laid down has been followed in various judgements including *CIT v. Hero Textile & Trading Ltd – ITA No. 296 of 2001, CIT v. Sinore Trading Ltd – I T Ref. No 179 of 1996, CIT v/s Darshan Securities (P.) Ltd (2012) 206 Taxman 68/ (2012) 341 ITR 556 (Bombay) / 249 CTR 199 (Bom)(HC), CIT v. HSBC Securities and Capital Market India Private Limited – (2012) 208 Taxman 439 (Bom.) (HC.)* & also numerous judgements of the Hon'ble Tribunal.

49. S.74 : Losses – Capital gains – Carry forward and set off – Right to set off capital loss is a "vested right" not affected by amendment [S. 45]

Facts:
The assessee company is engaged in the business of investment banking and dealing in government securities. For A. Y. 2001-02 the assessee had long term capital loss which was set-off against short term capital gain. The remaining loss to the extent of Rs. 42,91,545/- was carried forward and set off against short term capital gain for A.Y. 2003-04. The AO rejected the stand of the assessee company on the basis of amendment to section 74(1) that came into effect from 01.04.2003 applicable for A.Y. 2003-04 whereby long term capital loss cannot be set off against short term capital gain. The plea of the assessee before the Assessing Officer was that the amendment came into existence from A.Y. 2003-04 whereby the assessee company had already incurred and claimed a loss for A.Y. 2001-02. The assessee further contended that the right was accrued and vested to the assessee before amendment was introduced to the prevailing section 74(1). Aggrieved by the order of AO the assessee company preferred an appeal before CIT(A), the CIT(A) held that the right to an assessee is vested only with respect to particular proceedings of that year, and hence sustained the order of AO and dismissed the appeal of the assessee. The assessee filed an appeal before the Tribunal, the Division Bench noticed that they were two contradictory views taken by the co-ordinate benches and thus a Special Bench was constituted by the President.

Issues:
The Special Bench has to consider an issue:

(i) Whether the provisions of section 74 which deal with carry forward and set off of losses under the head "capital gains" as amended by Finance Act, 2002 will apply only to the unabsorbed capital loss for the assessment year 2003-04 and onwards or will also apply to the unabsorbed capital losses relating to the assessment years prior to the assessment year 2003-04.

Views:
The Special Bench reviewed the whole of the case efficaciously wherein golden rule of construction of interpretation of statute was perceived. The Special Bench stated that the amendment to section 74(1) came into with effect from 01.04.2003 applicable from A.Y. 2003-04 to unabsorbed capital losses, but it not applicable to losses prior to A.Y. 2003-04.

The amendment to section 74(1) has no retrospective effect and thus it considers subsequent years to A.Y. 2003-04 only.

Held:
Held by the Special Bench:

(i) The provisions of section 74(1) as amended w.e.f. 01.04.2003 have been relied upon by the revenue authorities to disallow the assessee's claim for set off of long-term capital loss relating to A.Y. 2001-02 against short-term capital gain of the year under consideration and as already noted by us, the plain grammatical construction of the language of sec.74(1) as amended w.e.f. 1.4.2003 makes it clear that the same are applicable and deal with carry

forward and set off of loss under the head "capital gain" incurred in A.Y. 2003-04 and subsequent years. The right accrued to the assessee by virtue of section 74(1) as it stood prior to the amendment made w.e.f. 1.4.2003 thus has not been taken away either expressly by the provisions of section 74(1) as amended w.e.f. 01.04.2003 or even by implication.

(ii) The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed.

(iii) The provisions of section 74 which deal with carry forward and set off of losses under the head "capital gains" as amended by Finance Act, 2002, will apply only to the unabsorbed capital loss for the assessment year 2003-04 and onwards and will not apply to the unabsorbed capital losses relating to the assessment years prior to the assessment year 2003-04. Accordingly, the assessee holding that the assessee is entitled to set off the long-term capital loss incurred in AY 2001-02 against the short-term capital gain made by it in AY 2003-04. (AY. 2003-04)

Kotak Mahindra Capital Co. Ltd. v. ACIT (2012) 138 ITD 57 / 18 ITR 213/75 DTR 193/148 TTJ 393(SB) (Mum.)(Trib.)

Editorial: Approved in *Bhavesh P. Shah v. ACIT ITA No. 5629/Mum/2012 (Mum.)*

"Income-tax Appellate Tribunal has earned confidence of the citizens by the way it has been discharging its responsibilities over the years."

Hon'ble Mr. Justice A.C. Gupta Judge, Supreme Court of India. (Ruby Jubilee Souvenir - 1981 (40th Anniversary)

50. S. 80HHC : Export business – Profits & Gains of industrial undertaking – Deduction under section 80 HHC is to be allowed on profits and gains as reduced by the deduction claimed and allowed [S. 80IA(9), 80IB]

Facts:
Assessee for the year had claimed to be 100 % exporter. It claimed deduction under section 80HHC at 50 per cent of the gross total income. Deduction under section 80-IB was claimed being 30 per cent of total business profit of the undertaking. While computing deduction under section 80HHC the deduction allowed under section 80-IB was not taken into consideration. Ld. AO held that deduction under section 80HHC was to be reduced by amount of deduction allowed under section 80-IB. CIT(A) allowed assessee's claim. Therefore, revenue filed appeal before Hon. ITAT.

Issues:
In the light of conflict of views of different benches, matter has been referred to the Special Bench for adjudication to consider the following question.

"Whether in view of the provisions of section 80-IA(9) read with section 80-IB(13), the deduction of income under Chapter VI-A can be allowed on the entire profit and gains of an undertaking or an enterprise of an assessee or it is to be allowed on such profit and gains as are reduced by the deduction claimed and allowed under section 80-IB/80-IA."

Held:
It is a well settled principle of interpretation of statute that the entire statute should be read as a whole and the same has to be considered thereafter chapter by chapter and then section by section and ultimately word by word.

Hon. Bench is not persuaded to take a view different from the one taken by the Special Bench Case of Rogini Garments (108 ITD 49). On consideration of provisions of section 80- IA(9), there are two restrictions in the statutory provision under consideration. These are:-

(a) where an assessee is allowed deduction under this section (80-IA or 80-IB), deduction to the extent of such profit and gain shall not be allowed under any other provision of this Chapter (Heading "C-Deduction in respect of certain incomes"), and

(b) deduction shall in no case exceed the profit and gain of the undertaking or hotel as the case may be.

The language used in section 80-IA(9)/80-IB(9A) is clear and unambiguous and is required to be given effect to. Deduction of profits and gains allowed under section 80-IA/80-IB is not to be allowed again under any other provision. There is then further restriction on total deduction not exceeding eligible profit of the undertaking. All statutory provisions are inter-related and are part of one scheme. This cannot be read de hors one and other. Restriction imposed in section 80-IA(9)/80-IB(9A) are to be read in all sections and given effect to. This would only give harmonious reading. Thus, it was held that deduction to be allowed under any other provision of Chapter VI-A with the heading 'C' is to be reduced by amount of deduction allowed under section 80-IB/80-IA of the Income-tax Act. (AY. 2001-02 to 2004-05)

ACIT v. Hindustan Mint and Agro Products (P) Ltd. (2009) 123 TTJ 577/119 ITD 107 (SB)(Delhi)(Trib.)

Editorial: Aforesaid proposition is reversed by Bombay High Court in case of *Associated Capsules (P) Ltd v. DCIT (332 ITR 42/197 Taxman 84/237 CTR 408)*. In this case it is held that the reasonable construction of section 80-IA(9) would be that where deduction is allowed under section 80-IA(1), then the deduction computed under other provisions under heading 'C' of Chapter VI-A has to be restricted to the profits of the business that remain after excluding the profits allowed as deductions under section 80-IA, so that the total deduction allowed under the heading 'C' of Chapter VI-A does not exceed the profits of the business. Also, in case of IPCA Laboratories (112 Taxmann.com 331) (Bom. HC), case of Associated Capsules was followed. Departments SLP in case of IPCA Laboratories is dismissed. (112 taxmann.com 332) (SC)

However, in case of *ACIT v. Mirco Labs Ltd.*, Hon. Apex Court has referred matter to larger bench as there was difference of opinion as to whether assessee could claim simultaneous deductions under section 80-IA/ 80-IB and 80HHC on same profits. (380 ITR 1/283 CTR 9)

"Every institution has a personality, motive, objects and direction. A purposeful existence of any institution necessarily requires a continuous, watchful appraisal of its role, functioning, achievements and defaults. Once an institution is created for definite objects in view,occasionally the goals become blurred and the institution became static, and in the end it becomes counterproductive. As in the life of an individual so in the life of an institution re-adjustments of goals, priorities, methodology of functioning and evaluation of performance are the sine qua non."

"Income -tax Appellate Tribunal can confidently look back on its performance of humanising a tough law. However, in the onward march of nation, industrialisation marching apace, complex tax problem are surfacing. Constitutional goals have provided guidelines."

Hon'ble Mr. Justice D.A. Desai, Judge, Supreme Court of India. (Ruby Jubilee Souvenir - 1981 (40th Anniversary)

51. S. 80HHE : Export of software – Non-Resident – export of software – Article 26 of India-US DTAA – non-discrimination – under article 26(2) of said treaty, if US enterprise is carrying on a business in India, it shall not be treated less favourably than an Indian enterprise carrying on same business for purpose of taxation – in view thereof, since assessee was engaged in business of export of software in same manner in which a number of Indian enterprises were exporting software, assessee's case had to be compared with case of an Indian enterprise engaged in business of exporting software – assessee would be entitled to deduction under section 80HHE on same footing and in same manner as deduction was admissible to a resident assessee. [S.90, Art. 26(2)]

Facts:

The assessee was a citizen of America, and a non-resident in India for purposes of the Income Tax Act. He had a permanent establishment in India carrying on business of export of software. He claimed deduction in India in respect of profits earned from export of computer software. Assessee's contention was that an Indian resident in similar business would be entitled to deduction under section 80HHE, and that non-resident could not be treated differently in view of the provisions of Article 26(2) of the India-US DTAA. The Revenue authorities rejected the claim on the basis that section 80HHE was applicable only to residents. As divergent views had been taken by the coordinate Benches in respect of such claim, the issue was referred to a Special Bench.

Issues:

The following question was referred to the Special Bench:

"Whether on the facts and circumstances of the case, deduction under section 80HHE of the Income-tax Act, 1961 is to be allowed in respect of export of software out of India to an assessee who is resident of USA?"

Views:

The Special Bench reasoned that as per Article 26(2) of India-USA DTAA, taxation of a permanent establishment of a USA resident shall not be less favorable than the taxation of a resident enterprise carrying on the same activities. Applying this logic, the Bench considered that granting deductions/ exemptions to Indian resident enterprise, but not granting the same to a similarly placed non-resident enterprise, would result in less favourable treatment to the non-resident. Thus exemptions and deductions available to Indian enterprises would also be granted to the US enterprises if they are carrying on the same activities. Therefore, assessee was entitled to section 80HHE deduction as admissible to a resident assessee. The Bench also reasoned that where the provisions contained in the DTAA are capable of clear and unambiguous interpretation, it would not be necessary to refer

to the commentary on the OECD Model Convention, the US Technical Explanation or decisions of any foreign jurisdiction. The decision of the Hon'ble Supreme Court in *CIT v. P. V. A. L. Kulandagan Chettiar (2004) 267 ITR 654 (SC)* followed. Decision of ITAT Pune Bench in *Automated Securities Clearance Inc. v. ITO (2008) 118 TTJ 619 (Pune)* was overruled.

Held:
Accordingly, it was held that the assessee is entitled to deduction under section 80HHE on the same footing as it is available to a resident person in India. The question was thus answered in favour of the assessee and against the Revenue. (AY. 2002-03 to 2004-05)

Rajeev Sureshbhai Gajwani v. ACIT (2011) 52 DTR 201 / 129 ITD 145 / 137 TTJ 1 / 8 ITR 616 (SB)(Ahd.) (Trib.)

In *CIT v. Herbalife [2016] 384 ITR 276 (Del)*, Revenue's argument based on decision of ITAT Pune Bench decision in *Automated Securities Clearance Inc. v. ITO (2008) 118 TTJ 619 (Pune)* was rejected by the Delhi High Court. The Delhi High Court expressly noted that the decision in Automated Securities (supra) was overruled by the Special Bench in Rajeev Sureshbhai Gajwani, and thus the ratio of Rajeev Sureshbhai Gajwani is implicitly approved by the Hon'ble Delhi High Court.

Editorial: Decision of ITAT Pune Bench in the case of Automated Securities (supra) was rendered in the context of a specific technical explanation in the India-US DTAA. The argument of the Revenue was that in the India-US DTAA, an aspect of reasonableness of differentiation is required to be read into the provisions on application of the appropriate principles of treaty interpretation (particularly considering the background of that particular treaty, the Technical Explanation etc.) Nonetheless, the Special Bench decision has now decided that differentiation simpliciter is tantamount to discrimination. Nonetheless, it must be borne in mind that the principle must be read in light of the language of the particular treaty in each case and in some situations, specific provisions in the treaties or protocols may mandate a different result: an illustrative example is provided in *Gupta Overseas v. DIT ITA 257/Agra/2013*.

"By its performance the Tribunal has succeeded in inspiring confidence both of the Government and the Citizens. The work done by the Tribunal has to a great extent lessened the burden of the Courts."

Hon'ble Mr. Justice A.K. Sen, Judge, Supreme Court of India. (Ruby Jubilee Souvenir - 1981 (40th Anniversary)

52. S. 80I : Industrial undertakings – Qualifying income – Interest received from debtors for late payment and interest derived by assessee from deposits with bank, IDBI and company deposits cannot be said to have been derived directly from the industrial undertaking and is not eligible for deduction under s. 80-I.

Facts:
Assessee company was engaged in the business of manufacturing and sale of detergent powder/ cake to various customers. It was eligible to claim deduction of the profits derived from its unit under section 80I of the Act. The assessee company also claimed deduction under section 80I in respect of interest on delayed payments by the buyers. Further, it also claimed deduction under section 80I in respect of interest on deposits with bank, IDBI and company deposits. The same was rejected by the AO.

Issues:
Whether interest received by assessee from customers for delayed payment by them of sale proceeds of goods would qualify for deduction under section 80-I?

Whether interest derived by assessee from deposits with bank, IDBI and company deposits could not be said to be derived from an industrial undertaking so as to be eligible for deduction under section 80-I?

Views:
The Special Bench held that, as per section 80-I, profit and gains derived from the industrial undertaking, included in the gross total income of the assessee, was eligible for deduction at certain percentage as prescribed in section 80-I. The term "derived from" was interpreted by the Hon'ble apex Court in the case of *CIT v. Sterling Foods (1999) 153 CTR (SC) 439 / (1999) 237 ITR 579 (SC) and Pandian Chemicals Ltd. v. CIT (2003) 183 CTR (SC) 99 / (2003) 262 ITR 278 (SC).* As per the Apex Court, the words "derived from" meant a direct nexus between the profits and gains and the industrial undertaking. Thus, in order to ascertain whether any income qualifies for deduction under section 80I, one should test whether such income bears a direct nexus with the undertaking or not.

The direct or immediate source for earning of interest on fixed deposits, on deposits with IDBI and on deposits with company is the deposits made by the assessee and not the industrial undertaking. Though the funds which are deposited might have been generated from the profit and gains of the industrial undertaking, however, the nexus between the interest income and the industrial undertaking is not direct or immediate.

In so far as the interest on delayed payment is concerned, the Special Bench held that such interest is not arising because of manufacturing of detergent powder/cake by the industrial undertaking, but because, the sale proceeds remained unpaid for a stipulated period. The interest cannot be said to flow directly from the industrial undertaking. The immediate and effective source of interest is the sale proceeds which remained unpaid for a stipulated credit period. The industrial undertaking comes in the second degree.

Held:
Interest received from debtors for late payment and interest derived by assessee from deposits with bank, IDBI and company deposits cannot be said to have been derived directly from the industrial undertaking and is not eligible for deduction under s. 80-I.(AY. 1992-93)

Nirma Industries Ltd. v. ACIT (2005) 95 ITD 199 / 95 TTJ 867 (SB)(Ahd.)(Trib.)

Editorial: High Court reversed the finding of the Special bench on the issue of interest on delayed payment by the buyers. It held that interest received by assessee from its trade debtors towards late payment of sale consideration is not required to be excluded from profits of industrial undertaking as same is income derived from business of industrial undertaking. *Nirma Industries Ltd v. Dy CIT (2006) 283 ITR 402 /222 CTR 198/ 145 Taxman 330 (Guj) (HC)*

"I must compliment the Tribunal for having dispensed justice most impartially and keeping in view the interest of both the Revenue and the Assessee. The Tribunal has made valuable contribution to the Income -tax law and some of its judgements have been outstanding."

Hon'ble Mr. Justice Prakash Narain, Chief Justice, Delhi High Court (Ruby Jubilee Souvenir -1981 (40th Anniversary)

53. S. 80IB(10) : Housing projects – Residential – Commercial units – Proportionate deduction – Housing project approved by local authority as housing project with convenience shopping the assessee is entitled to deduction – Prior to 1-4-2005 – Clause (d) inserted to Section 80IB(10) with effect from 1-4-2005 is prospective and not retrospective and hence cannot be applied for the period prior to 1-4-2005.

Facts:
The Appellant had constructed a project called "Brahma Estate". The Pune Municipal Corporation had duly approved the project describing it as "New Residential + Commercial" Project. As per provisions of Development Control Rules then applicable to Pune city, there could not be any residential project which was a purely residential project and in which no part of the land was used for commercial purposes. The commercial premises comprised of built-up area of 7,128.87 sq mtrs, being 20.83 per cent of total area. For the AY 2003-04, the Appellant claimed deduction under section 80-IB(10) of the Act in respect of profits earned from the said project.

Special Bench:
The matter was referred to the special Bench for resolving the controversy as divergent views were expressed by the various Division Benches of the Tribunal on issue relating to section 80-IB (10).

Issues Before Special Bench:
Whether deduction under section 80-IB (10), as applicable prior to 1-4-2005, is admissible in case of a 'housing project' comprising of residential housing units and commercial establishments?

Whether entire profits of the housing project would be deductible under section 80-IB (10)?

Views:
The Assessing Officer held that deduction under section 80-IB (10) is allowable only for housing project and the assessee's project had not been approved of by the Pune Municipal Corporation as a housing project. Therefore, the said project was not eligible for deduction under section 80-IB(10). Clause(d) in section 80-IB(10) was introduced vide Finance (No. 2) Act, 2004 which provides that the commercial use of built-up area shall not exceed 2,000 sq. ft. or 5 per cent of the aggregate built-up area, whichever is less and the Assessing Officer was of the view that clause(d) to section 80-IB(10) was effective retrospectively from the assessment year 2003-04 as it was only explanatory in nature.

Held:
The tax incentive by way of deduction under section 80-IB (10) was predominantly for the purpose of augmenting affordable dwelling units, and it must be interpreted in that light. It was beyond dispute or controversy that, notwithstanding Legislature's unambiguous objective the availability of tax benefits was not confined to only such housing projects which were purely residential projects and in which no part of the area was used for commercial purposes.

The project eligible for this tax concession had to be a housing project which was predominantly for affordable residential dwelling units and not predominantly to serve commercial purposes.

Prior to AY 2005-06, it would be sufficient if the project was approved by the local authority for the purposes of the eligibility. In any other case, where approximately 90 per cent or more of the total area was utilized for building dwelling units and other conditions of the section 80-IB were fulfilled, such project should be held as fully satisfying the description of term 'housing project' as envisaged.

Also, there would be no legal justification to deny exemption to residential segment of a housing project in which the total built-up area of commercial is more than 10 per cent, and which satisfies conditions of section 80-IB (10) on standalone basis. If the income of the project pertaining exclusively to the construction of the residential units can be separately worked out and other requirements of section are satisfied, there would be no good reason to withhold grant of incentive to such income of the undertaking.

Further, the bench also held that the restriction placed in the assessment year 2005-06 vide Clause(d) to section 80-IB(10) was applicable only with prospective effect and there was no justification to presume that such a limit or prohibition was in place in the earlier years as well on the commercial use of an area.

The bench further held that the deduction under section 80-IB (10) was to be granted in respect of 'profit of the housing project', and 'not the profit attributable to the residential units'. Once, it was held that the project-in-question was a housing project, entire profits of the housing project would be deductible under section 80-IB (10). (AY. 2003-04)

Bhrama Associates v. JCIT (2009) 119 ITD 255 / 22 DTR 1 / 30 SOT 155 / 122 TTJ 433 (SB)(Pune)(Trib.)

Editorial: Affirmed by Bombay High Court in [2011] 197 Taxman 459 (Bombay HC) 333 ITR 289 (Bom.). This decision of the Bombay High Court was approved by Supreme Court in the case of *CIT v. Sarkar Builders (2015) 375 ITR 392 (SC)*.

The above views were upheld by the Supreme Court in the case of *CIT v. Veena Developers (2015) 277 CTR 197 / 119 DTR 237 / (2016) 66 taxmann.com 353 (SC)* and was later followed in the case of *CIT v. Indo Continental Hotels & Resorts Ltd. [2019] 107 taxmann.com 162 (SC)*.

54. S. 80IB : New industrial undertakings – Depreciation – Not claimed – To be reduced Computation – While computing the income for the purpose of deduction under Chapter VI-A, the depreciation has to be allowed whether it is claimed by the assessee or not. [S. 32, 80HH, 80I, 80IA]

Facts:
The assessee is a partnership firm engaged in the manufacturing of paper. The assessment year under consideration is A. Y. 2001-02. The assessee filed the return of income on 15th Oct., 2001 declaring nil income. It has a manufacturing unit located in the Union Territory of Daman, which is a backward Union Territory as specified in Sch. VIII of the IT Act. The income derived from the manufacturing unit is eligible for deduction under section 80-IB of the Act. The assessee did not claim depreciation on fixed assets for the year under consideration though it has claimed the depreciation for the earlier years except for the asst. yr. 2000-01. In the opinion of the AO, by not claiming depreciation it has not forgone its right to claim the depreciation and started claiming depreciation from sixth year on the original cost of the assets when the deduction is limited to 25 per cent of the eligible income of the assessee. AO held that by adopting this modus operandi the assessee tried to reduce the tax liability from sixth year. The assessee, by not claiming depreciation is actually planning the tax avoidance leading to tax evasion. CIT(A) held that it is not open to the assessee not to claim depreciation while computing the profits derived from its industrial undertaking.

Issue:
There were conflicting views of the Tribunal on this issue. The cases which are approving the view that depreciation cannot be enforced upon the assessee for computing Chapter VI-A deductions were, (i) *Medley Pharmaceutical Ltd. v. ITO (2001) 71 TTJ (Mumbai) 328*; (ii) *Beta Naphthol (P) Ltd. v. Dy. CIT (1994) 50 TTJ (Indore) 375*; and (iii) *Plastiblends India Ltd. v. ITO* (IT Appeal No. 4542 Mumbai of 1999, dt. 10th Feb., 2004) [reported at (2005) 95 TTJ (Mumbai) 1062—Ed.]. The case taking a contrary view in favour of the Revenue was *Mandhana Exports (P) Ltd. v. Asstt. CIT (2002) 76 TTJ (Mumbai) 559 : (2002) 82 ITD 306 (Mumbai)*. Therefore, the Special Bench was constituted.

The issue dealt with the law applicable for the period 1st April, 1988 to 31st March, 2002 because there was an amendment in the provisions relating to grant of depreciation by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, w.e.f. 1st April, 1988 whereby Section 34 was omitted. Further, the Finance Act, 2001 inserted Explanation 5 to Section 32 w.e.f. 1st April, 2002.

Views:
For the purpose of computing deduction under Chapter VI-A, the amount of income of that nature as computed under the provisions of this Act has to be taken. Therefore, while computing eligible income effect to all the provisions of the IT Act (excluding Chapter VI-A) is to be given. The provisions of IT Act include Section 32 which provides for deductibility of depreciation, therefore, the same was held to be deductible before making any deduction.

The decision of the Supreme Court in the case of *CIT v. Mahendra Mills (2000) 243 ITR 56 (SC)* relied upon by assessee was distinguished by Special Bench on the ground that the decision given by the Supreme Court was for asst. yr. 1974-75, when Section 34 was on the statute book, which is omitted

by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986 w.e.f. 1st April, 1988. As per Section 34, the assessee was entitled to depreciation under Section 32 only if the prescribed particulars have been furnished by the assessee.

If the depreciation is not claimed, the resultant income would be more and consequently more deduction would be available to the assessee under Chapter VI-A.

The decisions of the Supreme Court in the case of *Cambay Electric Supply Industrial Co. Ltd. v CIT (1978) 113 ITR 84 (SC)* and *Mettur Chemical & Industrial Corpn. Ltd. v. CIT, (1996) 217 ITR 768 (SC), the decision of the Gujarat High Court in the case of CIT v. Cadila Chemicals (P) Ltd. (2003) 259 ITR 692 (Guj); Rajasthan High Court in the case of Vijay Industries v. CIT (2004) 270 ITR 175 (Raj); and the Bombay High Court in the case of Indian Rayon Corpn. Ltd. v. CIT (2003) 261 ITR 98 (Bom)* were followed.

Since the Special Bench held that the depreciation has to be allowed while computing the income for the purpose of computation of deduction under Chapter VI-A even prior to the amendment by way of an Explanation 5 to s. 32 introduced by the Finance Act, 2001, the question with regard to retrospective effect of the amendment, was not decided.

Held:
Depreciation, which is allowable but not claimed in the return for normal computation of income, has to be allowed while computing the deductions under Chapter VI-A, viz., ss. 80HH, 80-IA, 80-IB, etc. of an industrial undertaking. (AY. 1999-2000 to 2002-03)

Vahid Paper Converters v. ITO (2006) 98 ITD 165/ 100 TTJ 532 (SB) (Ahd) (Trib.)

Editorial : Affirmed in *Scoop Industries (P.) Ltd v. ITO (2007) 161 Taxman 366/ 289 ITR 195 / 207 CTR 599 (Bom) (HC), Plastiblends India Ltd v Add.CIT (2009) 185 Taxman 187 / 318 ITR 352 / 227 CTR 1 (FB) (Bom)(HC), Plastiblends India Ltd v Add.CIT (2017) 251 Taxman 188 / 398 ITR 568 / 298 CTR 281 (SC)*.

"The Tribunal has the reputation of being fair and impartial and it has been disposing of the cases coming to it with reasonable speed. The Tribunal has thus gained confidence of both the Government and the taxpayer."

Hon'ble Mr. Justice G.P. Singh, Chief Justice, Madhya Pradesh High Court and Currently Acting Governor, State of Madhya Pradesh. (Ruby Jubilee Souvenir - 1981 (40th Anniversary)

55. S. 80P : Co-operative Bank – Interest on refund – Constitutes gains of business – Eligible for deduction – Income tax refund constitute income from other sources. [S. 2(13), 28(i), 56, 244A]

Facts:

The assessee Maharashtra State Co-operative Bank Ltd (MSCBL) is a co-operative bank which had filed its return declaring total income at Rs. Nil claiming deduction under section 80P for the entire amount of gross total income for AY 2000-01. During the assessment proceedings, it was noted by the Assessing Officer (AO) that the assessee had received interest under section 244A amounting to Rs. 34.43 crores which was included in its total income under the head of income from business, and deduction was claimed under section 80P(2)(a)(i). The facts which led to the granting of interest of such magnitude to the assessee were that during the assessment years 1986-87 to 1996-97 the assessee had claimed deduction under section 80P(2)(a) with reference to its entire income. Initially the entire tax deducted at source aggregating to Rs. 5.98 crores on the interest income was refunded after processing the returns under section 143(1) of the Income Tax Act (The Act) but subsequently, these assessments were reopened by way of notice under section 148 and the deduction was denied under section 80P. This resulted in a demand aggregating to Rs. 105 crores. The matter travelled to the Tribunal (ITAT). The ITAT held that the assessee was entitled to deduction under section 80P. In view of the said decision of the Tribunal, a sum of Rs. 140 crores was refunded to the assessee, including interest under section 244A amounting to Rs. 34.43 crores during the year under consideration. The AO, during the reassessment proceedings of the present year, opined that the interest received by the assessee on income-tax refund was on account of non-banking activity thus assessee is not entitled for deduction under section 80P for such income. Against this, the assessee contented that the interest received under section 244A should be considered as income from banking business as the amount of tax was paid on account of demand raised by the department in the banking business was rejected by the Assessing Officer. The assessee's contentions were rejected by both AO & CIT(A) & hence matter reached to the ITAT.

Issue:

After hearing both the sides, the Division Bench was not in concurrence with any one view and therefore the Members deemed it prudent to make reference to the Hon'ble President of the ITAT for the constitution of the Special Bench on the sole question :

"Whether, in the facts and circumstances of the case, assessee is entitled for deduction under section 80P(2)(a)(i) on the interest received under section 244A of the Act on the refund of tax."

Views:

After reviewing arguments on legal jurisprudence & analysis of relevant sections, the Special Bench held that,

The 'Principle of Consistency' is not unexceptionable and in the facts of the present case, an exception of not following the decision of earlier Bench is required to be made.

Further it was also opined that, the expression 'profits and gains of business' is exhaustive having wider scope and covers not only the income chargeable under the head 'Profits and gains of business or profession' but also other incomes which have nexus with the business, even though not it is not arising directly from the carrying on business activity.

Furthermore, it was held that since Income Tax was paid on the business of Banking, the interest on such income-tax refund will have to be considered as 'gain' (not 'profit') of banking business covered within the expression 'profits and gains' of banking business, notwithstanding the fact that it falls under the head 'Income from other sources'.

Phrase 'attributable to' used in section 80P, is inclusive of not only the items of income having direct nexus, but also items of income having some commercial or causal connection with the source of business income.

Held:
The Special Bench gave it's the decision based on all the propositions which were put before it. While giving its decision, the Special Bench dwelled upon four main issues. It was held as follows:

On the first issue of applicability of 'Principle of Consistency', it was held that;

After careful consideration, the SB opined that since this issue was not taken up before the Division Bench and also since the SB was not constituted for this issue, it would prefer not to decide the matter solely on this issue but having opined this, it was also opined that if subsequent Bench finds it difficult to follow the view of earlier Bench due to any corroborative reason, such as change in the factual or legal position or non-raising or non-consideration of an important argument by the earlier Bench having bearing on the issue, then it cannot follow the view of earlier Bench blindly. It is also a settled legal position, that if a subsequent Bench differs with previous Bench, then it should not itself venture to disagree with the earlier view but a reference should be made to a Larger Bench. Hence, when a matter is referred to the Larger Bench, the view earlier taken by the Division Bench ceases to be binding on the Special Bench even though it retains the enduring value. Therefore, it held opinioned that the exception to the application of principle of consistency gets attracted to the facts of this case and the appeal was to be decided on merits rather than following the earlier view taken by the Tribunal in its own case.

On the decision on merits, decision was given on following three factors,

First being, 'Head of income under which interest on income-tax refund falls', it was held that; "Interest on the refund of income-tax does not and can never fall under the head 'Profits and gains of business or profession' irrespective of the fact that the assessee is in banking or non-banking business." Therefore, the interest on income-tax refund would always fall under the head 'Income from other sources'.

The second factor was, 'Meaning of Expression 'Profits and Gains' of business as used in section 80P'; It was held that, "We are dealing with a case in which the assessee was carrying on banking business over the years and tax was collected by the Revenue in relation to such banking business. Thus there is a nexus between the payment of income-tax, its refund and interest on such refund with the business of banking. ……,. …. for the carrying on of the banking business, the assessee would not have paid the Income-tax which was refunded to it. Since Income-tax was paid in relation to the banking business, the interest on income-tax refund will be considered as 'gain' (not 'profit') of banking business covered within the expression 'profits and gains' of banking business. We, therefore, hold that interest on refund of income-tax would be covered within the expression "profits and gains of business" notwithstanding the fact that it falls under the head 'Income from other sources'.

On the last factor of 'Scope of Phrase 'Attributable to' Eligible Business', it was held that, "The direct nexus of interest on income-tax refund is with the payment of income-tax but when we try to trace the relation between Income-tax and the income on which it was paid, it comes to light that the same was for the business of banking. Thus there exists a commercial and casual (causal) connection between the interest on income-tax refund and the banking business'….. 'the assessee is compelled to pay tax on its income, due to circumstances beyond its control. The above factor has weighed heavily in our mind in the conclusion which we have reached in the present case. In view of the fact that the expression 'attributable to' has been used in section 80P vis-a-vis the 'business of the banking', we have absolutely no doubt in our mind that such interest is attributable to the banking business and there cannot be any question of denial of deduction under section 80P on such interest..' (AY. 2000-01)

Maharashtra State Co-operative Bank Ltd. v. ACIT (2010) 2 ITR 543 / 129 TTJ 521 / 37 DTR 194 / 38 SOT 325 (SB)(Mum.)(Trib.)

Editorial: The decision of the Special Bench is presently under challenge before the Hon'ble High Court, Bombay in ITXA 6991 of 2010 and The Hon'ble Court vide order dated 21/01/2013 as admitted the appeal of the Department pending disposal.

"The Income-tax Appellate Tribunal has all along been doing excellent work and has acquired a great tradition for its judicial work of which any judicial body would be proud."

Hon'ble Mr. Justice A.K. Sarkar, Former Chief Justice of India. (Ruby Jubilee Souvenir - 1981 (40th Anniversary)

56. S. 92C : Transfer pricing – Transfer pricing adjustment in relation to advertisement, marketing and promotion (AMP) expenses incurred by the assessee for creating or improving the marketing intangible for and on behalf of the foreign AE is permissible – Application of Bright Line Test to segregate the AMP expenses into routine and non-routine in nature upheld. [S. 92B, Rules 10A, 10B]

Facts:

Assessee was a wholly owned subsidiary of LG Electronics Inc, a Korean company. L.G. Electronics Inc. was engaged in the business of manufacture, sale and distribution of electronic products and electrical appliances. Assessee, in the capacity of a licensee, obtained a right to use the technical information, designs, drawings and industrial property rights for the manufacture, marketing, sale and services of the agreed products on payment of royalty. LG Korea allowed the assessee to use its brand name and trademarks for the products manufactured in India during the validity period of the agreement. LG Korea did not demand any royalty payment for use of LG brand name and trademarks during the year in question. Transfer Pricing officer (TPO) in his order dated 29th October 2010 observed that the assessee's expenses on advertisement, marketing and promotion (AMP expenses) were 3.85 per cent of its sales as opposed to those incurred by the comparable companies which came to 1.39 per cent. TPO held that the assessee was promoting LG brand owned by its foreign AE and therefore should have been adequately compensated by the foreign AE. TPO applying the Bright Line Test, held that the expenses upto 1.39 per cent of the sales should be considered as having been incurred for the assessee's own business and the excess 2.46 per cent (3.85 per cent - 1.39 per cent) should be treated as having been incurred on brand promotion of the foreign AE which was proposed as a transfer pricing adjustment.

Issue:

Whether transfer pricing adjustment in relation to advertisement, marketing and sales promotion expenses incurred by the assessee was justified. Whether the AO was justified in holding that the assessee should have earned a mark-up from the associated enterprise in respect of AMP expenses alleged to have been incurred for and on behalf of the AE.

Held:

Before going into the merits of the matter, the first issue which was to be decided by the Special bench was whether the TPO had the jurisdiction to make the transfer pricing addition in respect of the AMP expenses when that particular transaction was not referred to him by the AO. Sub-section (2A) was inserted in section 92CA by the Finance Act, 2011 w.e.f. 1st June 2011 to empower the TPO to assess any international transaction, other than the one referred to him u/s. 92CA(1), which comes to his notice during the course of the proceedings before him. Another amendment of relevance was the insertion of sub-section (2B) by the Finance Act, 2012 with a retrospective effect from 1st June 2002 which provided that the TPO would have jurisdiction in respect of an international transaction where the assessee has not furnished the report under section 92E in respect of such transaction and it comes to the notice of the TPO during the course of the proceedings before him.

Special bench in its majority decision held as follows:

Sub section (2A) of section 92CA which widened the powers of the TPO came into effect from 1st June 2011 and had no applicability in the present case where the TPO passed the order on 29th October 2010.

Amendment by the Finance Act, 2012 incorporating sub-s. (2B) of s. 92CA was retrospective and applicable w.e.f. 1st June, 2002. Thus, the TPO could have examined the transaction relating to AMP expenses which came to his notice during the assessment proceedings as the assessee had not reported the transaction in its report under section 92E of the Act.

Condition of taking the CIT's approval by the AO before making a transfer pricing reference is prescribed only in section 92CA(1) and the same cannot be read into sub-sections (2A) and (2B).

Transfer pricing adjustment in relation to advertisement, marketing and promotion expenses incurred by the assessee for creating or improving the marketing intangible for and on behalf of the foreign AE is permissible.

A 'transaction' for incurring brand promotion expenses can exist even without an express agreement between the assessee and its AE.

Transaction of brand building by the assessee is in the nature of 'provision of service' which is one of the components of the definition of 'international transaction'.

The characterisation of a transaction as an international transaction cannot be denied or negated because AMP expenditure was incurred in India and the amounts were paid by the assessee to independent parties in India.

Concept of economic ownership of a brand is not recognized for the purposes of the Act. Assessee's argument that AMP expenses incurred in India lead only to the building of the economic ownership of a foreign brand, which vests solely with the Indian assessee was rejected.

Application of Bright Line Test was upheld since the same was only used to segregate the AMP expenses incurred by an assessee into routine expenses i.e. for its own business and non-routine expenses i.e. for promoting brand value of the AE. Bright line test was not used to determine the Arms Length Price.

Special bench did not approve of the benchmarks or the comparables adopted by the TPO to apply the 'bright line test'. It laid down certain criteria/parameters for selection of comparables for applying the 'bright line test' and determination of the cost/value of the international transaction.

The fact that the overall net profit earned was better than the comparables is irrelevant. The correct approach under the Transactional Net Margin Method is to consider the operating profit from each international transaction in relation to the total cost or sales or capital employed etc. of such international transaction and not the net profit, total costs, etc. of the assessee as a whole on entity level.

The fact that the orders of the lower authorities do not refer to any method employed for determining the ALP of the international transaction is not detrimental if the ALP in substance has actually been computed by applying the cost plus method.

Section 37 of the Act and the arm's length proceedings under Chapter X of the Act operate independently. The AMP expenses, allowable as expenditure under s. 37(1) of the Act, would not affect determination of the ALP of an international transaction. (AY. 2007-08)

L.G. Electronics India Pvt. Ltd. v. ACIT (2013) 140 ITD 41 / 22 ITR 1 / 83 DTR 1 / 152 TTJ 273(SB) (Delhi)(Trib.)

Editorial: Delhi High Court in *Sony Ericsson Mobile Communications India (P.) Ltd v. CIT (2015) 231 Taxman 113) (Mag)/374 ITR 118/ 276 CTR 97 (Delhi)(HC)* agreed with the decision of the Special bench on the aspect of jurisdiction of the TPO under section 92CA(2B) and also approved the ratio that AMP expenses constitute an international transaction. High court, however, rejected the use of bright line test for segregation of routine and non routine AMP expenses. High Court also reversed the ratio of the Special bench with respect to aggregation of closely linked transactions and the application of TNMM. Delhi High Court in *Maruti Suzuki India Ltd. v Commissioner of Income Tax (2016) 381 ITR 117 (Delhi)/ (2016) 282 CTR (Del) 1* held that the decision in Sony's case holding that there is an international transaction as a result of the AMP expenses cannot be held to have concluded the issue in all cases. Court held that the revenue had failed to demonstrate the existence of an international transaction in the present case. Court observed that assessees in Sony's case were distributors of products manufactured by foreign AEs (unlike the present case where the assessee is a manufacturer) and that none of the assessees in Sony appeared to have questioned the existence of an international transaction.

Special leave has been granted by the Supreme Court to the assessee as well as revenue on this vexed issue and awaits final adjudication. (*Reebok India Company Ltd. v. ACIT Civil Appeal no. 146 of 2016) / (CIT v. Haier Appliances India (P.) Ltd. (2016) 242 Taxman 256 (SC)*)

"The Tribunal has played a notable part in resolving the disputes which inevitably arise between the Department and the citizens in the matter of their assessments. By and large the Tribunal has inspired confidence by its sense of fairness."

Hon'ble Mr. Justice H. R. Khanna, Former Judge, Supreme Court of India (Ruby Jubilee Souvenir -1981 (40th Anniversary)

57. S. 92C : Transfer pricing – Arms' Length Price – Reference to Transfer Pricing Officer – Before invoking the provisions of ss. 92C and 92CA, there is no legal requirement for the Assessing Officer to prima facie demonstrate tax avoidance – These provisions can be invoked by the Assessing Officer and he can proceed to determine the arm's length price where he either finds the existence of circumstances mentioned in cls. (a) to (d) of sub-s. (3) of s. 92C or where he considers it necessary and expedient to refer the determination of ALP to the Transfer Pricing Officer.

Facts:

The assessee is an Indian company engaged in the business of development and export of software. The assessee was also entitled to deduction under s.10A of the IT Act, 1961 in respect of the profits and gains derived from export of software. In the course of assessment proceedings, it was noticed that assessee had received the sum of Rs. 7,96,26,846 from its associate enterprise—DB Software Solutions, LLC, USA and had paid the sum of Rs. 37,64,86,959, i.e., on account of marketing services (Rs. 9,32,66,856) and on site software development services (Rs. 28,32,20,103) to its subsidiary company Aztec Software Inc., USA. The Auditor's Report under section 92E in Form No. 3CEB was also filed along with the return. However, in view of the Board's Instruction No. 3 of 2003 dt. 20th May, 2003, the Assessing Officer made a reference to the Transfer Pricing Officer (TPO), Bangalore under s. 92CA for determining the ALP.

The said order of the Assessing Officer was challenged before the CIT(A) on various grounds which included the ground challenging the jurisdiction of the Assessing Officer under section 92C of the Act.

The Special Bench was constituted to adjudicate the following questions of law as modified after hearing parties-

1. Whether it is a legal requirement under the provisions contained in Chapter X of the IT Act, 1961 that the AO should prima facie demonstrate that there is tax avoidance before invoking the relevant provisions ?

2. Whether it is a legal requirement under the provisions contained in Chapter X of the IT Act, 1961 that the AO should prima facie demonstrate that any one or more of the circumstances set out in clauses (a), (b), (c) and/or (d) of sub-section (3) of section 92C of the Act are satisfied in the case of any assessee, before his case is referred to the Transfer Pricing Officer under sub-section (1) of section 92CA for computation of the arm's length price ?

3. Whether the AO is required to record his opinion/reason before seeking the previous approval of the CIT under s. 92CA(1) of the IT Act, 1961.

4. Whether before making a reference to the Transfer Pricing Officer under s. 92CA(1) r w s. 92C(3) of the IT Act, 1961, is it a condition precedent that the AO shall provide to the assessee an opportunity of being heard ?

5. Is the approval granted by the CIT under s. 92CA(1) justiciable ? If so, can it be called in question in appeal on the ground that it was accorded without due diligence or proper application of mind ?

6. What is the legal effect of Instruction No. 3 of 2003 dt. 20th May, 2003 issued by the CBDT on transfer pricing matters?

7. What is the role of the AO after receipt by him of the order passed by the Transfer Pricing Officer under s. 92CA(3) of the IT Act, 1961 ?"

Views:

Provisions of Sections 92C and 92CA reveal that these provisions can be invoked by the AO and he can proceed to determine arm's length price where he either finds the existence of the circumstances mentioned in cls. (a) to (d) of sub-section (3) or where he considers it necessary and expedient to refer the determination of ALP to the TPO. There is no other requirement for invoking these provisions by the AO. Besides as per mandate of s. 92(1) income from international transactions between associated enterprises has to be computed having regard to arm's length price. The language used by the legislature is plain and unambiguous and there is nothing in the language employed by the legislature on the basis of which it can be said that AO must demonstrate the avoidance of tax before invoking these provisions.

Sections 92C and 92CA, are independent of and distinct from each other. The provisions of s. 92C(3) of the Act confer powers on the AO to determine the ALP himself where the circumstances mentioned in cls. (a) to (d) of the sub-section exist and is not bound to refer the case of the assessee to the TPO. On the other hand, the AO may refer the case of the assessee to the TPO if he considers it necessary or expedient to do so. The AO may consider it necessary or expedient to refer the case of the assessee to the TPO even without considering the existence of circumstances mentioned in s. 92C of the Act. The AO has only to be satisfied that it is necessary or expedient to make a reference to the TPO. Now under what circumstances, the Assessing Officer would consider it "necessary" or "expedient" would depend upon facts of each case.

Held:

Question no.1-

Although Chapter X has title "Special provision relating to avoidance of tax" and aim of various sections under Chapter X is to check avoidance of taxes, diversion of income and funds by non-residents from India, there is no such requirement of establishment of "tax evasion" before initiation of proceedings for determination of arm's length price under Sections 92C and 92CA.

Question no.2-

The AO is not required to demonstrate the existence of the circumstances set out in cls. (a) to (d) of sub-s. (3) of s. 92C of the Act before referring the case of the assessee to the TPO for determining the ALP under s. 92CA(1) of the Act.

Question no.3-

There is nothing in the section to suggest that AO should hear the assessee or record reasons before making reference to TPO. The AO should have some material with him to justify reference to TPO.

Availability of some material on record is essential as he has to obtain approval of the CIT for his action.

Question no.4-

The assessee cannot be asked to have a choice whether in his case ALP should be determined by the AO or by TPO. As per the statutory provision, the TPO is required to provide the opportunity of being heard to the assessee in the process of determination of ALP.

Question no. 5-

It is settled law that the CIT cannot grant approval in a mechanical manner, and this provision is clearly understood to provide some check on arbitrary exercise of power by the AO. Any misuse of such exercise of discretion can be corrected by way of judicial review by statutory appellate authorities and ultimately the Courts.

Question no.6-

CBDT Instruction No. 3, dt. 20th May, 2003, directing all officers of the Department to refer the matter to TPO for determination of ALP where the aggregate value of international transaction(s) exceeds Rs. 5 crores is binding on the Departmental authorities.

Question No.7-

Prior to substitution of sub-s. (4) of s. 92CA by the Finance Act, 2007 w.e.f. 1st June, 2007, order of TPO under s. 92CA(3) was not final and binding on the AO and after recording reasons, the AO could take transfer pricing other than one determined by TPO. (AY. 2002-03)

Aztech Software & Technology Services Ltd. v. ACIT (2007) 107 ITD 141/109 TTJ 892/ 15 SOT 49/ 294 ITR 32(AT)(SB) (Bang)(Trib).

Editorial : The issue on merits of determination of ALP was set aside restored to the file of the AO to determine fresh ALP in the light of observation made by the Tribunal in the Order and in accordance with the regulations. The questions relating to jurisdiction only have been digested.

On appeal before the Bombay High Court on the merits of Computation of ALP, the High Court dismissed the appeal observing that no question of law arises for examination by the High Court without raising any patent illegality or perversity and left to the Lower Appellate Authority to re-determine the issue without expressing any opinion on any of the aspects.

58. S. 115JA : Company – Book profit – Deemed income – Provision for bad and doubtful debts, advances and investments need not be added / disallowed while computing Minimum Alternate Tax ("MAT") [Companies Act, 1956, S. 349]

Facts:
The assessee, Usha Martin Industries Ltd filed its return of income declaring loss under the normal provisions and book profit under section 115JA of the Income-tax Act, 1961. While computing "book profits" for the purposes of section 115JA, provision for doubtful debts was not added back.

Issue:
While framing the assessment order, the AO inter alia added provision for doubtful debts while calculating book profits under section 115JA of the Income-tax Act, 1961. On appeal, the CIT(A) deleted the addition.

A Special Bench was constituted to decide whether provisions made for doubtful debts, advances and investments falls within the purview of adjustments under section 115JA of the Income-tax Act, 1961?

Held:
Provision for bad and doubtful debt is not a provision for liability but provision for diminution in value of assets. Accordingly, clause (c) of the Explanation to section 115JA dealing with amounts set aside to provide for meeting liabilities, other than ascertained liabilities would not be applicable in respect of provision for bad and doubtful debts. (AY's 1997-98, 1998-99 and 2002-03). Hence the provision in question need not be added back while computing MAT. (AY. 1997-98)

Jt.CIT v. Usha Martin Industries Ltd. (2006) 105 TTJ 543 (2007) 104 ITD 249 / 288 ITR 63 (AT)(SB) (Kol.)(Trib.)

Editorial: The Supreme Court in the case of *CIT v. HCL Comnet Systems & Services Ltd. [2008] 305 ITR 409 (SC)* held that clause (c) of the Explanation to section 115JA of the Income-tax Act, 1961 cannot be invoked for adding back provision for doubtful debts. (AY. 1997-98). Finance (No. 2) Act, 2009 inserted clause (g) in the Explanation to section 115JA(2) of the Income-tax Act, 1961 with retrospective effect 1 April 1998 to provide that if any provision for diminution in the value of any asset has been debited to the profit and loss account, it shall be added for computing book profits. The amendment is made retrospectively from 1 April 1998 and applies in relation to AY 1998-99 and subsequent years.

Finance (No. 2) Act, 2009 inserted clause (i) in Explanation 1 to section 115JB(2) of the Income-tax Act, 1961 with retrospective effect 1 April 2001 to provide that if any provision for diminution in the value of any asset has been debited to the profit and loss account, it shall be added for computing book profits. The amendment is made retrospectively from 1 April 2001 applies in relation to AY 2001-02 and subsequent years.

This has also been clarified in the CBDT Circular No. 5/2010 [F. No. 142/13/2010-SO-(TPL)] dated 3 June 2010 (Refer para 40).

59. S. 115JB : Book profits – Computation – Matter Remanded. [S.14A, R.8D]

Facts:
The assessee was carrying on the business as finance and investment company, making investment in shares and securities and advancing moneys and borrowing moneys to/from industrial enterprises. The assessee had filed its return of income showing income of Rs. 6,17,39,487/-. However, the tax was paid under section 115JB at an income of Rs. 32,18,30,990/-.

Issue:
The Hon'ble President of the Tribunal, constituted this Special Bench to adjudicate the following questions:

"(i) Whether the expenditure incurred to earn exempt income computed u/s 14A could not be added while computing book profit u/s 115JB of the Act."

And

(ii) Whether investments which did not yield any exempt income should enter into the computation under Rule 8D while arriving at the average value of investment, income from which does not form part of the total income?"

Held:
The Hon'ble Special Bench decided both issues in favour of the assesse, by holding that the computation under clause (f) of Explanation 1 to section 115JB(2) is to be made without resorting to the computation as contemplated under section 14A read with Rule 8D of the Income tax Rules 1962 and only those investments are to be considered for computing the average value of investment which yielded exempt income during the year.

ACIT v. Vireet Investment (P.) Ltd. (2017) 165 ITD 27/154 DTR 241/188 TTJ 1 (SB) (Delhi) (Trib.)

Editorial: There cannot be any quarrel with the proposition that clause (f) of Explanation 1 to section 115JB(2) is in conformity to matching principles of accounting. Matching principle of accountancy provides that expenses are debited in the P&L A/c only to the extent relatable to the accrual of the corresponding income and, therefore, only expenses debited to the P&L A/c which have direct and proximate nexus with the exempt income credited to the P&L A/c are to be added back.

60. S. 119 : Instructions to Subordinate authorities, no distinction between instructions/circulars issued under section 119(1) and 119 (2), both are binding on the Revenue authorities. Consequently, Instructions of Board prescribing monetary limit for filing appeal are binding on revenue authorities – Tribunal does not have the power to review its own order – Where view taken by Tribunal was a possible view and issue are highly debatable, the said order can not be rectified under section 254(2) [S. 254(2)].

Facts:
The CBDT with the objective of reducing pendency of appeals in Tribunal, High Court and Supreme Court issued Instructions to the Revenue authorities regularly, providing monetary limits for filing of appeals. In the year 2000, the CBDT issued Instruction No. 1979 dated 27.03.2000 superseding all earlier instructions and increased the monetary limit so provided.

Issue/contentions:
Contrary to such instruction, Revenue authorities did file appeals before the Tribunal where the tax limit was lower than the limit prescribed in the Instruction. The Tribunal in the case of *ITO v. Dharamvir (253 ITR (AT) 1) (Chd Trib)* held that the Instruction would be binding on the Revenue authorities and as it is benevolent in nature as it seeks to reduce hardship of Small Tax Payers and, therefore, officers must comply with it. Following the aforesaid co-ordinate bench decision, the Tribunal dismissed the appeal of the Revenue in the Assessee's case. Thereafter, Revenue moved a Miscellaneous Application before the Tribunal in the Assessee's case as well as other cases. Keeping such applications in mind the Special Bench was constituted.

Held:
From reading of section 119(1) it is apparent that instruction and directions to the Revenue authorities by the CBDT are binding on the authorities. The only restriction which has been imposed on the CBDT is that it could not be prejudicial to the Assessee. The only difference between subsection (1) and (2) of section 119 is that subsection (1) deals with general instructions and directions, where as subsection (2) is more specific and refers to particular class of Assessees. Also, if such Instructions are not followed, it would open flood gets of arbitrariness where Revenue may follow a pick and choose policy. Further, it was held that Tribunal has limited powers under section 254(2), only those mistakes of law or facts, which are obvious, patent and glaring from records can be rectified under that section. All issues, which requires prolonged discussion, arguments, debatable and where two views are conceivable cannot be rectified under section 254(2). View taken by the Division Bench was a possible view and, therefore, the same cannot be rectified under section 254(2). (AY. 1983-84 to 1985-86)

ITO v. Bir Engg. Works (2005) 94 ITD 164 / 93 TTJ 256 (SB)(Amritsar)(Trib.)

Editorial: The CBDT Circulars in operation today in relation to monetary tax limits are a welcome step towards restricting docket explosion, especially in the higher judiciary. Supreme Court in the case of *DIT v. SRBM Dairy Farming P. Ltd. (400 ITR 9)* held that Circulars/ Instructions would even apply to pending appeals to achieve the objective of reducing docket explosion. It is pertinent observe that it was accepted position before the Court that Instructions issued by the CBDT would be binding on the Revenue authorities as it was never contested before the Court, only question before the Court was whether it would apply to pending proceedings or no.

61. S. 143(2) : Assessment – Notice – Block assessment – Whether provisions of section 143(2) are applicable to block assessment proceedings. Whether only procedural requirements of section 143(2) is applicable to block assessment proceedings and Non issuance of notice under section 143(2) would only be a case of deviation resulting into an irregularity only, which is curable, and not a nullity [S.158BC]

Issue:
President constituted a Special Bench for determining whether provisions of section 143(2) are applicable to block assessment proceedings and whether non issuance and non service of notice under section 143(2) shall have the effect of vitiating the block assessment order, rendering the assessment order void.

Held:
Clause b of section 158BC provided that AO shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, 143(2) and 143(3) and 144 shall, so far as may be apply. By interpreting the words "so far as may be" employed under said clause, it was held that provisions of section 143(2) and other provisions mentioned would apply only to the extent possible/practical and not in literal sense. However, if there is any deviation from the procedure, Revenue would have to justify the reasons behind the same. It was held that only procedural part of section 143(2) would apply to Block assessment proceedings and, therefore, provisions cannot be invoked for jurisdiction to proceed to assess the undisclosed income, which directly flows from section 158BA read with section 158BC(b). Only portion which would apply would be serving of notice under section 143(2) and justifiable reasons for deviations are to be provided. It was further held that non-issuance of notice under section 143(2) would not be a nullity, it would only be an irregularity which can be cured, as it is not a jurisdictional requirement for the AO to issue a notice under section 143(2). Only requirement is providing of opportunity of being heard, if adequate opportunity of being heard has not been provided to the Assessee then the CIT(A) may remand the matter back to the AO, directing the AO to pass a fresh assessment after giving reasonable opportunity of being heard. (AY. 1988-89 to 1998-99)

Nawal Kishore & Sons Jewellers v. Dy. CIT (2003) 87 ITD 407 / 81 TTJ 362 (SB)(Luck.)(Trib.)

Editorial : Decision has been reversed in view of the decision of the Supreme Court in the case of *ACIT v. Hotel Blue Moon (2010) 321 ITR 362 (SC)*, wherein it has been held that once assessment has to be completed under section 143(3) read with 158BC, it is mandatory to issue notice under section 143(2) as per the prescribed time limit. Failure to do so cannot be procedural irregularity and is not curable. Aforesaid decision has been thereafter consistently followed including for regular assessment by the Supreme Court itself in the case of *CIT v. Laxman Das Khandelwal (417 ITR 325)*, where the Supreme court also held that the non issuance of notice cannot be cured by invocation of section 292BB. Supreme Court in the case of *CIT v. I-ven Ineractive Ltd. (418 ITR 662)* on the basis of the facts of the case took the view that as new the address was not intimated to the AO, issuance of notice under section 143(2) on the old address of the Assessee was sufficient. It has in no manner deviated from decision in the case of Hotel Blue Moon (supra).

62. S.143(2) : Assessment – Notice – Proviso to sub-section (2) is applicable even in case of a return filed in response to notice under section 148 and no assessment can be made if notice under section 143(2) is not served within time prescribed by proviso to section 143(2). [S. 148]

Facts:
The assessee Raj Kumar Chawla (RKC) is an individual. The appellant assessee's case was reopened under section 148 of the Income Tax Act (The Act). RKC filed his return of income in reply to the said notice as per the provisions of the Act. The Assessing officer (AO) failed to issue notice under section 143(2) within stipulated time while conducting the reassessment proceedings. RKC raised an objection as there was a procedural lapse from the AO and hence requested to nullify the assessment. The matter travelled to the Hon'ble Income Tax Appellant Tribunal (ITAT) where special bench was formed to decide the issue.

Issue:
Since there were conflict of views on applicability of the proviso to section 143(2) of the Act, the matter was referred to be placed before Hon'ble President for constitution of a Special Bench on the following questions :

"1. Whether the proviso to section 143(2) of the Income-tax Act, 1961 which mandates the service of notice within 12 months from the end of the month in which return is filed, also applies to the returns filed pursuant to notice under section 148 of the Income-tax Act, 1961?

2. If the answer to the aforesaid question is in the affirmative then what is the effect of non-service of notice under the proviso to section 143(2) within the time prescribed, to the return filed pursuant to section 148 of the Income-tax Act, 1961?"

Views:
After reviewing of the entire case law, it can be seen that the Hon'ble Special Bench has considered the Income tax Provisions for both Section 143(2) and section 148 of the Act as they stood for the relevant assessment year (AY. 1995 - 96) and also CBDT Circular No. 545, dated 31-10-1989 (the purpose of service of notice). Upon careful analysis of the said provisions and circulars, the Special Bench has taken a view that timely service of the Notice under section 143(2) is mandatory assessment procedure even in case of reassessment under section 148 of the Act.

Held:
The Hon'ble Special Bench of ITAT, after going through various judgments and CBDT Circulars, held that once the return is filed pursuant to notice under section 148, it must be assumed and treated to be a return filed under section 139 and the assessment must thereafter be made under section 143 or 144 after complying with all the mandatory provisions. Therefore, it is obligatory upon the AO to issue a notice under section 143(2) of the Act, within the stipulated period as provided under the proviso. In view of the above, it was held that, "the proviso to section 143(2) which mandates the service of notice within 12 months from the end of the month in which return is filed, also applies to the returns filed pursuant to notice under section 148."

With regards to the second question, the Special Bench held that, "As regards the issue regarding effect of non-service of notice under the proviso to section 143(2) to return filed pursuant to section 148, it was tobe held that the assessment can be made if the notice under section 143(2) is not served within the time prescribed by the proviso under section 143 and, thus, the return filed will be deemed as accepted." (AY. 1995-96)

Raj Kumar Chawla v. ITO (2005) 94 ITD 1 / 92 TTJ 1245 / 1 SOT 934 (SB)(Delhi)(Trib.)

Editorial: The decision was followed by in *ACIT, C C-9, New Delhi v. Ravnet Solutions (P.) Ltd. [2018] 99 taxmann.com 351 (Delhi - Trib.)*, which in turn was challenged by the Department before the Hon'ble Delhi High Court, the Hon'ble court vide it's order dated November 28, 2017 (Reported in [2017] 399 ITR 567 (Delhi) upheld the decision of ITAT by relying on Apex Court decision in case of *Asstt. CIT v. Hotel Blue Moon [2010] 321 ITR 362/188 Taxman 113 (SC)*.

It was also followed in *ITO v. R. K. Gupta [2009] 308 ITR (AT) 49 (Delhi)*

The captioned Special Bench decision was considered as a land mark decision at the time as even if there were judgments on applicability of section 143(2)for assessment under section 143(3) of the Act, there was no judgment on applicability of provisions of section 143(2) (read with proviso) in reassessment proceedings under section 147/148 of the Act.

After the Special Bench decision, the Income Tax Act was amended for in order to regularise past notices issued under section 143(2) in pursuance to reopening of the assessments under section 148 of the Act, consequently regularising such assessments.

"… This Tribunal has been in existence for over 35 years and during this period it acquired high prestige and reputation not only amongst the lawyers practicing before it but also amongst the assesses as well as the department. It has been able to inspire confidence in the public mind in regard to its caliber, integrity and independence."

Hon'ble Shri P.N. Bhagwati Former Judge Supreme Court of India. (Members Conference - 29-10-1977)

63. S. 153A : Assessment – Search – No addition can be made in respect of an unabated assessment which has become final if no incriminating material is found during the search – An ICD is an "infrastructural facility" for S. 80-IA(4) – Container freight station is an In land port / Infrastructure facility is entitled to deduction. [S.80IA(4), 132A]

Facts:
The Assessee is a company engaged in the business of providing logistic support. A search was carried out on its premises on 10.07.2009. Thereafter, a notice under section 153A of the Act was issued to the Assessee to file its return of income. On 30.10.2009 the Assessee filed its return of income declaring total income making a claim of deduction under section 80 IA(4) on the basis that it operates an Container Freight Station "CFS", which is an eligible Infrastructure Facility.

Issue:
The AO relied on Division Bench in the case of *Container Corporation of India Limited v. ACIT (346 ITR (AT) 140) (Del Trib)* to hold that CFS would not tantamount as an Inland Port and held that the Assessee was not entitled to deduction under section 80-IA, CIT(A) confirmed the action of the AO.

The Division Bench noticed the decision of Container Corporation (Supra) and opined that matter may be referred to a special Bench of the Tribunal was constituted to hear the Assessee's appeal and the same was proposed for purposes of deciding two questions, namely, what is the scope of assessment under section 153A of the IT Act. Whether that encompasses additions not based on any incriminating material found during the search and whether the CIT(A) was justified in upholding the disallowance of deduction under section 80-IA(4).

Held:
(i) by the clear language of section 153A together with its provisos, pending assessments abate. In assessments that are abated, the AO retains the original jurisdiction as well as the jurisdiction conferred on him by section 153A for which assessments shall be made for each of the 6 assessment years separately;

(ii) In other cases, in addition to the income that has already been assessed, the assessment u/s 153A will be made on the basis of incriminating material i.e. (a) the books of accounts and other documents found in the course of the search but not produced in the course of original assessment and (b) undisclosed income or property disclosed in the course of search;

iii) After analyzing section 153A and also CBDT Circulars in cases of non-abated assessment years, it was held that no addition could be made in assessment under section 153A when no incriminating document was found and seized during the course of search, which could indicate any undisclosed income.

(iv) A Container Freight Station, like an Inland Container Depot, is an "Inland Port" having regard to the fact that it is referred to as such in the statutory provisions and in the understanding of the

CBEC, which administers the Customs Act. It has also been treated as part of the customs port for purpose of customs formalities and clearances. Accordingly, it is an "infrastructure facility" for purposes of s. 80IA(4).

All Cargo Global Logistics Ltd v. Dy. CIT (2012) 137 ITD 287 / 18 ITR 106 (SB)(Mum.)(Trib.)

Editorial : Ratio is very relevant while dealing with matters relating to Search and seizure and is one of the landmark decisions affirmed in *Allcargo Global Logistics Ltd v. CIT (2015) 235 Taxman 568 (SC)*.

The *Commissioner of Income Tax v. Continental Warehousing Corporation & Anr.(reported in [2016] 374 ITR 645 (Bom)*

In *CIT v. Container Corporation of India Ltd (404 ITR 397)* view taken in connection with ICD as an Inland Port eligible for deduction under section 80-IA(4) has been upheld.

In connection with the issue that when the proceedings are non-abated, no addition can be made if no incriminating material is found. SLP has been admitted by the Supreme Court in the case of *CIT v. Continental Warehousing Corporation Ltd. (235 Taxman 568)* and pending adjudication.

"... The Income-tax Appellate Tribunal is an outstanding example in this country of what an Appellate Tribunal should be. It has developed traditions over years which have uniformly inspired public confidence, not only by the high quality of adjudication but also by the expeditious manner in which disposing of its work."

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Hon'ble Shri R.S. Pathak Former Judge Supreme Court of India. (Members Conference - 29-10-1977)

64. S. 158BC : Block Assessment – Procedural defect – Notice u/s 158BC(a) in case of searched person directing him to file return within time less than 15 days – procedural defect – irregularity and not a nullity. [S. 132, 143(3), 148]

Facts :
Search under section 132 was conducted at the premises of the assessee on 12-3-1999. Notice for framing an assessment for the block period under section 158BC(a) was issued on 12-10-1999. In the said notice the assessee was directed to file return within 10 days. The assessee actually filed the return on 27th January, 2000. The assessment was framed on 30th April, 2001.

The sum and substance of the contention on behalf of the Assessee was that since the jurisdiction was assumed for framing an assessment by issue of notice under section 158BC(a) which gave shorter time than prescribed under the Act, such notice is illegal and consequently the assessment framed in pursuance to such notice has to be annulled. It cannot be treated as an irregularity but should be treated as illegality. The contention of the revenue on the other hand is that it is merely an irregularity and not an illegality so that due to such defect the assessment cannot be annulled but the Assessing Officer may be directed to issue fresh notice whereby sufficient time as prescribed under the Act may be given to the assessee to file return and to frame assessment thereafter.

Issue :
"(i) Whether the defect in the notice under section 158BC which gave less than 15 days time' to the assessee to file the return affects the validity of the assessment so as to annul or quash the same or whether it is a mere procedural irregularity which can be cured, with the result that the assessment may only be set aside to be reframed after curing the defect?

(ii) Entire appeal including above referred to question."

Views :
Special bench held that notice under section 158BC in case of a person in whose case a search under section 132 has been conducted, is a procedural notice issued after assumption of jurisdiction. Any curable defect in notice served under section 158BC on a person, in whose case a search under section 132 has been conducted, cannot render block assessment proceedings to be null and void. Where pursuant to a search, Assessing Officer, for framing assessment for block period under section 158BC(a), issued a notice to assessee directing him to file return within 10 days, defect in notice issued under section 158BC(a) in so-far it did not allow clear 15 days time for filing of block return was a procedural irregularity which could be cured by serving a valid notice.

Held :
(i) It will be incorrect to equate the notice issued under section 158BC(a) as akin to notice under section 148. It is true that before framing any assessment, the assessing authority is required to assume jurisdiction for such assessment, reassessment etc. In the case of assessment of search cases under Chapter XIV-B jurisdiction flows from section 158BA(1), the trigger point for the same is conducting a search under section 132 and not issue of notice under section 158BC(a). Having once

assumed jurisdiction, if there is any defect in the notice, it can be considered only as an irregularity and not an illegality.

(ii) There is defect in the notice insofar as the assessee was asked to file the return within 10 days however, time is not the essence of notice under section 158BC(a). The assessee filed the return much beyond 45 days' time and still the Assessing Officer accepted the same and proceeded to complete the assessment within the limitation period prescribed under section 158BE of the Act. Such defect can be only an irregularity and not an illegality.

(iii) A nullity results from an error which is incurable and, therefore, fatal to the proceeding (see Aiyer's Law Terms and Phrases, 6th Edn., P. 485). An illegality occurs when there is breach of some provision of law and an irregularity, which is usually, amendable, occurs when some error of procedure is committed in the course of a proceeding (See *Chaube Jagdish Prasad v. Ganga Prasad Chaturvedi AIR 1959 SC 492)*. When there is a contravention of some provision of law, the question often arises whether the act done in the breach of such provision is perforce a nullity. If the provision is only directory, an act done in contravention thereof is manifestly not a nullity. However, if the provision is couched in a mandatory form, prima facie, it would be a nullity. Every act done in breach of a mandatory provision, however, is not necessarily a nullity.

(iv) On service of a defective notice under section 158BC, a procedural irregularity has taken place which can be cured by serving a valid notice. The Assessing Officer cannot complete the Block Assessment without service of a valid notice under section 158BC of the Act. As the Assessing Officer had the jurisdiction to make the Block Assessment, and after the bestowing of jurisdiction on him, a procedural irregularity has taken place, it is open to him to correct the procedural irregularity and then complete the block assessment. The assessment should be set aside for being redone de novo from the stage where irregularity had occurred and the assessment proceedings cannot be declared null and void.

Krishna Verma (Smt.) v. ACIT 107 ITD 1 / 109 TTJ 173 / 13 SOT 96 (SB)(Delhi)(Trib.)

Editorial : After considering the decision of Special Bench in *Krishna Verma (Smt) v. ACIT (Supra)*, in *Godavari townships Pvt Ltd v. DCIT [2014] 45 taxmann.com 175 (Vish)(Trib)* it was held that non-striking of relevant portion in a penalty notice is a jurisdictional error. In *Manoj Aggarwal v. DCIT [2008] 113 ITD 377 (DEL) (SB)* it was held that unless a clear time of fifteen days is given as envisaged in section 158BC (a)(i), notice will be rendered invalid and, hence, assumption of jurisdiction under section 158BD by issue of such notice and all further proceedings of block assessment pursuant thereto will also be rendered invalid and void.

65. S. 158BD : Block assessment – Undisclosed income of any other person – Satisfaction – Notice period – A clear time of fifteen days is required to be given in the notice for furnishing return in the prescribed form otherwise the notice will be rendered invalid and, hence, assumption of jurisdiction under section 158BD by issue of such notice and all further proceedings of block assessment pursuant to such notice will be invalid and void – Recording of satisfaction is mandatory. [S. 158BC, 158BE]

Facts:

[The primary issue dealt with in this article is dealt with in the appeal in the case of M/s. Bishan Chand Mukesh Kumar – IT (SS) A. No. 33/Delhi/2006 and the facts are reproduced from the same]

Pursuant to a search in the case of Mr. Bishin Chand Agarwal and Mr. Manoj Agarwal, a notice u/s 158BD (pertaining to assessment in the case of a person other than the searched person) came to be issued in the case of the Assessee firm M/s Bishan Chand Mukesh Kumar. The said Notice and the consequential assessment order came be challenged on various grounds viz.,

(a) that there are material irregularities in the said notice;

(b) that the said notice is not in conformity with the provisions of sub-clause (i) of sub-section (a) to section 158BC;

(c) that the said notice was not in pursuance of a note of satisfaction as required in law and in particular section 158BD of the Act;

(d) that the impugned note of satisfaction was bad in law for the reason that it was not in conformity with law and beyond time; (emphasis supplied) and, that

(e) the proceedings are barred by limitation.

Issue:

Apart from the other issues as stated above the primary issue before the Hon'ble Tribunal was, whether it is imperative to record satisfaction before commencement of the proceeding under section 158BD of the Income Tax Act for the purpose of framing assessment in the case of a person other than the searched person.

Held:

It was held that block assessment proceeding is distinct and different from the regular assessment proceeding and it deals exclusively with block assessment relating to search and all other proceedings are alien to it. Chapter XIV-B is a complete code by itself providing for the mode and manner of making an assessment in cases of search as different from a regular assessment. It covers two types of persons: firstly, the person searched; secondly, the persons not searched and in respect of whom the search material discloses the existence of undisclosed income in their hands. Section 158BC provides the procedure of making an assessment in the case of the person searched and

section 158BD provides the mode and manner of making an assessment in the case of a person not searched but in respect of whom there is discovery of undisclosed income in his hands.

Relying on the judgement of the Hon'ble Supreme Court in the case of *Manish Maheshwar v. ACIT – (2007) 208 CTR 97 / 159 Taxman 258 / (2008) 204 Taxation 205 (SC) / 3 SCC 794* it was firstly held that recording of satisfaction is mandatory in order to initiate proceedings u/s 158BD of the Act. It was further held that the satisfaction as contemplated under section 158BD of the Act can be recorded only and only in the course of the section 158BC proceeding and nowhere else since it is the Assessing Officer assessing the person searched who goes through the seized material and comes to a decision as to whether there is any undisclosed income unearthed as a result of search, if so its nature and to whom it belongs. In such circumstance, the recording of such satisfaction is impliedly to be done in the course of the section 158BC proceeding. It was ultimately held such satisfaction cannot be recorded beyond the date of the block assessment in the section 158BC proceeding and the date of the block assessment is the outer limit for recording such satisfaction.

On the quality of satisfaction, it was further held that the satisfaction contemplated in section 158BD is totally different than contemplated in section 147. It is fundamental that the Assessing Officer finds out whether there is undisclosed income. Hence, the note of satisfaction must contain a positive finding by the Assessing Officer making the assessment under section 158BC indicating therein the undisclosed income found as a result of his examination of the seized material, the person to whom such income belongs and proceed accordingly as provided for in the said section.

Manoj Aggarwal v. Dy. CIT (2010) 113 ITD 377 / 117 TTJ 145 / 11 DTR 1 (SB)(Delhi)(Trib.)

Editorial: The ratio laid down in the said judgement is relevant even for the new regime of block assessment as contained in sections 153A to 153D of the Act. However, it needs specific mention that so far as the ruling of the Hon'ble Tribunal that recording of satisfaction has to be only during the course of assessment proceeding u/s 158BC of the Act, the said observation no longer holds good in view of the Judgement of the Hon'ble Supreme Court in the case of *CIT v. Calcutta Knitwears – (2014) 223 Taxman 115 (SC)* wherein it has been held that the bare reading of the provision indicates that the satisfaction note could be prepared by the Assessing Officer either at the time of initiating proceedings for completion of assessment of a searched person under section 158BC or during the stage of the assessment proceedings. However, it does not mean that after completion of the assessment, the Assessing Officer cannot prepare the satisfaction note to the effect that there exists income belonging to any person other than the searched person in respect of whom a search was made under section 132 or requisition of books of account were made under section 132A. The legislature has not imposed any embargo on the Assessing Officer in respect of the stage of proceedings during which the satisfaction is to be reached and recorded in respect of the person other than the searched person. However, the Judgement in the case of Manish Maheshwari (supra) was not cited before the Hon'ble Supreme Court in the case of Calcutta Knitwears (supra). The judgement of the Hon'ble Tribunal is affirmed by the Hon'ble High Court in the case of *CIT v. Praveen Fabrics – (2011) 198 Taxman 463 (Punjab and Harayana).*

66. S. 158BC : Block assessment – Surcharge – Amendment w.e.f 1-6-2002 – Levy of surcharge in respect of the search initiated prior to 1-6-2002 was not valid in law. Tax rate of tax applicable to undisclosed income is to be determined as per Sec 158BA r.w.s. 113 – Levy of surcharge in respect of the search initiated prior to 1-6-2002 was not valid in law. [copy from original]

Facts:
Assessee's undisclosed income for the block period from 01.04.1989 to 18.11.1999 was determined under section 158BC of the Act and accordingly tax was levied. In addition to the tax, surcharge was also levied as per section 113 of Finance Act, 2002 (FA 2002) w.e.f 01.06.2002. Assessee's contention was that surcharge could not be levied to the block period in question. However, the Income tax department contended that the section 113 of FA 2002 had as much legal authority as the Act and mandated levy of surcharge even though there is no reference to surcharge in a block assessment.

Issues:
The issues before the Special bench were as under:-

Whether the proviso to section 113 of FA 2002 levying surcharge on tax would apply to undisclosed income for a block period from 01.04.1989 to 18.11.1999 which is prior to insertion of the proviso?

Whether proviso to section 113 inserted by FA 2002 enabling enhancement of tax determined by an amount of surcharge is clearly a substantive provision, and in absence of specific provision in the statute providing for retrospective operation, same cannot have retrospective effect?

Whether the levy of sur charge fails because of the ambiguity or unworkability in the provisions of the Finance Act. Further, whether the legislature intended to levy surcharge in cases covered under section 113 and if it could be considered as a drafting error?

Views:
The Supreme Court in *CIT v. Suresh N. Gupta (297 ITR 322)* along with various other decisions had held that surcharge was leviable in a case of block assessment even prior to the amendment made to section 113 w.e.f 01.06.2002. The Allahabad High Court in *CIT v. Jugal Kishore Gupta (221 CTR 352)* had followed the decision of the Supreme cour in the case of Suresh Gupta (supra).

Held:
The special bench of the tribunal held that the proviso to section 113 inserted by the FA 2002 is a substantive provision and not merely a procedural provision. The provision does not specifically provide for retrospective operation and hence cannot have retrospective effect. Further, the rate of tax on undisclosed income in block assessment is provided at 60% and there is no mention of any levy of surcharge over and above the tax. Chapter XIVB is a self-contained code and undisclosed income of a block period is distinct from total income computed with reference to a previous year. The levy of surcharge prior to 01.06.2002 is not permissible in respect of tax determinedon the income computed under a block assessment made prior to 01.06.2002. The proviso inserted is neither retrospective not declaratory or clarificatory having any retroactive operation.

The proviso to section 4(1) of the Finance Act and section 158BA(2) of the Act enables levy of surcharge. There is no reference to the Central Act in either of these sections which prescribes the levy of surcharge. Hence, the Finance Act has to be examined de-hors these two charging sections to ascertain whether the surcharge was leviable on undisclosed income of a block period. However, the charging section in the Finance Act does not authorise the levy of surcharge. The Finance Act has no mention to 'undisclosed income' or 'block period' and the rates are only with regard to 'total income' of a previous year. The proviso in the Finance Act relating to levy of surcharge was introduced for the first time under the rates prescribed for advance tax (i.e. Part III). Thus, the legislature never intended to levy surcharge in tax on undisclosed income relating to a block period. Further, language of a charging provision which imposes a charge of tax must be construed strictly. If the taxing statute fails to reflect its intendment clearly, Courts cannot help the draftsmen by a favourable construction.

Thus, levy of surcharge prior to introduction of the proviso to section 113 w.e.f. 01.06.2002 fails as is it is riddled with complexity, making it unworkable and impossible to harmonise.

Merit Enterprises v. Dy. CIT (2006) 102 TTJ 748 / 101 ITD 1 (SB)(Hyd.)(Trib.)

Editorial: The decision of the Supreme Court in *CIT v. Suresh N. Gupta (2008) 297 ITR 322 (SC)*, held that surcharge in addition to income tax is leviable on undisclosed income and the proviso to section 113 is clarificatory in nature. However, the Supreme Court in *CIT v. Vatika Township (P.) Ltd (2014) 49 taxmann.com 249 (SC)* overruled the decision of Suresh Gupta (supra) and held that the proviso to section 113 would operate prospectively w.e.f. 01.06.2002, thereby, concurring with the view of the Special bench.

67. S. 158BE : Block assessment – Time limit – Panchanama – A panchanama which does not record a search does not extend limitation, hence order held to be invalid. [S. 132]

Facts:

Assessee (Shree Ram Lime Products Ltd) was searched under section 132 of the Income Tax Act, 1961 (the Act) with regard to its Bhatta premises and office premises. Two authorisations dated 17.12.2002 and 20.12.2002 for search were issued. In relation to the first authorisation, three different panchanamas were drawn on 20.12.2002, 21.12.2002 and 03.01.2003. It is noteworthy that the last panchanama dated 03.01.2003 was executed only for the purpose of revocation of the prohibitory order passed on 21.12.2002 under section 132(3) of the Act. Whereas, in relation to the second authorisation, Panchanamas were drawn on 20.12.2002, 24.12.2002, 26.12.2002 and 27.12.2002. The AO passed a block assessment order for the block period (i.e. Assessment years 1997-98 to 2003-04) on 31.01.2005 in the light of the last panchanama executed on 03.01.2003. Being aggrieved, the assessee filed an appeal before the CIT(A) and partly succeeded. Against the CIT(A)'s order, the revenue filed an appeal before the ITAT and the assessee preferred a cross objection challenging the validity of the assessment order dated 31.01.2005. The main contention of the assessee before the special bench was that in the light of section 158BE of the Act, the AO ought to have passed an assessment order on or before 31.12.2004 (i.e. within two years from the end of the month in which the last of the authorisations for search under section 132 of the Act was executed). It was the contention of the assessee that the last panchanama executed on 03.01.2003 was not a valid panchanama in the eyes of law as no search and seizure activity was carried on the said day and the AO was not correct in passing the assessment order on 31.01.2005 by computing the time limit from the said panchanama. The assessee in short contended that the assessment order dated 31.01.2005 was barred by limitation.

Issue:

The special bench was constituted in order to adjudicate on the following question:

"Whether on the facts and in the circumstances of the case, the period of limitation for completion of the block assessment as per Sec.158BE read with Explanation 2 is to be reckoned from the end of the month in which last panchnama on the conclusion of search is drawn on the assessee or last Panchnama of the last authorization even when it is not last Panchnama drawn on the assessee and one or more valid Panchnama are drawn on the assessee thereafter in execution of any former authorization."

Views:

While dealing with aforesaid controversy, the special bench on the first place considered the applicability of the decision of the Rajasthan High Court in the case of "White & White Minerals (P.) Ltd. [2011] 200 Taxman 192/ 12 taxmann.com 120 (Raj.)" wherein the Court had dismissed an appeal filed by the Revenue against the order of the ITAT upholding that for the purpose of computing limitation as described in section 158BE, the last panchnama when search and seizure operation took place was to be considered and not a subsequent panchanama revoking a prohibitory order as a formality. The special bench found the resemblance in the facts before it with the facts present before the Rajasthan High Court in the aforesaid decision. From a perusal of the panchanama dated

03.01.2003, the special bench noticed that the proceedings were carried out from 5.50 pm to 6.20 pm and that too, only to revoke the prohibitory order passed on 21.12.2002. It was evident from the said panchanama that no search or seizure activity was carried out by the department on the said date and whatever material was required to be seized was already seized and taken in possession on earlier occasions. The special bench also referred to the decision of the Karnataka High Court in the case of *C. Ramaiah Reddy v. Asstt. CIT [2011] 339 ITR 210 (Kar)* and observed that the court in the said decision while interpreting the meaning of "panchanama" had categorically held that "Panchnama" which is mentioned in Explanation 2 (a) to Section 158BE is a panchnama which authorize a conclusion of the search. Clearly, if a panchdnama does not, from the facts recorded therein, reveal that a search was carried out at all on the day which it relates, then, it would not be a panchnama relating to search and, consequently, it would not be a panchnama of the type which finds mention in Explanation 2 (a) to Section 158BE".

Held:

In the light of the aforesaid discussion, the special bench concluded that the panchanama dated 03.01.2003 could not be considered panchanama finding mention in Explanation 2 to section 158BE of the Act as the search was already concluded by the said date and the said panchanama was executed only for a limited purpose to revoke the prohibitory orders passed on 21.12.2002. The panchanama dated 21.12.2002 was to be considered as the last panchanama in which search and seizure activity was carried on and thus, a period of limitation must be reckoned considering the said panchanama. Finally, the special bench held that the assessment order passed on 31.01.2005 reckoning the time limit by considering the last panchanama dated 03.01.2003 was barred by limitation and the same was quashed. (BP. 1997-98 to 2003-04)

ACIT v. Shree Ram Lime Products Ltd. (2012) 137 ITD 220 / 73 DTR 68/147 TTJ 121 / 17 ITR 1(SB) (Jodh.)(Trib.)

68. S. 206AA : Requirement to furnish Permanent Account Number – Rate under the section does not override beneficial rate under DTAA. [S. 90(2)]

Facts:
The assessee made certain payments in the nature of fees for technical services to non-residents, who did not furnish PAN. In making such payments, the assessee adopted the lower tax rate provided under the DTAA.

Issue/contentions :
If the non-resident payee does not furnish PAN, is the payer required to deduct tax as per section 206AA (i.e. highest rate of twenty percent) or at the rate in force in view of section 195 read with section 2(37A) and the relevant provisions of the DTAA?

The assessee contended that the provisions of DTAA prevail over the provisions of the Act to the extent beneficial to the assessee. Accordingly, tax was to be withheld as per the lower tax rate provided under the DTAA and not at the rate as per section 206AA. The department's case was that as the provisions of section 206AA start with a non-obstante clause, they override all other provisions of the Act, including section 90(2). Accordingly, the lower rate under the DTAA could not be claimed.

Held:
The Special Bench noted that at the relevant time, the provisions of 139A(8) read with Rule 114C did not oblige a non-resident to obtain PAN. Such being the case, it could not be held that a non-resident had to furnish his PAN to the payer. It was further held that as the provisions of the DTAA override the provisions of the Act in view of section 90(2) of the Act, the assessee was eligible to claim the benefit of the lower tax rate under the DTAA. It was further held that as the provisions of the DTAA override the charging provisions of the Act, they would most certainly also override the machinery provisions of the Act, including section 206AA.

Nagarijuna Fertilzers and Chemicals Ltd. v. ACIT (2017) 149 DTR 137 /185 TTJ 569 (Hyd.) (Trib.) (SB)

Editorial: The ratio of the Special Bench reiterates in yet another sphere of income tax, the supremacy of the DTAA over the Act. The ratio of the Special Bench has been affirmed by the Delhi High Court in the case of *Danisco India P. Ltd. v. UOI (2018) (404 ITR 539).*

69. S. 221 : Collection and recovery – Penalty – Tax in default – Self assessment tax – Failure to pay self assessment tax while filing the return though taxes are paid while filing the revised return, the assessee is liable to pay the penalty. [S. 140A]

Facts:
The assessee filed the return of income but did not pay self-assessment tax. Pursuant thereto, assessee filed revised return and paid the said tax.

Issue: The AO imposed penalty under section 221 of the Act for non-payment of tax under section 140A at the time of filing of original return. Hon'ble President has constituted this Special Bench to decide the following question:

Whether an assessee is liable to penalty under section 221(1) of the Act in a case in which the though the assessee has not paid the self-assessment tax under section 140A, while filing the return of income, but revises the income, by filing revised return of income, and pays the tax on the revised return of income at the time of filing the revised return of income?

Held:
The penalty under section 221(1) r.w.s. 140A(1) is actually leviable on the facts of a particular case or not will depend on the facts of that case and depending on, inter alia, the factual finding as to whether or not the default of the assessee was for good and sufficient reasons. Answered against the assessee. (AY. 2008-09)

Claris Life Sciences Limited v. DCIT (2017) 167 ITD 1/157 DTR 153 /189 TTJ 409 /59 ITR 450 (SB) (Ahd) (Trib)

Editorial : In the case of *CIT v. Dadu Vala & Co. [1988] 170 ITR 491 (Raj.)* it was held that Imposition of penalty under section 221(1) is not automatic but discretionary. Obviously, the exercise of discretion is not to be arbitrary but is dependent on the facts and circumstances of the case. However, in the case of *CIT v. Smt. Vijayanthimala [1977] 108 ITR 882 (Mad.)* it was held that An assessee incurs a liability to penalty the moment default has occurred, notwithstanding the fact the default has ceased to exist by the time the authorities concerned take action to penalise the assessee for the said default

70. S. 234D : Interest on excess refund – Provision applicable retrospectively – Clarification given in Explanation 2, inserted by Finance Act, 2012, applicable for assessment years commencing from 1st June 2003, if the proceedings in respect of such A.Y. are completed after the said date

Facts:
In this case, the assessment year involved was AY 2003-04. The assessment was completed on 30th November 2005 and accordingly, the assessing officer opined that the assessee was liable to pay interest under section 234D of the Income-tax Act, 1961.

The Assessing Officer was of the view that the assessee was liable to pay interest for the said year in light of the insertion of Explanation 2 to section 234D vide Finance Act, 2012, which sought to clarify that the provision would apply with retrospective effect from 1st June 2003. The Commissioner (Appeals) confirmed the order of the AO in this regard.

Issue/contentions:
The question before the Hon'ble Special Bench was:

"Whether, by virtue of insertion of Explanation 2 to section 234D by Finance Act 2012 with retrospective effect from 1st June 2003, the assessee was liable to pay interest under section 234D for AY 2003-04?"

Held:
Explanation 2 was inserted in section 234D by the Finance Act, 2012 with retrospective effect from 1st June 2003, clarifying that the provisions of section 234D will also apply to the assessment year commencing before the first day of June, 2003 if the proceedings in respect of such assessment year is completed after the said date. Therefore, as the assessment year involved was of AY 2003-04 and since the proceedings in respect of the said year were completed after 1st June 2003, i.e., 30th November 2005, the Tribunal held that the assessee is liable to pay an interest under section 234D. (AY 2003-04)

Kotak Mahindra Capital Co. Ltd. v. ACIT (2012) 18 ITR (T) 213 / 138 ITD 57 / 148 TTJ 393 (SB)(Mum.) (Trib.)

Editorial: Confirmed that the retrospective application of the amendment was not accepted in *DIT v. Jacobs Civil Incorporated (2011) 330 ITR 578 (Del)*, which held that section 234D did not apply to assessments prior to AY 2004-05. In *CIT v. Indian Oil Corpn. Ltd. (2012) 210 Taxman 466 (Bom)* and *CIT v. Gujarat State Financial Services Ltd. (2014) 270 CTR 83 (Guj)*, it was held that consequent to addition of Explanation 2 to section 234D by Finance Act, 2012 with retrospective effect from 1-6-2003, which amendment was clarificatory, section 234D is applicable even to period prior to assessment year 2004-05. However, as the explanation itself states retrospective application of section 234D for assessments completed prior to 1st June 2003 is not valid. Further support can be drawn from *CIT v. Reliance Energy Ltd. (2013) 358 ITR 371 (SC)* and *Sundaram Finance Ltd. v. DCIT (2019) 417 ITR 679 (Mad)*.

71. S. 234D : Interest under section 234D is leviable from AY 2004-05 onwards and would not apply for earlier year(s) even for assessments framed after 01.06.2003 or the date when refund was granted.

Facts:
Assessments were framed under section 144 read with section 147 of the Income-tax Act, 1961. The AO at the end of the order observed that interest is to be charged as applicable and accordingly interest was levied while calculating the demand. As the CIT(A) did not adjudicate the ground relating to levy of interest under section 234D, the assessee filed a rectification application. The CIT(A) deleted the levy of interest following the decision in the case of *Glaxo Smithkline Asia (P.) Ltd. v. ACIT [2006] 6 SOT 113 (Delhi)* in which it was held that no interest could be charged in respect of period prior to insertion of section 234D (which was with effect from 01.06.2003).

Issue:
As there was divergence of opinion a Special Bench was constituted to decide the issue which was "Whether, in the facts and circumstances of the case, interest under section 234D should be charged from AY 2004-05 or with reference to regular assessment framed after 01.06.2003 irrespective of the AY's involved or irrespective of the date when refund was granted?"

Held:
Provisions of section 234D are substantive and they cannot be applied retrospectively. Section 234D which has been brought on the statute from 01.06.2003 cannot be applied to AY 2003-04 or earlier years, but will have application only with effect from AY 2004-05 even though regular assessments for these years are framed after 01.06.2003 or the refund was granted for those years after the said date. (AY. 1998-99, 1999-2000, 2000-01)

ITO v. Ekta Promoters (P.) Ltd. (2008) 113 ITD 719 / 117 TTJ 289 / 10 DTR 563 (SB)(Delhi)(Trib.)

Editorial: The Delhi High Court in the case of *DIT v. Jacabs Civil Incorporated [2011] 330 ITR 578 (Delhi)* has affirmed the decision of the Special Bench by holding that the ITAT was right in deleting the interest under section 234D for the period prior to AY 2004-05. Finance Act, 2012 inserted Explanation 2 to section 234D of the Act which provided as under:

"Explanation 2. - For the removal of doubts, it is hereby declared that the provisions of this section shall also apply to an assessment year commencing before the 1st day of June, 2003 if the proceedings in respect of such assessment year is completed after the said date."

The Bombay High Court in the case of *CIT v. Indian Oil Corpn. Ltd. [2012] 254 CTR 113 (Bombay)* after considering the aforesaid amendment by the Finance Act 2012 held that interest under section 234D is leviable even prior to AY 2004-05. if the assessment order is passed after insertion of section 234D with effect from 01.06.2003. Supreme Court in the case of *CIT v. Reliance Energy Ltd. [2013] 358 ITR 371 (SC)* has held that where assessment was completed prior to 01.06.2003, provisions of section 234D of the Act could not be applied after considering the amendment made by Finance Act, 2012.

72. S. 254(1) : Appellate Tribunal – Additional ground – Issues which have not been raised before or considered by the first appellate authority cannot be challenged before Hon. ITAT – Additional ground dismissed. [S. 253]

Facts:
The inclusion of interest received to business income was neither challenged nor was it considered by the Commissioner (Appeals). On further appeal before Hon. ITAT, the inclusion of the interest was not objected in the grounds originally taken. Subsequently, assessee for the first time raised additional grounds, challenging the inclusion of said interest in its income.

Issue:
Since the issue regarding the admission of a ground taken for the first time before the Tribunal by way of an additional ground was intricate and important, the Bench put forward a proposal for constitution of a Special Bench to hear and dispose of the appeal and the matter was placed before the Special Bench.

Held:
While the outer limit of the subject-matter of appeal before the first appellate authority would be the subject-matter of assessment, the outer limit of the 'subject-matter of appeal' before the Tribunal would be the issues raised before or actually decided by the first appellate authority, the outer limit getting further restricted in the case of an appeal by the grounds decided against the appellant by the first appellate authority and the case of respondent to the inter-linked issues having a bearing on the subject-matter of appeal. In other words, it will be open to an assessee or the ITO to challenge that portion of the order of the first appellate authority which is against him partially or in toto. In case the ITO or the assessee omits for some reason to challenge one of the issues decided against him by the first appellate authority originally, he may do so by seeking leave of the Tribunal to raise additional grounds which the Tribunal in its discretion will entertain. Within the scope of the subject-matter of appeal before the Tribunal, the Tribunal will have the widest possible power but not with regard to issues which fall outside the subject-matter of appeal, viz., issues which have not been raised before or considered by the first appellate authority. Accordingly, the additional ground challenging the inclusion of impugned interest could not allowed. (A.Y. 1978-79)

National Thermal Power Corpn. v. IAC (Del) (1985) 12 ITD 99 (SB) (Delhi Trib.)

Editorial: The aforesaid case then came up before Hon. Supreme Court. Hon. Supreme Court following the ratio in Jute *Corporation of India Ltd v. CIT (1991) 187 ITR 688 (SC)* has decided the issue in favor of assessee and remanded the matter to Tribunal. (229 ITR 383). It was held that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) takes too narrow a view of the powers of the Tribunal. Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

73. S. 254(1) : Appellate Tribunal – Issues "sub-judice" before High Court – Reference made to Special Bench could not be subsequently withdrawn at the request of the assessee merely because the High Court had subsequently admitted an appeal having an identical question of law – Additional ground – Special Bench has power and duty to dispose of the entire appeal. [S. 253, ITAT Rules 1963, R.11]

Facts:

The assessee transferred its power transmission business to KEC International Ltd. for a consideration of Rs. 143 crores. As the transferred business had a negative net worth of Rs. 157.19 crores, the assessee offered the entire consideration of Rs. 143 crores as capital gains arising on slump sale of business. Assessing Officer, however, held that the sale consideration should have been taken as Rs. 300 crores (Rs. 143 crore + Rs. 157 crore) as the negative net worth represented the additional liabilities taken over by the purchaser. CIT(A) followed two decisions of the ITAT namely, *Zuari Industries Ltd. v. ACIT (2007) 105 ITD 569 (Mum) and Paperbase Co. Ltd. v. CIT (2008) 19 SOT 163 (Del)* and decided in favour of the assessee taking a view that the negative net worth has to be taken as zero for computing capital gains as per section 50B. At the time of hearing of the Department's appeal against the order of the CIT(A), ITAT was not convinced with the view taken by the Co-ordinate bench in Zuari's case. Assessee submitted to the ITAT that in such an event the issue may be referred to the Special bench. Thereafter at the request of the assessee, the President of the ITAT constituted a Special bench to decide the issue. Before the date of hearing of the matter before the Special bench, the assessee in its application to the ITAT President submitted that the Bombay High Court had admitted an appeal involving the same issue in Zuari's case and therefore a request was made to withdraw the reference made to the special bench. This application made by the assessee was placed before the Special bench for consideration.

Issue:

Whether a reference made to the Special bench could be subsequently withdrawn on the basis that an appeal had been admitted by the High Court against an earlier decision of the ITAT on the same issue which was before the consideration of the Special bench.

Held:

Special Bench held that a reference made to the Special bench could not be subsequently withdrawn merely because the High Court had admitted an appeal having an identical question of law. Special bench held that merely because a superior authority is seized of an issue identical to the one before the lower authority, there cannot be any impediment on the powers of the lower authority in disposing of the matters involving such issue as per prevailing law and that acceptance of the assessee's request would result in the entire working of the ITAT to come to a standstill. Special bench further stated that the law does not permit a person to both approbate and reprobate and, therefore, when the Special Bench was constituted on the basis of assessee's plea, the assessee could not now urge that the Special bench be deconstituted. (AY. 2006-07)

Dy. CIT v. Summit Securities Ltd. (2012) 135 ITD 99 / 68 DTR 201 / 15 ITR 1 / 145 TTJ 273 (SB)(Mum.) (Trib.)

74. S. 254(2) : Appellate Tribunal – Rectification of mistake apparent from the record – Reframing the question – Revenues miscellaneous application was dismissed [S. 255(3)]

Facts:
A miscellaneous application was filed by the revenue against the order passed by Special Bench of the tribunal mainly on three grounds, which inter-alia include the following ground:

that the Special Bench had formulated a new question which was not referred by the President of the Tribunal while constituting the Special Bench under section 255(3),

Issue:
The issue for consideration before Special Bench in adjudication of the miscellaneous application, inter-alia, was whether there is a mistake in the order of the tribunal in reframing the question which is within the parameters of the reference made by the President, ITAT and the original question.

Views:
Since in the original question there was no mention of the amount in dispute, the Special Bench of the Tribunal, in which the President-ITAT was also a party, and also keeping in view that in the reference it has been mentioned by the President-ITAT that 'to hear the appeal and proposed question', deemed it appropriate to elaborate the question by including the amount of addition in dispute and break-up thereof and also in order to bring out the point which requires determination more clearly. Special Bench accordingly considered to reframe the question covering the original question in full.

Held:
On consideration of the issue Special Bench held that there is no mistake in the order of the Tribunal in reframing the question which is within the parameters of the reference made by the President, ITAT and the original question. (AY. 2003-04)

DCIT v. Suzler India Ltd. [2012] 138 ITD 1 / 19 ITR(T) 268 / 149 TTJ 137 (SB) (Mum.) (Trib.)

75. S. 255 : Appellate Tribunal – Additional ground – Once Special Bench comes to be in seisin of entire appeals, it was for bench to decide whether or not to admit additional grounds of appeals. There was only one limitation on admission of additional ground that no new facts are required to be investigated upon such admission of additional ground. The powers of Tribunal are not confined to deal with issues arising out of orders of lower authorities, provided issue so raised was bona fide and same could not have been raised earlier for good reasons. [S. 254(1)]

Facts:

The assessee, a non-resident company, was incorporated in and under the laws of the Netherlands. The assessee had an arrangement with an Indian company 'AFL', for handing over its inbound and outbound shipments from Indian Gateways. The assessee stated before the Assessing Officer that it did not have any business connection in India and it did not carry out any business operations in India, hence no part of its income accrue or arose, or was deemed to accrue or arise, in India. The assessee also stated that since it did not have any Permanent Establishment [PE] in India, no part of its business profits in India could be taxable in India in the light of article 7 of the DTAA between India and Netherlands. The Assessing Officer rejected the contentions of the assessee. On appeal, the CIT (A) upheld the contention of the assessee.

In the assessment years 1989-90 and 1990-91, the Tribunal had concluded that the assessee's income from inbound shipment was partly taxable in India in so far as it is relatable to the operations carried out in India as the assessee had a PE in India in the form of 'AFL'. When the instant appeals came up for hearing before a Division Bench of the Tribunal, the respondent assessee submitted that Tribunal's decision on the issue of existence of assessee's PE in India needed to be reconsidered by a larger bench and that plea was accepted by the Division Bench. The Division Bench's recommendation for constitution of a larger bench was, however, only to consider the question whether or not it could be said that the assessee had a PE in India, and if it was held that the assessee had a PE in India, whether assessee's income from inbound shipments could be said to be attributable to such PE.

During the course of hearing, the revenue filed a petition before the Tribunal praying for admission of certain additional grounds of appeal -that the entire revenue of the assessee to be taxed partly as "Royalty" and partly as "Fees for Technical Services" (FTS).

Issue:

The Special Bench was constituted to answer the following question:

Whether it was open to the Assessing Officer to raise new issues at the appellate stage, and whether it was open to the Tribunal to consider the questions which even the Assessing Officer or the CIT (A) had not examined when they were in seisin of the proceedings.

Views:
Section 255(1) provides that powers and functions of the Tribunal are to be exercised and performed by the benches constituted by the President from among the members thereof. Section 255(3), inter alia, further provides that the President may constitute a Special Bench for 'disposal of a particular case'. It was, therefore, clear that it was the bench so formed which will exercise the powers of the Tribunal, unless, of course, reference to the Special Bench itself restricts powers of such a Special Bench, as may be expedient and necessary, to deal only with a limited aspect of the appeal. The powers of the Tribunal are not confined to deal only with the issues arising out of the order of the CIT(A) or, for that purpose, even the order passed by the Assessing Officer.

Held:
Once the Special Bench comes to be in seisin of the entire appeal, it was for the bench to decide whether or not to admit the additional grounds of appeal. Therefore, the objection raised by the assessee to the effect that the Special Bench had no powers to admit an additional ground of appeal, was devoid of legally sustainable merits. The powers of the Tribunal are not confined to deal with the issues arising out of the orders of the lower authorities. As long as an issue has relevance to the correct determination of taxes in respect of the year, and particularly when relevant facts can be ascertained from the material already on record, it was open to the appellant and the cross-objector, to raise that issue, provided the issue so raised was bonafide and the same could not have been raised earlier for good reasons.

However, one limitation on the admission of the additional ground was that no new facts are required to be investigated upon such admission of the additional ground. Further, by way of raising additional grounds of appeal, the subject-matter of tax proceedings could not be allowed to be enlarged. (AY. 1991-92 to 1993-94)

ACIT v. DHL Operations BV (2007) 108 TTJ 152 / 13 SOT 581 (SB)(Mum.)(Trib.)

76. S. 255 : Appellate Tribunal – Reference to special Bench – whether entire appeal can be referred to the Special Bench – Order of the President of the Tribunal referring the entire appeal for consideration by the Special Bench as against the questions referred by division bench cannot ordinarily be questioned. [S. 253(3)]

Facts:

Assessee was a government company. The assessee corporation contended that it was incorporated with the object of construction of dam, canals and power houses; and, therefore, it was carrying on the construction business. Accordingly, assessee contended that it had commenced its business activity from the moment it had put first bricks for construction and started its first activity with regard to construction. As a consequence it claimed that the all revenue expenditure incurred by it for the purpose of carrying on its business right from the initial work for construction have to be allowed as deduction. Matter travelled to ITAT for AYs 1989-90 to 2000-01, and ITAT held in those AYs that "The assessee Corporation being engaged in constructing infrastructure, the dam, in this case, cannot be said to have set up its business or it had commenced business. At best it can be said that it had taken steps to provide the infrastructure. It is only when the infrastructure is ready to exploit, it can be said to be started and/or set up its business or commenced its business." Certain interest expenditures were also disallowed under section 57.

The appeal for AY 2001-02 came up before ITAT subsequently, and assessee had taken the stand before the AO that the main object for the formation of the company was to construct dams and canals etc., and the business has commenced from the very first year of incorporation of the Assessee. Further, Assessee also brought on record certain facts about having engaged in activities of water supply and delivery, which had generated income right from earlier years also. However, the Revenue authorities held following the views taken in earlier years, that business activities can be said to commence when the dam construction was completed and water started flowing through the canals to the power generation system. Issue of allowability of interest was also contested by assessee, though claim was rejected by Revenue authorities following the views taken in earlier years.

When the appeal was heard by the Division Bench of ITAT, it was noted that the issues were covered against the assessee by order of the co-ordinate Bench in assessee's own case in earlier year. However, the Division Bench noted that insofar as the issue of interest expenditure was concerned, divergent views had been taken by co-ordinate benches in the case of another assessee. Accordingly, the Division Bench made a reference to the Hon'ble President for constitution of a Special Bench to decide the following issue:

- Whether, interest expenditure incurred by the assessee on amount though borrowed for the purpose of business but pending such utilization, is actually utilized for earning interest income, can such interest expenditure be held as expended for the purpose of earning interest income in view of the provisions of section 57(iii) of the Act or not?

- Whether on the facts and circumstances of the case, interest expenditure incurred on borrowed funds which were actually utilized for earning of interest income is to be allowed as deduction from

the gross interest receipts or not for computing the income assessable under section 56 of the Act?

The Hon'ble President accordingly constituted the Special Bench. Subsequently, the Assessee made a request to the President that instead of the specific issue being referred to the Special Bench, the entire appeal itself ought to be heard by the Special Bench. On due consideration, the said request was accepted by the President.

Before the Special Bench, the Revenue contended that as issues pertaining to commencement of business had already been decided in the earlier years, there was no basis for those issues to be heard by the Special Bench; and that the Special Bench ought to confine itself only to the specific issues framed by the Division Bench.

Issues:
Other than the issues on merits of the matter, the important issue which had to be decided by the Special Bench was whether the Special Bench could go into the correctness of the order of the President referring the entire appeal to the Special Bench, rather than just the specific issues referred by the Division Bench. Further, ITAT was also required to decide on merits the question as to when the business can be said to have commenced, and whether the interest expenditure was allowable as a deduction or not.

Views:
The Special Bench noted that in view of the decision of the Hon'ble Supreme Court in *ITAT v. DCIT 218 ITR 275 (SC)*, the power of the Hon'ble President to constitute a Special Bench even suo motu by an administrative order cannot be questioned. The Hon'ble Supreme Court had noted that while the Benches are required to decide matters by exercise of their judicial powers, the President has the administrative power for the constitution of Benches. Of course, Special Bench cannot be constituted for no rhyme or reason but the decision of the President can be challenged only in very limited respects for instance where mala fides are demonstrated, before the appropriate writ Court under Article 226 of the Constitution. It is not open to the Revenue to challenge the constitution of the Special Bench before the Special Bench itself.

Held :
On the basis of the above reasoning, the decision of the President to refer the entire appeal to the Special Bench could not be challenged by the Revenue. On the merits, whether the business of the assessee is set up or not is a mixed question of facts and law, dependent on the specific facts prevailing in the relevant previous year. Hence, on merits, after going into the material evidence, it was held that the business of the assessee can be said to have commenced on 21.2.2001 when water was supplied through the main canals and all revenue expenditure after that date have to be allowed as deduction. (AY. 2001-02)

Sardar Sarovar Narmada Nigam Ltd. v. ACIT (2012) 138 ITD 203 / 149 TTJ 809 / 78 DTR 172 / 19 ITR 133 (SB)(Ahd.)(Trib.)

Editorial Affirmed in *CIT v. Sardar Sarovar Narmada Nigam Ltd v. ACIT (2013) 218 Taxman 248/263 CTR 591 / (2014) 364 ITR 477 (Guj) (HC)*

The decision highlights the important principle laid down in *ITAT v. DCIT 218 ITR 275* on the powers of the Hon'ble President to constitute Special Benches. The said power cannot be challenged before the Special Bench; and the actions of the Hon'ble President in constituting such Special Benches can be challenged only in extremely rare instances under Article 226 of the Constitution of India.

On the facts of Sardar Sarovar Nigam's case, the Division Bench itself had referred some issues to the Special Bench; and thereafter taking an overall view of the matter, the President felt it appropriate that the entire matter could most efficiently be dealt with by the Special Bench. However, the decision ought not be read as meaning that there are no checks and balances on the powers of the Hon'ble President. The appropriate forum to consider such questions may not be the Special Bench so constituted, but in rare cases, it may be open to the Hon'ble High Court to interfere under Article 226 of the Constitution. Reference may be made to *Jagati Publications v. ITAT (2015) 377 ITR 31 (Bom)*, where one such rare instance of gross abuse of process in constitution of a Special Bench can be seen. In that case, the Hon'ble High Court in exercise of powers under Article 226 of the Constitution interfered with the order of constitution of Special Bench. Even there, the Hon'ble High Court noted that the High Court was only setting aside the impugned decision on the basis of the decision making process being entirely vitiated, and was not sitting in appeal over the wisdom / merits of the decision itself. However, as noted by the High Court in this judgment, propriety would usually demand that if a Division Bench is seized with a matter and has prima facie opined that the matter need not be referred to a Special Bench at all, then parties should not unilaterally approach the President for getting the matter referred to a Special Bench. Tactics of "bench hunting" or unilateral discussion with the concerned authorities – whether on part of the Revenue or on part of assessees – ought to be condemned. The President's powers of constitution of Benches, though wide and far-reaching – cannot be exercised arbitrarily.

77. S. 255 : Appellate Tribunal – Procedure – Functions – Binding – Precedent – Third member – Special Bench – Decision of the Special Bench even of three Members is entitled to all the weight and must have precedence over the decision of a Third Member. [S.254(1)]

Facts:
It was urged before the Special Bench that a decision by a Third Member is binding on the Special Bench.

Issue/contentions:
What is the binding nature of a Third Member decision vis-à-vis a Special Bench decision?

Views:
The Department urged that the Third Member decision is equivalent to the decision of a Special Bench (of an equal strength) and is, therefore, binding on it. The assessee argued that the Special Bench is not bound by the decision of the Third Member.

Held:
A decision by a Third Member has the same binding force as that of a three member Special Bench. However, if there is a conflict between a decision by a Third Member and that by a Special Bench, the latter would prevail. (AY. 1995-96, 1998-99, 1999-2000)

Dy. CIT v. Padam Prakash (HUF) (2006) 104 ITD 1 / 288 ITR 1 (AT) / 104 TTJ 989 / 10 SOT 1 (SB) (Delhi)(Trib.)

Editorial: The decision of the Special Bench is relevant in understanding the binding force of a decision by a Third Member vis-à-vis the decision by a Special Bench. The ratio of the Special Bench has been followed in a series of decisions, including a Third Member decision in the case of *BT Patil and Sons Belgaum Construction P. Ltd. v. ACIT (2010) (35 SOT 171)*

78. S. 263 : Commissioner – Revision – Orders prejudicial to interests of revenue – It is not necessary for CIT to make further enquiries before cancelling assessment order – CIT can treat an assessment order as erroneous if the AO has not made any enquiry before accepting the statement made in the return. [S.36(1)(v), 40A(7)(b)(i)]

Facts:
The assessee is a company. During the year under consideration the Assessee had made provision for gratuity in its Balance Sheet amounting to Rs.7,85,600/-. In the return, the Assessee has claimed the same as deduction. The AO while finalising the assessment allowed the claim of the Assessee without making any discussion in the order. The CIT after going through the record of the Assessee observed that the approved gratuity liability as on 31.03.1981 and 31.03.1980 was Rs.55,35,469 and Rs.51,97,480, respectively. Hence, the amount payable as contribution to the fund was only Rs.3,37,989 as against Rs.7,85,600 allowed by the AO. The CIT, therefore, invoked the provisions of section 263 of the Act and treated the assessment order passed by AO as erroneous and prejudicial to the interest of the revenue. The CIT while treating the assessment order as erroneous as well as prejudicial to the interest of the revenue relied upon the decision of Hon'ble Supreme Court in the case of *Rampyari Devi Saraogi v. CIT [1968] 67 ITR 84 (SC)* wherein it has been held that the CIT may consider an order to be erroneous if it is a stereotyped order which simply accepts the claim of the Assessee and fails to make enquiries which are called for in the circumstances of the case.

The Appellant being aggrieved by the order passed by the CIT under section 263 of the Act filed an appeal before the Tribunal.

Issue:
The issue raised before the Special Bench of the Tribunal is whether the CIT was correct in law in invoking the provisions of section 263 of the Act in withdrawing the claim of deduction of gratuity provision of Rs.7,85,600 paid to an approved gratuity fund and allowed by the AO in the assessment order as against actual liability of Rs. 3,37,989?

Views:
The AO is not only an adjudicator but also an investigator. It is the duty of the AO to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke an inquiry.

Held:
The Special Bench of the Tribunal held that it is not necessary for the CIT to make further enquiries before cancelling the assessment order. The CIT can invoke the provisions of section 263 and hold the assessment order as erroneous if in the circumstances of the case the AO should have made further inquiries before accepting the statements made by the assessee in his return. The reason is obvious. Unlike the Civil Court which is neutral to give a decision on the basis of evidence produced before it, an AO is not only an adjudicator but is also an investigator. He cannot remain passive in the face of a return which is apparently in order but calls for further enquiry. It is his

duty to ascertain the truth of the facts stated in the return when the circumstances of the case are such as to provoke inquiry. The meaning to be given to the word 'erroneous' in section 263 emerges out of this context. The word 'erroneous' in that section includes cases where there has been failure to make the necessary inquiries. It is incumbent on the AO to investigate the facts stated in the return when circumstances would make such an inquiry prudent and the word 'erroneous' in section 263 includes the failure to make such an enquiry. The order becomes erroneous because such an enquiry has not been made and not because there is anything wrong with the order if all the facts stated therein are assumed to be correct. (AY. 1981-82)

Rajalakshmi Mills Ltd. v. ITO (2009) 121 ITD 343 / 123 TTJ 721 / 31 SOT 353 / 25 DTR 258 (SB) (Chennai)(Trib.)

Editorial: Hon'ble Supreme Court in the case of *CIT v. Amitabh Bachchan [2016] 384 ITR 200 (SC)* has further enhanced the power conferred on the CIT under section 263 of the Act by holding that the CIT is free to exercise his jurisdiction on consideration of all relevant facts, provided an opportunity of hearing is afforded to assessee to contest facts on basis of which he had exercised revisional jurisdiction.

79. S. 275 : Penalty – Bar of limitation – Date of initiation – Period of limitation for purpose of section 275 is to be reckoned from date when penalty proceedings are initiated by Dy. Commissioner (Joint Commissioner) and not from date on which assessment proceedings are completed. [S.271D, 271E]

Facts

The Assessee is an Individual and the assessment year under consideration is A.Y. 1993-94 & 1994-95. A search action was conducted on 08.09.1993 at the premises of Shri Surinder Kumar, son of Shri Basant Lal, Agarwal Street, Bhatinda. During the course of search action, a receipt showing payment of cash loan of 1 Lac given by Shri Surinder Kumar to the Assessee was found and seized in the case of M/s. Dewan Chand Amrit Lal. The said information was passed on to the jurisdictional AO of the Assessee for making inquiry from the Assessee. On receipt of the information, the AO issued a notice dated 16.01.1996 and asked the Assessee as to why the reference should not be made to DCIT for considering the penalty under section 271D. Further, The AO made necessary inquiry and referred this matter to the DCIT on 05.11.1996. In the meantime, the DCIT also issued a show cause notice to the Assessee on 13.05.1996 which was replied by the Assessee. Before the DCIT, the Assessee contended that the imposition of penalty under section 271D is barred by the limitation period as prescribed under section 275. This plea of the Assessee was rejected by the DCIT in the penalty order passed on 05.11.1996. The DCIT held that the Assessee firm has violated the provisions of section 269SS. The provisions of section 275(1)(c) clearly provides that no order imposing penalty in any other case can be passed after expiry or financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated , are completed or six months from the end of the month in which action for imposition of penalty is initiated. It is observed by the Hon'ble Bench that the instant case relates to imposition of penalty under section 271D for violation of provisions of section 269SS. Thus, the present case covers under the provisions of section 275(1)(c) and therefore, a period of 6 months is available for imposing the penalty from the end of the month in which penalty proceedings under section 271D are initiated. As the proceedings under section 271D were initiated by my predecessor by issuing a show cause notice on 13.05.1996, the limitation period to pass a penalty order expired on 30.11.1996. Thus, the contention of the Assessee was rejected by the DCIT and penalty under section 271D was imposed vide penalty order dated 05.11.1996. On appeal, the CIT(A) confirmed the action of the AO relying on the decision in the case of Miri Lal Mulk Raj, ITA 728 of 1992, ITAT, Allahabad Bench. Being aggrieved with the order of CIT(A), the Appeal was preferred before ITAT. The ITAT division bench felt that there is divergence of opinion amongst various Benches of Tribunal with regard to the computation of period of limitation for imposing the penalty under section 271D. One view was that period of limitation for imposition of penalty under section 271D is to be calculated with reference to the notice issued by DCIT after recording his satisfaction. The other view was that the period of limitation commences from the date of issue of notice by the AO. In light of the same, the Hon'ble President, ITAT constituted the Special Bench for adjudicating the issue under consideration.

Issue:

The Special Bench was constituted to adjudicate following question of law

"Having regard to the provisions of section 271D and 271E and section 275 of the Income Tax Act, 1961, whether period of limitation for purposes of section 275 of the Act is to be reckoned from the date when assessment proceedings are completed or from the date when penalty proceedings are initiated by the JCIT"

Views:
The Special Bench opined that the DCIT (now JCIT) is a competent authority to impose the penalty under section 271D and 271E. The AO does not have power either to initiate the penalty proceedings or to impose the same. There is no procedure laid down for the AO to give reference to the competent authority to impose the penalty under section 271D or 271E of the Act. Therefore, the limitation for completion of the penalty proceedings as provided under section 275(1)(c) should be computed from the date of issuance of the show cause notice by the competent authority i.e. DCIT (now JCIT). In the present case, the respective orders under section 271D have been passed within a period of six months from the date of initiation of the penalty by the competent authority. Thus, the penalty orders passed in the case of the Assessee are not barred by the limitation period.

Held:
After considering the submissions of the Assessee as well as department, the Special Bench held that the Legislature has not considered it necessary to provide for limitation to initiate the penalty proceedings under sections 271D and 271E. The intention behind incorporation of section 269SS, 269T, 271D and 271E was to counter the proliferation of black money. If in the course of search action, some information is found about cash loans or deposits or repayment of loans or deposits or such claims are made, the necessity to initiate the penalty proceedings under section 271D or 271E arises. If one were to compute the limitation with reference to the assessment proceedings, then in no case, penalty under sections 271D and 271E could be initiated in the cases where the information is gathered in the course of search. Therefore, in such cases the very purpose of legislating the provisions of sections 271D and 271E would defeat. Thus, looking from the background which gave rise to incorporation of sections 269SS, 269TT, 271D and 271E, the Special Bench was of the considered view that the legislature has consciously not prescribed any limitation for initiation of penalty proceedings under sections 271D and 271E. However, the legislature has provided limitation for imposition of the Penalty under section 271D and 271E of the Act. The Special Bench held that in the facts under consideration, the DCIT issued notices to the Assessee on 13.05.1996 and the penalty order was passed on 15.11.1996 which is well within the time period of six months after the expiry of the month in which the show cause notice was issued by the DCIT. In light of the said observations, the Special Bench finally held that for the purpose of sections 271D and 271E, the period of limitation under section 275 is to be reckoned from the date when penalty proceedings are initiated by the DCIT (JCIT) and not from the date the assessment proceedings are completed. (AY. 1993-94)

Dewan Chand Amrit Lal v. Dy. CIT (2005) 98 TTJ 947 / (2006) 98 ITD 200 (SB)(Chd.)(Trib.)

Editorial:
i. Contrary view has been taken by Hon'ble Rajastan High Court in case of CIT vs. Jitendra Singh Rathore [2013] 352 ITR 327 (Rajasthan) laying down the proposition that a Period of limitation for the purpose of penalty under section 271D is to be calculated from date of first show cause notice issued for imposing penalty even if it is issued by the AO.

ii. The Mumbai ITAT in the case of *Lodha Builders (P) Ltd. v. ACIT [2014] 163 TTJ 778 (Mumbai –Trib)* after relying on the decision in case of Jitendra Singh Rathore (Supra) and also considering the decision of Special Bench decision held that the limitation period for imposing the penalty under section 271D / 271E would be counted from date of assessment order with AO's decision to make reference to ACIT, who is authorized to impose penalty and not from date of issue of show cause notice by Addl. CIT.

The provisions of Section 275(1)(c) are applicable in the facts under consideration since the penalty proceedings under section 271D and 271E do not fall in the category of clause (a) & (b) of the said section. As per this section, the Penalty under section 271D and 271E cannot be imposed after expiry of the financial year in which the proceedings, in the course of which the penalty has been initiated, are completed or 6 months from the end of the month, in which the penalty proceedings are initiated, whichever expires later.

80. S. 292BB : Notice deemed for valid in certain circumstances – Prospective – W.e.f. 1-4-2008 – Applicable from AY. 2008-09. [S.143(2), 147, 148, 158BC]

Facts:
The assessee Kuber Tobacco Products (P.) Ltd (KTPL) is a private limited company. A search action under section 132 was carried out in the case of the assessee. Thereupon, a notice under section 158BC was issued to it and the assessment order was passed. The order was silent about the issuance of notice under section 143(2) and even the assessee did not raise any objection either before the Assessing Officer or before the Commissioner (Appeals) to the effect that in the absence of notice under section 143(2) the assessment framed under section 158BC could not be held to be valid. For the first time the assessee raised said issue before the Tribunal. As against that the revenue contended that since the assessee had participated in the block assessment proceedings, it was precluded from taking any objection that notice under section 143(2) was not served upon him in view of the provisions of section 292BB inserted by the Finance Act, 2008 with effect from 1-4-2008.

Issue:
Since there were conflict of views on whether the assessee could be precluded from taking objection pertaining to service of notice under section 143(2) or not, following question was referred to the Special Bench:

"Whether the assessee who has participated in the block assessment proceedings is precluded from taking any objection that notice under section 143(2) was not served upon him or was not served upon him in time in view of the provisions of section 292BB inserted by the Finance Act, 2008 with effect from 1-4-2008 and if so, since when he can be said to be so precluded."

Views:
After reviewing various case laws & analysis of relevant sections, the Special Bench held that, S. 292BB, inserted by Finance Act, 2008, has no retrospective effect and it is to be construed prospectively. Therefore, up to 31-3-2008, as per S. 292BB, assessee could not be precluded from taking any objection regarding invalidity of an assessment/re-assessment on ground of improper/ invalid issuance/service of notice .

Further it is held that applicability of S 292BB is concerned, it is not strictly restricted to issue of notice under section 143(2) but it is in respect of other notices relating to any provisions of Act which include notice to initiate re-assessment proceedings and other proceedings also.

Held:
The Special Bench held as follows:

"(i) Section 292BB even if it is procedural it is creating a new disability as it precludes the assessee from taking a plea which could be taken as a right, cannot be construed retrospectively as the same is made applicable by the statute with effect from 1-4-2008.

(ii) Section 292BB is applicable to the assessment year 2008-09 and subsequent assessment years."

By holding so, the matter was remanded to the Division Bench to decide the issue in regular manner i.e. by accepting additional ground taken by the assessee, first time before the Division Bench.

Kuber Tobacco Products P. Ltd. v. Dy. CIT (2009) 117 ITD 273 / 120 TTJ 577 / 28 SOT 292 / 18 DTR 1 (2009) 310 ITR 300 (AT)(SB)(Delhi)(Trib.)

Note:

The decision was affirmed by Hon'ble Delhi High Court in case of *CIT v. Chetan Gupta reported in [2016] 382 ITR 613 (Delhi).*

The decision was also followed in various cases including but not limited to following cases:

ITO v. Naseman Farms (P.) Ltd reported in [2011] 45 SOT 99 (Delhi) (URO);

DCIT v. Mangat Ram reported in [2013] 154 TTJ 24 (Amritsar - Trib.) (UO);

ITO v. Aligarh Auto Centre reported in [2013] 152 TTJ 767 (Agra - Trib.).

Editorial: The decision of Special Bench was subject matter of challenge before the Hon'ble High Court, Delhi bearing ITAT nos 1308,1311 of 2009 and 1159, 1161 of 2010 the latter being filed against the order passed by division bench after remanded back by Special Bench. The Hon'ble Court vide order dated 06/10/2010 disposed of these appeals filed by the Department in favour of the assessee. The High Court status of these matters is confirmed by Hon'ble Delhi High Court in the case of *PCIT v. Silver Line [2016] 383 ITR 455 (Delhi) dated 04/11/2015.*

This Special Bench decision explained not only applicability of section 292BB but it also explained that the provisions of section 292BB being curative and procedural, required to be applied prospectively & not retrospectively.

Further, Hon'ble Bombay High Court in case of Mr. Salman Khan (ITA No. 508 of 2010) (Bom HC) dated 6 June 2011 (AY 1999 – 2000) have held that provisions of Section 292BB are applicable prospectively and not retrospectively.

Further, the Hon'ble Supreme Court in case of Laxman Das Khandelwal (Civil Appeal Nos. 6261 and 6262 of 2019) (SC) dated 13 August 2019 has held that Section 292BB does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.

Even the Hon'ble Delhi High Court in case of *Shri Jai Shiv Shankar Traders Pvt. Ltd. (ITA No. 519 of 2015) (Delhi HC)* dated 14 October 2015 (AY 2008-2009) has held that Section 292BB saves a case of "non service" of the notice but not a case of "non issue" of the notice.

List of Special Bench Decisions 1967-2020

Sr. No.	Date	Name	Citations	Issues	Sections
1	1967-01-11	A & Others vs. WTO (Bom.)	(1978) T & P Vol. 11 Jan. 67	Charitable Trust	13(1)(h), 23A of W. T. Act
2	1973-06-18	CIT vs. Mahalakshmi Glass Works (P) Ltd. (Bom.)	(1983) 3 SOT 8	Reference Application	256(1), 2(16) 121
3	1974-03-15	Deb. Sahitya Kuthir (P) Ltd. vs. ITO (Cal.)	(1983) 3 SOT 450	Industrial Company – Manufacturing	80J(4), 2(7) (d)
4	1974-10-18	A Bombay vs. ITO (Bom.)	(1974) T & P Vol. 6 Oct. 18	House Property – Municipal Taxes	23
5	1975-05-21	ITO vs. Salve (N.K.P.) (Bom.)	(1983) 3 SOT 184	Profession – Expenses for Contesting the election allowable	37(1), 28(i)
6	1976-04-24	India Sugars & Refineries Ltd. vs. ITO (Bom.)	(1983) 3 SOT 167	Deduction - Gross - Net -Dividend option claim	80L, 80 M, 80A, 80AB, 70 (1)
7	1976-11-26	WTO vs. Sona S. Sapatwalla (Mrs.) (Bom.)	(1983) 3 SOT 105	Wealth Tax Assets – Exemption	2(m)(ii)
8	1977-05-28	Trustees of Sabrina Charitable Trust vs. WTO (Bom.)	(1983) 3 SOT 262	Charitable Trust – Discrisionary	21A, 13(2) (h), 5(1)(1)
9	1977-08-11	Bhilal Engg. Corpn. Ltd. vs. Dy. CIT (Nag.)	(1997) 63 ITD 223 / (2002) 75 TTJ 505	Depreciation	32
10	1977-09-01	Thirunavukkarasu Chettiar (SL. SP. PL.) vs. ACED (Mad.)	(1983) 3 SOT 178	Estate Duty – Adoption of son	6
11	1977-10-07	Kalavati Pakvasa (Mrs.) vs. ACED (Bom.)	(1983) SOT 126	Estate Duty – Valuation of property	5, 36(2)
12	1977-10-28	Birad Kanwar of Udaipur vs.	(1983) 3 SOT 230 ITO (Jp.)	Income	4, 10(2), 10(19)
13	1977-11-08	Lookmani Readymade Clothes vs. ITO (Bom.)	(1983) 3 SOT 488	Penalty – Registration	139(1), 271(1)(a)
14	1977-12-01	Amar Dye Chem. Ltd. vs. ITO (Born)	(1983) 3 SOT 384	Tribunal – Powers – Vires / Capital / Business Expenditure	255, 28, 37, 80J r.w. 19A(3)
15	1977-12-09	Rajshri Productions (P) Ltd. vs. ITO (Bom.)	(1983) 3 SOT 500	Circular – Assessment – Binding	119

Sr. No.	Date	Name	Citations	Issues	Sections
16	1978-01-31	Vayaskara Aryavilasam Oushadasala (P) Ltd. vs. ITO (Coch.)	(1983) 3 SOT 484	Deduction – Retrenchments Compensation	37(1), 25 FF Industrial Dispute Act
17	1978-02-23	ITO vs. India Type & Rubber Co. Ltd. (Bom)	(1983) 3 SOT 92	Appeal – Interest	246 , 214
18	1978-03-23	Nichani (V. N.) vs. WTO (Mad.)	(1983) 3 SOT 200	Exemption – Residential House – Co-owner	5(1)(iv)
19	1978-03-31	S. H. V. Raj Badhar Naidu Chetter vs. WTO	(1978) tax 50 (6) 73	Wealth Tax – Cinema Theatre owned – expenses	5(1)(iv)
20	1978-04-24	Bangalore Trading Corpn. vs. ITO (Mad.)	(1983) 3 SOT 26	Appeal – Revised Return	139(2), 215
21	1978-04-24	ITO vs. Kosamattam Chitty Fund & Investment (Coch.)	(1983) 3 SOT 16	Income – Chitties	4, 28
22	1978-05-29	Orissa Cement Ltd. vs. ITO (Delhi)	(1983) 3 SOT 79	Priority Industry	80 - I
23	1978-06-29	Globe Trading Co. vs. ITO (Bom.)	(1983) 3 SOT 353	Appeal – Registration	246(1)(c), 184 (7)
24	1978-07-29	Geoffrey Manners & Co. Ltd. vs. ITO (Bom.)	(1983) 3 SOT 40	Company – Directors –	40(c), 40 A(5)(c)
25	1978-10-12	Brahadeeswaram (R.) vs. ACED (Mad.)	(1983) 3 SOT 101	Additional Grounds – Appellate Tribunal – Power	63, 34(1)(c)
26	1978-12-21	Frick India Ltd. vs. ITO (Delhi)	(1983) 3 SOT 64	Capital or Revenue – Technical know how	37(1)
27	1979-01-31	Nar Hari Dalmia vs. ITO (Delhi)	(1984) 7 ITD 463	Income – Interest Income– Clubbing of Income	4, 64
28	1979-02-08	Pelikon Paper Stationery Mart vs. ITO	(1984) 7 ITD 346	Firm – Retirement – Dissolution	188
29	1979-02-08	Raj Pottery Works vs. ITO (Delhi)	(1983) 3 SOT 221 (1986) 26 TTJ 311	Firm – Registration Rate applicable	187
30	1979-06-12	Soft Beverages (P) Ltd. vs. ITO (Mad.)	(1982) 1 SOT 311 / (1983) 3 ITD 686	Deduction	40A(7)
31	1979-07-11	Sri Koda Katla Rice Mill vs. ITO (Hyd)	(1979) 8 TTJ 566	Deduction – confiscation of goods	28
32	1979-07-27	Dwarkadas & Co. (P) Ltd. vs. ITO (Bom.)	(1982) 1 ITD 303 / (1982) 13 TTJ 107 / 1 SOT 495	Revision – Commissioner, Appeal	263, 246, 214
33	1979-07-30	Mansa Ram and Sons vs. ITO (Delhi)	(1983) 3 SOT 133	Reassessment – Non Disclosure	34, 148
34	1979-07-31	ITO vs. Chadha (G.K.) (Delhi)	(1982) 1 SOT 191	Interest on Borrowed Capital	36(1)(iii)

Sr. No.	Date	Name	Citations	Issues	Sections
35	1979-08-18	Ranjit Kumar Mullick vs. WTO (Cal.)	(1983) 3 SOT 196	Wealth Tax – Deduction Debt owed	2(m)
36	1979-10-01	ITO vs. Vickers Sperry of India (Bom.) 1 SOT 105	(1983) 3 ITD 739 / (1982)	Depreciation - Scientific Research, Perquistes, Medical expenses	17, 32, 35 (1)
37	1979-10-31	Modipon Ltd. vs. ITO (Delhi)	(1983) 3 SOT 328	Development – Rebate – New Industrial Undertaking	33, 80J(i)
38	1979-12-18	Bijoynagar Tea Co. Ltd. vs. ITO	(1983) 3 SOT 116	Agricultural Development Allowance	35C
39	1979-12-19	Colaba Central Co-op. Consumers Wholesale and Retail Stores Ltd vs. ITO (Bom.)	(1981) 12 TTJ 379 / (1983) 3 SOT 46	Co-operative Society – Deduction	28, 37 (1)
40	1980-03-01	Joseph John vs. ITO (Coch.)	(1982) SOT 552 / (1983) 3 ITD 571	Penalty – Concealment	271(1)(c), 274(2) and 139
41	1980-11-10	ITO vs. Sri Ramakrishna Contrs. (Hyd.)	(1983) 3 SOT 479	Estimate of Profits – Interest to partners	29, 40(b)
42	1980-11-20	Uttar Gujarat Sahakari Ru Vechan Sangh Ltd. vs. ITO (Ahd.)	(1983) 3 SOT 51	Bad Debts	36(1)(vii)
43	1981-01-21	ITO vs. Tata Robins-Fraser Ltd.(Cal.)	(1982) 1 SOT 229	Capital Revenue Expenditure	37(1)
44	1981-01-21	Tata Robins-Fraser Ltd. vs. ITO (Cal.)	(1982) 1 SOT 229	Business Expenditure – Capital or Revenue expenditure – Technical know-how royalty	37(1)
45	1981-01-24	Sahney Steel & Press Works Ltd. vs. ITO (Hyd.)	(1981) 11 TTJ 351 / (1982)1 SOT 316 / (1983) 4 ITD 6	Remission or cessation of liability – Subsidicy	41(1) r.w. 28(iv)
46	1981-01-31	Gulabchand Jhabakh (L.) vs. WTO (Mad.)	(1982) 1 SOT 613 / (1982) 14 TTJ 465	Wealth Tax – Exemption	5(1)(iva)
47	1981-01-31	ITO vs. First Leasing Co. of India (Mad.)	(1985) 13 ITD 234 / (1985) 23 TTJ 469	Reassessment – Information – Investment allowance – leasing of machinery	147(b), 32A
48	1981-02-12	Pioneer Match Works vs. ITO (Mad.)	(1982) 1 SOT 331 / (1983) 3 ITD 714	Depreciation – Subsidy	43(1)
49	1981-02-28	Premchand Chaganlal vs. ITO (Hyd.)	(1983) 3 ITD 768 / (1982) 1 SOT 27	HUF or Individual – Total partition	4

Sr. No.	Date	Name	Citations	Issues	Sections
50	1981-03-04	Jayam (Smt. K.S.) vs. ACED (Mad.)	(1983) 3 ITD 804 / (1982) 1 SOT 667	Estate Duty – Notional Portition – Valuation – Interest	39
51	1981-03-17	Biju Patnaik vs. WTO (Delhi)	(1982) 12 TTJ 25 / (1982) 1 SOT 623 / (1983) 3 ITD 693	Wealth Tax Rule 1BB – Valuation – Residential House	7(1) / (4)
52	1981-04-10	ITO vs. Sri Krishna Tiles and Potteries P. Ltd. (Mad.)	(1982) 13 TTJ 11/ (1982) 1 SOT 305 / (1983) 3 ITD 617	Payments not deductible – Gratuity	40A(7)
53	1981-04-20	IAC vs. Kodak Ltd. (Bom.)	(1983) 3 SOT 517	Amounts not deductible	10(10), 40 A(5)
54	1981-04-20	IAC vs. Kodak Ltd. (Bom.)	(1983) 3 SOT 517 (1986)18 itd 213	Business Disallowance	40A(5)(a)(ii)
55	1981-04-20	IAC vs. Kodak Ltd. (Bom.)	(1983) 3 SOT 517 / (1986) 18 ITD 213	Business Disallowance – Remuneration	40A(5)(a)(ii)
56	1981-04-30	ITO vs. Ranjitmal Chordia (M) (Mad.) 14 TTJ 544	(1982) 1 SOT 78 / (1982)	Income from House Property – Annual value – tax levied	23(1)
57	1981-05-15	Mridu Hari Dalmia vs. ITO	(1984) 7 ITD 761 1 SOT 367	Salaries – Perquisites fair rental value	17(5)
58	1981-07-18	ITO vs. Sri Sanku Subbalakhmaiah & Sons. (Hyd.)	(1982) 1 ITD 402, (1983) 2 SOT 37	Capital or Revenue – Price paid for Shares	4, 37
59	1981-07-20	Mokashi (Dr. J. N.) vs. ITO (Bom.)	(1983) 3 ITD 774 / (1982)	Clubbing of Income	64(1)(ii)
60	1981-08-07	ITO vs. Hindustan Vacuum Glass Ltd. (Delhi)	(1982) 1 SOT 396 / (1983) 3 ITD 605	Business Loss – Unabsorbed depreciation	72(2) r.w. 32(2)
61	1981-09-28	ITO vs. Happy Sound Industries (Delhi)	(1982) 13 TTJ 348 / (1982) 1 SOT 172	Export Markets Development Allowance	35B(1)(b)
62	1981-10-20	Ram Gopal Neotia vs. ITO (Cal.)	(1982) 1 ITD 160, (1983) 2 SOT 561	Penalty	274(2), 271(1)(c)
63	1981-10-24	Chenni Chattiar (C) vs. WTO (Mad.)	(1982) 1 ITD 232 / (1984) 14 TTJ 540/1 507 637	Wealth Tax – HUF – Reassessment	20 r.w. 17
64	1981-11-07	Mohan Rao (K.S.). vs. ITO (Hyd.)	(1982) 1 SOT 34 / (1983) 4 ITD 1	HUF or Individual – Inheritance by son	4
65	1981-11-26	ITO vs. Southern Roadways (P) Ltd. (Mad)	(1983) 3 SOT 54	Capital Gains – Capital Receipts, Route Permit	32(1)(iii), 45, 41(2), 50

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66	1981-12-07	ITO vs. C. L. Sadani Family Trust (Cal.)	(1982) 1 ITD 223 / (1982) 1 SOT 484	Trust – Beneficiary – Unborn Person	164 (1)
67	1982-01-06	ITO vs. M. Ct. M. Chidambaram Chettiar Foundation (Mad.)	(1982) 1 ITD 14 / (1982) 1 SOT 66 / (1982) 14 TTJ 548	Charitable Trust – Accumulation of Income	11
68	1982-01-06	M. Ct. Muthiah Chettiyar Family Trust. vs. ITO (Mad.)	(1982) 1 IT D 14 / 199/(1982) 1 SOT 53	Charitable Trust – Accumulation of Income	11
69	1982-01-16	Arasan Aluminium Industries (P) Ltd. vs. ITO (Mad.)	(1982) 1 ITD 10 / (1982) 1 SOT 45	Income – Capital Revenue Receipt – Pre Commencement	4
70	1982-01-22	Wood Craft Products Ltd. vs. ITO (Cal.)	(1982) 1 ITD 1 / (1982) 1 SOT 407	Deductions – Religious nature	80 G
71	1982-01-29	Rajendra Kumar Tuli vs. WTO (Bom.)	(1982) 1 ITD 213 / (1982) 1 SOT 601	Net Wealth – Debt Owed	2(m)
72	1982-01-29	Shah (N. M.) vs. WTO (Bom.)	(1982) 1 ITD 244 / (1982) 1 SOT 573	Wealth Tax – Net Wealth	2(m)
73	1982-02-10	Narayanaswamy (V.) vs. ITO (Mad.)	(1982) 1 ITD 397 / (1983) 2 SOT 274	Clubbing of Income – Deduction of Bank Interest	64, 80 L
74	1982-02-15	Investment Corporation of India Ltd. vs. ITO (Bom.)	(1982) 1 ITD 880 / (1982) 14 TTJ 250 / (1983) 2 SOT 260	Capital Gain on Sale of Shares	48(ii)
75	1982-02-25	Pattan Masthan Khan vs. GTO (Hyd.)	(1982) 2 ITD 130 / (1983) 2 SOT 733	Gift Tax – Stamp Duty	18A
76	1982-03-29	ITO vs. Nagpur Zilla Krishi Audhyogik Sahakari Sangh Ltd. (Nag.)	(1982) 2 ITD 138 / (1983) 2 SOT 345	Deductions – Income from Co-op. Soc. – Relief	80P(2)
77	1982-04-02	Chadha (R. D.) vs. CIT (Delhi)	(1982) 2 ITD 592 / (1983) 2 SOT 77	Exemption – Terminal Benefit	10 (10A) (i)
78	1982-04-02	Sachdev (P. C.) vs. CIT (Delhi)	(1983) 2 SOT 77 / (1982) 2 ITD 592	Exemption – Pension	10(10A)(i)
79	1982-04-13	ITO vs. Rajaratna Naranbhai Mills Ltd. (Ahd.)	(1982) 1 ITD 1044 / (1983) 2 SOT 144/(1983) 17 TTJ 163	Depreciation – Carry forward	32(2)
80	1982-04-14	Rajen Ramesh Chandra vs. ITO (Ahd.)	(1982)1 ITD 791 / (1983) 2 SOT 32	HUF – Individual	4
81	1982-04-23	ITO vs. Krishna Iyer (S.) (Mad.) 2 SOT 298	(1982) 2 ITD 595 / (1983)	Clubbing of Income – Transfer	64 (i)(iii)

Sr. No.	Date	Name	Citations	Issues	Sections
82	1982-04-23	ITO vs. Subbiah Chettiar (C.) (Mad.) 2 ITD 595	(1983) 2 SOT 298 / (1982)	Transfer of Assets	64(1)(iii)
83	1982-04-27	U. P. Tractors vs. ITO (Delhi)	(1983) 3 SOT 381	Appellate – Asst. Commissioner – Powers	251
84	1982-04-30	Rajratha Naranbhai Mills Ltd.	(1982) 1 ITD 1044, (1983) 2 SOT 144	Carry forward of unabsorbed depreciation	32(2)
85	1982-05-11	ITO vs. Framji (Smt. S.J.) (Bom.)	(1982)1 ITD 390 / (1983) 2 SOT 358	Capital Gain – Sale of Shares in Co-op. Housing Society	80T (b)(i)
86	1982-05-13	Mannalal Nirmal Kumar Soorana vs. ITO (Delhi)	(1982) 1 ITD 412 / 14 TTJ 392 / (1983) 2 SOT 631	Capital Assets–Voluntary Disclosure of Income & Wealth Act,1976	2(14) / 45 r.w. 2(47) / 5 / 3/ 8,11,12,16
87	1982-05-24	ITO vs. Sippy Films (Bom.)	(1982) 1 ITD 1031 / (1982) 14 TTJ 368 / (1983) 2 SOT 532	Appeal – Draft Order	246 r.w. 144 B
88	1982-05-30	Bela Singh Pabla vs. ITO (Delhi)	(1982) 1 ITD 370 / (1983) 2 SOT 410	Assessment – Direction – IAC	144B, 143(3), 147
89	1982-05-30	Shree Arbuda Mills Ltd. vs. ITO (Ahd.)	(1983) 3 SOT 311	Merger – Appellate Authority	263
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91	1982-08-16	Travancore Chemical & Msg. Co. Ltd. vs. ITO (Coch.)	(1983) 6 ITD 788	Sur Tax – Deduction	2(5) r.w. 2
92	1982-09-06	Executive Engineer and Administrative Officer, Tamil Nadu Housing Board vs. ITO (Mad.)	(1982) 2 ITD 336, (1983) 2 SOT 506	Interest – Payment to Contractor	201, 201(1A), 194(c)
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98	1982-10-30	ITO vs. Vinay Bharat Ram (Delhi)	(1983) 2 SOT 47 / (1983) 3 ITD 263	HUF – Individual – Gift	4
99	1982-11-03	Apara Textile Traders Ltd. vs. STO (Ahd.)	(1982) 2 ITD 600 / (1983)	Sur Tax – Surcharge Deposit 2 SOT 603	2(5) r.w.2(i) – Deduction
100	1982-11-04	Allied Chemical Corpn. vs. IAC (Bom.) 3 ITD 418	(1983) 2 SOT 62 / (1983)	Appellate Tribunal -- Powers, Dividend, Non-Resident	5(2)(b) w.r. Rule 115
101	1982-12-27	ITO vs. Palaniammal (Smt. P.) (Mad.)	(1984) 7 ITD 416	Penalty – Self Assessment	140A(3)
102	1982-12-27	Kulandayan Chettiar (P.V.AL) vs. ITO (Mad.)	(1983) 2 SOT 369 / (1983) 3 ITD 426	Double Taxation Agreements – Rate Purpose	90 r.w. 5
103	1983-01-13	M. L. Shukla & Co. vs. ITO (All)	(1983) 3 ITD 502 / (1983) 3 SOT 29	Diversion at Source by an Over Riding Charge	4
104	1983-03-16	East Coast Marine Products (P) Ltd. vs. ITO (Hyd.)	(1983) 4 ITD 72	Revision - Direction of IAC / Commission	263
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195	1988-03-25	Gedore Tools (India) (P) Ltd. vs. IAC (Delhi)	(1988) 25 ITD 193	Deductions – New Industrial	80J
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359	2004-08-23	G & Co. vs. ITO (Bom.)	(1982) 1 SOT 142 / (1983) 3 ITD 566	Export Market Allowance	35B(1)
360	2004-09-22	Bai Sonabai Hirji Agiary Trust vs. Income-tax Officer	[2005] 93 ITD 70 (Mumbai) (SB)[22-09-2004]	constitution of special bench	255(3)
361	2004-10-08	Vinod Khatri vs. Dy. CIT (Del.)	(2002) 82 TTJ 911	Tribunal – Filing Form	253(b)
362	2004-10-08	Bidyut Kumar Sett vs. Income-tax Officer	[2005] 92 ITD 148 (Kolkata) (SB)[08-10-2004]	Filing fees in case of penalty appeal before ITAT	253(6)
363	2004-10-20	G.T.O. vs. Padma Srinivasan (Smt.) (Mad.)	(1983) 3 SOT 157	Gift - Chargeability	3
364	2004-12-01	Deputy Commissioner of Income-tax vs. Venkateswar Investment & Finance (P.) Ltd.	[2005] 93 ITD 177 (Kolkata) (SB)[01-12-2004]	Losses suffered on purchase and sale of shares by company whose principal business is granting loans & advance - whether to be considered as speculative losses.	73
365	2004-12-13	Jaihind Bottling Co. (P.) Ltd. vs. Assistant Commissioner of Income-tax	[2005] 1 SOT 1 (Mumbai) (SB)[13-12-2004]	Inclusion of such assets on which 100% deduction was allowed by virtue of section 32(1)(ii) in 'block of assets' for the purpose of section 50	50, 32
366	2004-12-27	Assistant Commissioner of Income-tax vs. Apsara Processors (P.) Ltd.	[2005] 2 SOT 132 (Ahmedabad - ITAT) (SB)[27-12-2004]	Amendment in section 271(1)(c) with effect from 1-4-2003 - Prospective/ retrospective?	271(1)(c)
367	2005-01-28	Assistant Commissioner of Income-tax, vs. Concord Commercials (P.) Ltd.	[2005] 95 ITD 117 (Mumbai) (SB)[28-01-2005]	Losses - In speculation business - only if a company is hit by Explanation to section 73	73, 71, 56
368	2005-01-31	Raj Kumar Chawla vs. Income-tax Officer	[2005] 1 SOT 934 (Delhi) (SB)[31-01-2005]	return u/s 148 and issue of notice u/s 143(2)	143, 144, 148
369	2005-02-02	Peerless Securities Ltd. vs. Joint Commissioner of Income-tax	[2005] 94 ITD 89 (Kolkata) (SB)[08-02-2005]	capital asset- enduring benefit test, amount, bringing in existence assets, payment of admission fee	37(1)

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370	2005-02-14	Income-tax Officer vs. Bir Engg. Works	[2005] 94 ITD 164 (Amritsar) (SB) [14-02-2005]	binding nature of instructions/circulars on department, tribunal's power of review, tribunal's power to adjudicate debatable issue u/s 254(2)	119, 254(2), 254
371	2005-04-25	Nirma Industries Ltd. vs. Assistant Commissioner of Income-tax,	[2005] 95 ITD 199 (Ahmedabad - ITAT) (SB)[25-04-2005]	disallowance of professional charges, preliminary expenses, deduction of interest on deposit with banks u/s 80-I, interest on borrowed money, term 'related concern' and Excessive or unreasonable payments, immediate nexus with industrial undertaking for section 80-I, deduction under section 80-I on transport rent income, utilisation of amount withdrawn from deposit account	40A(12), 35D, 80-I, 80HH, 36(1)(iii), 40A(2),32AB
372	2005-05-25	Smt. Mahesh Kumari Batra vs. Joint Commissioner of Income-tax,	[2005] 95 ITD 152 (Amritsar) (SB) [25-05-2005]	Block assessment in search cases - defect in notice, Unexplained investments - inadequate family expenditure	158BC, 158BA, 147, 292B, 69
373	2005-06-07	Promain Ltd. vs. Deputy Commissioner of Income-tax	[2005] 95 ITD 489 (Delhi) (SB)[07-06-2005]	powers of the tribunal to decide issue relating to validity of search	254, 132, 158BC
374	2005-06-23	B. Sorabji vs. Income-tax Officer,	[2005] 95 ITD 540 (Mumbai) (SB)[23-06-2005]	allowability of deduction u/s 80HHC	80HHC
375	2005-07-15	Wallfort Shares & Stock Brokers Ltd. vs. Income-tax Officer, Ward 4(2)(1)	[2005] 96 ITD 1 (Mumbai) (SB)[15-07-2005]	Tax avoidance, Dividend stripping, taxability of income distributed by mutual fund, conflict between Chapter III and section 14A, inter head set off of losses	4, 28(i), 94(7), 14A, 71
376	2005-08-22	ABN Amro Bank NV vs. Assistant Director of Income-tax, International Taxation-I	[2005] 97 ITD 89 (Kolkata) (SB)[22-08-2005]	allowability of interest paid by PE to HO outside India and TDS thereon	37(1), 40(a)(i), 195, 201

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377	2005-08-31	Deputy Commissioner of Income-tax, Spl. Range-14 vs. Royal Jordanians Airlines	[2006] 98 ITD 1 (Delhi) (SB)[31-08-2005]	immunity from tax to a sovereign, interest under section 234C has been charged in notice of demand under section 156 but not in body of assessment order	4, 234B, 234A, 234C, 154
378	2005-09-25	Wall Street Construction Ltd. vs. Joint Commissioner of Income-tax, Special Range-12	4181 of 2000,4183 of 2000,4184 of 2000, IT APPEAL NOS. 4181, 4183 AND 4184 (MUM.) OF 2000	allowability of Business expenditure where an assessee is following project completion	37(1), 36(iii)
379	2005-10-28	Assistant Commissioner of Income-tax, CC-XXVIII vs. Surya Kanta Dalmia	[2005] 97 ITD 235 (Kolkata) (SB)[28-10-2005]	addition on account of disclosure in Voluntary Disclosure Scheme (VDIS), 1997 unsustainable where identity, creditworthiness and genuineness proved	68
380	2005-11-03	Dewan Chand Amrit Lal vs. Deputy Commissioner of Income-tax, Hissar Range	[2006] 98 ITD 200 (Chandigarh) (SB) [03-11-2005]	with regard to provisions of sections 271D and 271E, determination of period of limitation for purpose of section 275	275, 271D and 271E
381	2005-11-09	Vahid Paper Converters vs. Income-tax Officer, Vapi Ward-4, Daman	[2006] 98 ITD 165 (Ahmedabad - ITAT) (SB)[09-11-2005]	allowability of depreciation while computing deductions under Chapter VI-A	80-I
382	2005-11-25	Housing & Urban Development Corpn. Ltd. vs. Joint Commissioner of Income-tax, Special Range-24	[2006] 5 SOT 918 (Delhi) (SB)[25-11-2005]	taxability of investments and interest	2(7), 5
383	2005-11-30	Durga Prashad Goyal vs. Income-tax Officer, Ward-I, Moga	[2006] 98 ITD 227 (Amritsar) (SB) [30-11-2005]	initiation of reassessment proceedings on the basis of information from investigation wing	147
384	2006-01-08	Avada Trading Co. (P.) Ltd. vs. Assistant Commissioner of Income-tax, Spl. Circle 18(1)	[2006] 6 SOT 1 (Mumbai) (SB)[18-01-2006]	taxability of interest on refund under section 244A(1)	244A, 143(1)(a)

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385	2006-01-20	Joint Commissioner of Income-tax, Spl. Range-26 vs. Warner Bros. (F.E.) Inc.	[2006] 99 ITD 1 (Mumbai) (SB)[20-01-2006]	CBDT Instructions to subordinate authorities	119
386	2006-02-20	Deputy Commissioner of Income-tax vs. Maharashtra State Road Transport Corpn.	[2006] 100 ITD 187 (Mumbai) (SB)[20-02-2006]	scope of powers of High Powered Committee was constituted by Government of India	254
387	2006-03-10	Assistant Commissioner of Income-tax, Cir.1 (1), Ernakulam vs. Apollo Tyres Ltd.	[2006] 6 SOT 478 (Delhi) (SB)[10-03-2006]	order passed by a special bench can be rectified, taxability of gain earned on cancellation of foreign exchange forward contract and roll over charges	254, 255
388	2006-03-16	Kwality Milk Foods Ltd. vs. Assistant Commissioner of Income-tax	[2006] 100 ITD 199 (Chennai) (SB)[16-03-2006]	section 43B is curative in nature and as such retrospective	43B
389	2006-03-24	Ashima Syntex Ltd. vs. Assistant Commissioner of Income-tax	[2006] 100 ITD 247 (Ahmedabad - ITAT) (SB)[24-03-2006]	allowability of expenditure incurred on issuance of wholly convertible debentures	37(1)
390	2006-03-24	AMP Spg. & Wvg. Mills (P.) Ltd. vs. Income-tax Officer	[2006] 100 ITD 142 (Ahmedabad - ITAT) (SB)[24-03-2006]	speculative loss	73
391	2006-03-29	Joint Commissioner of Income-tax vs. Montgomery Emerging Markets Fund	[2006] 100 ITD 217 (Mumbai) (SB)[29-03-2006]	Set off-of from one source against income from another source under same head of income	70
392	2006-04-07	Atma Ram Properties (P.) Ltd. vs. Joint Commissioner of Income-tax	[2006] 8 SOT 741 (Delhi) (SB)[07-04-2006]	taxability of rental income and income from sale of land and building	28, 28(i)
393	2006-04-10	Punjab State Industrial Development Corporation Ltd. vs. Deputy Commissioner of Income-tax, Special Range-II, Chandigarh	[2006] 102 ITD 1 (Chandigarh) (SB) [10-04-2006]	computing deduction under section 80M	80M
394	2006-04-26	Merit Enterprises vs. Deputy Commissioner of Income-tax, Central Circle-1	[2006] 101 ITD 1 (Hyderabad) (SB) [26-04-2006]	retrospective levy of surcharge on tax charged under section 113 in respect of undisclosed income of block period	113, 158BC,113

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395	2006-05-05	Sudipto Sarkar vs. Deputy Commissioner of Income-tax	[2006] 101 ITD 229 (Kolkata) (SB)[05-05-2006]	Entertainment expenditure, motor car upkeep expenses	37(1), 37(2), 37(2A)
396	2006-05-17	Deputy Commissioner of Income-tax vs. Oman International Bank SAOG	[2006] 100 ITD 285 (Mumbai) (SB)[17-05-2006]	no need to prove debt written off is indeed a bad debt, sanctity of Third Member decision and Special Bench decision	36(1)(vii), 255
397	2006-05-19	Indian Plywood Mfg. Co. Ltd. vs. Deputy Commissioner of Income-tax	[2006] 100 ITD 318 (Mumbai) (SB)[19-05-2006]	ascertained liability	32AB
398	2006-06-07	Pallonji Shapoorji & Co. (P.) Ltd. vs. Deputy Commissioner of Wealth-tax, Special Range 23, Mumbai	[2006] 102 ITD 101 (Mumbai) (SB)[07-06-2006]	wealth tax - charge of tax	3, 4 of wealth tax act
399	2006-07-07	Punitaben Karsanbhai Patel Oral Specific Deferred Family Trust vs. Income-tax Officer	[2006] 103 ITD 175 (Ahmedabad - ITAT) (SB)[07-07-2006]	once income of a trust, assessed on substantive basis and liability finally settled under Kar Vivad Samadhan Scheme, 1998, same income could not be again assessed in hands of corresponding beneficiaries who had been assessed on a protective basis	263
400	2006-07-10	Joint Commissioner of Income-tax vs. Peerless Developers Ltd.	[2006] 103 ITD 349 (Kolkata) (SB)[10-07-2006]	appeal not maintainable if tax effect is low even when it involves a legal issue	253
401	2006-07-25	Southern Travels vs. Assistant Commissioner of Income-tax	[2006] 103 ITD 198 (Chennai) (SB)[25-07-2006]	set-off brought forward depreciation against capital gains of current year not permissible	32
402	2006-08-18	Mange Ram Mittal vs. Assistant Commissioner of Income-tax	[2006] 103 ITD 389 (Delhi) (SB)[18-08-2006]	procedure for Block assessment in search cases	158BC, 158BB
403	2006-09-14	R.M. Valliappan vs. Assistant Commissioner of Income-tax	[2006] 103 ITD 63 (Chennai) (SB)[14-09-2006]	taxability of a membership card of a stock exchange as a capital asset	2(14)

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404	2006-09-29	Deputy Commissioner of Income-tax, Circle II, Meerut vs. Padam Prakash (HUF)	[2007] 104 ITD 1 (Delhi) (SB)[29-09-2006]	sanctity of Third Member decision and Special Bench decision, point of taxation of enhanced compensation, disputed interest taxable when it is finally determined	225,45,5
405	2006-10-06	Joint Commissioner of Income-tax vs. Usha Martine Industries Ltd.	[2007] 104 ITD 249 (Kolkata) (SB)[06-10-2006]	adjustments for calculation of Minimum alternate tax and effect of wealth tax thereon	115JA
406	2006-10-19	Inspecting Assistant Commissioner, (Assessment) Range IV-C, Mumbai vs. Saurashtra Trust	[2007] 106 ITD 1 (Mumbai) (SB)[19-10-2006]	exemption for Charitable or religious trust	11, 2(15), 4(3)(i) of Indian Income-tax Act, 1922
407	2006-10-27	Vijaysinh R. Rathod vs. Income-tax Officer, Ward-3, Vapi	[2007] 106 ITD 153 (Ahmedabad - ITAT) (SB)[27-10-2006]	taxability of sale of occupancy right	45 , section 4 of the Dadra and Nagar Haveli Land Reforms Regulation 1971
408	2006-11-08	Rajiv Piramal Investments (P.) Ltd. vs. Assistant Commissioner of Income-tax, Circle 5(6)	[2007] 106 ITD 67 (Mumbai) (SB)[08-11-2006]	diminution in market rate of shares has to be estimated on an appropriate and logical consideration of factual position	48
409	2006-11-17	Hiralal Lokchandani vs. Income-tax Officer, Jharsuguda Ward, Jharsuguda	[2007] 106 ITD 45 (Kolkata) (SB)[17-11-2006]	determination of fair market value of of asset	55
410	2006-11-23	Arihant Builders, Developers & Investors (P.) Ltd. vs. Assistant Commissioner of Income-tax, Circle I(1), Indore	Appeal No.952 of 1994	procedure and constitution of Special Bench, issuance of notice U/s 143(2) after issuance of refund, Rejection of accounts, use of section 44AD as a guideline for purpose of applying a particular net profit	255 , 143, 145 , 44AD

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411	2006-11-30	Deputy Commissioner of Income-tax, Circle, Buland Shahr vs. Allied Construction	[2007] 105 ITD 1 (Delhi) (SB)[30-11-2006]	taxability of interest income on FDRs, Rejection of accounts, presumptive taxation where gross receipts exceeded prescribed limit	56, 145, 44AD
412	2007-01-12	Samaj Kalyan Parishad, Modinagar vs. Income-tax Officer, Central Circle-XXVI, New Delhi	[2007] 105 ITD 29 (Delhi) (SB)[12-01-2007]	Exemption of income from property held under	11, 2(15) and 13
413	2007-02-15	Joint Commissioner of Income-tax, Special Range 25, Mumbai vs. Mukund Ltd.	[2007] 106 ITD 231 (Mumbai) (SB)[15-02-2007]	allowability of expenditure for obtaining leasehold rights	37(1)
414	2007-03-05	Assistant Commissioner of Income-tax, Cir. 2(2), Cochin vs. Norasia Lines (Malta) Ltd.	[2007] 107 ITD 301 (Cochin) (SB)[05-03-2007]	applicability of interest, obligation to pay advance tax in case of a non-resident governed by section 172, Rectification of mistakes Apparent from records	234B, 234C, 172
415	2007-03-06	Assistant Commissioner of Income-tax vs. DHL Operations BV	[2007] 13 SOT 581 (Mumbai) (SB)[06-03-2007]	powers of the Tribunal	255
416	2007-03-09	Smt. Krishna Verma vs. Assistant Commissioner of Income-tax, Investigation Circle, Faridabad	[2007] 107 ITD 1 (Delhi) (SB)[09-03-2007]	validity and defects in notice issued under section 158BC	158BC, 143, 148, 132
417	2007-03-14	Deputy Commissioner of Income-tax, Range 8(3) vs. Syncome Formulations (I) Ltd.	[2007] 106 ITD 193 (Mumbai) (SB)[14-03-2007]	working of deduction under section 80HHC	80HHC, 115JA
418	2007-04-17	Income-tax Officer, Ward-19(3)-4, Mumbai vs. Ms. Sushila M. Jhaveri	[2007] 107 ITD 327 (Mumbai) (SB)[17-04-2007]	allowability of exemption where more than one residential house purchased	54, 54F
419	2007-04-27	Assistant Commissioner of Income-tax, Circle-I, Tirupur vs. Rogini Garments	[2007] 108 ITD 49 (Chennai) (SB)[27-04-2007]	Principle of legislative intention	80HHC, 80-IA

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420	2007-07-09	Y. Subbaraju & Co. vs. Assistant Commissioner of Income-tax	[2004] 91 ITD 118 (Bangalore) (SB) [09-07-2004]	Existence of material is a sine qua non for taking action under section 158BD	158BD
421	2007-07-20	Deputy Commissioner of Income-tax, Circle 4(1) vs. Glaxo Smithkline Consumer Healthcare Ltd.	[2007] 107 ITD 343 (Chandigarh) (SB) [20-07-2007]	deduction under section 43B, in respect of payment of excise duty, tax etc	43B
422	2007-08-14	Dhariwal Industries Ltd. vs. Assistant Commissioner of Income-tax (Inv.), Circle-2(1)/Additional Commissioner of Income-tax, Range-1, Pune	[2008] 111 ITD 379 (Pune) (SB)[14-08-2007]	meaning of the term 'tobacco preparations' and 'chewing tobacco'	80-I, 80-IA
423	2007-08-17	Videsh Sanchar Nigam Ltd. vs. Commissioner of Income-tax, City-1, Mumbai	[2008] 111 ITD 190 (Mumbai) (SB)[17-08-2007]	concept of new undertaking	80-IA
424	2007-08-31	Pradeep Agencies v. ITO	[2007] 18 SOT 12 (Delhi) (SB)/ [2007] 111 TTJ 346 (Delhi) (SB)	taxation in the hands of the 'right person'	167B, 67A
425	2007-08-31	Bhagwad Swarup Shri Shri Devraha Baba Memorial Shri Hari Parmarth Dham Trust vs. Commissioner of Income-tax, Dehradun	[2008] 111 ITD 175 (Delhi) (SB)[31-08-2007]	deemed registration of trust if order granting/refusing registration not passed within stipulated time	12AA, 12A
426	2007-09-07	Joint Commissioner of Income-tax, Special Range-16, Kolkata vs. ITC Ltd.	[2008] 112 ITD 57 (Kolkata) (SB)[07-09-2007]	allowability of business expenditure	37(1), 37(2), 36(1)(iii), 40A(2)
427	2007-10-18	Rammanohar Singh vs. Assistant Commissioner of Income-tax, Circle Satna	[2008] 170 Taxman 79 (Jabalpur) (SB) (MAG)[18-10-2007]	allowability of Business expenditure where higher charges paid for obtaining substancial earnings	37(1)
428	2007-10-26	New India Industries Ltd. vs. Assistant Commissioner of Income-tax, Circle 16(1), New Delhi	[2007] 18 SOT 51 (Delhi) (SB)/ [2007] 112 TTJ 917 (Delhi)(SB)	Bad debts	36(1)(vii), 36(1)(viia)

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429	2007-11-16	Voltas Ltd. vs. Assistant Commissioner of Wealth-tax, Circle 7(3), Mumbai	[2008] 113 ITD 19 (Mumbai) (SB)[16-11-2007]	Deemed wealth	4, 2(m) of wealth tax act 269UA of income tax act
430	2007-11-30	Medicare Investments Ltd. vs. Joint Commissioner of Income-tax, Special Range-20, New Delhi	[2008] 114 ITD 34 (Delhi) (SB)[30-11-2007]	allowability of deduction for loss incurred on sale of NCDs	28
431	2007-11-30	RBF Rig Corpn. LIC (RBFRC) vs. Assistant Commissioner of Income-tax, Circle-1, Dehradun	[2007] 109 ITD 141 (Delhi) (SB)[30-11-2007]	taxability of payment of tax on behalf of employee as a non-monetary perquisite	10(10CC), 17(2)(iv)
432	2008-02-15	Aquarius Travels (P.) Ltd. vs. Income-tax Officer, Co. Ward-2(3), New Delhi	[2008] 111 ITD 53 (Delhi) (SB)	Retrospective applicability of section 14A, as amended by Finance Act, 2002	Section 14A of IT Act
433	2008-02-15	Amway India Enterprises vs. Deputy Commissioner of Income-tax, Circle-1(1), New Delhi	[2008] 111 ITD 112 (Delhi - Trib.)	(i) Criteria for deciding nature of expenditure as to whether it is capital or revenue? (ii) Depreciation on Computer Software	Section 37(1) and 32 of IT Act
434	2008-02-20	Narang Overseas (P.) Ltd. vs. Assistant Commissioner of Income-tax, Central Circle 36, Mumbai	[2008] 111 ITD 1 (Mumbai) (SB)	Taxability of mesne profit	Section 4 of IT Act
435	2008-03-01	Sumit Bhattacharya vs. Assistant Commissioner of Income-tax, Circle 16(1), Mumbai	[2008] 112 ITD 1 (Mumbai) (SB)	Taxability of amount received on redemption of 'Stock Appreciation Rights' granted by employer	Section 15 r/w. 56 and 45 of IT Act
436	2008-03-07	Income-tax Officer, Ward-I, Murshidabad vs. Kenaram Saha & Subhash Saha	[2009] 116 ITD 1 (Kolkata) (SB)	Cash payments exceeding prescribed limits	Section 40(3) of IT Act, r/w Rule 6DD of the IT Rules

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437	2008-03-28	Assistant Commissioner of Income-tax, Central Circle-13, New Delhi vs. Mayur Recreational & Development Ltd.	[2008] 113 ITD 181 (Delhi) (SB)	Income from House Property - Estimation of ALV	Section 23 of IT Act
438	2008-05-09	Gujarat Credit Corpn. Ltd. vs. Assistant Commissioner of Income-tax, Circle-4, Ahmedabad	[2008] 113 ITD 133 (Ahmedabad - ITAT) (SB)	(i) Limitation Period for completion of assessment, in light of proviso to section 147 (ii) Non-disclosure of primary facts - whether re-opening justified? (iii) Speculation Loss - Non delivery of shares (iv) Penalty - For concealment of income	Section 73, 147, 153 and 271(1)(c) of IT Act
439	2008-05-30	Shri Kamrej Vibhag Sahakari Khand Udyog Mandli Ltd. vs. Income-tax Officer, TDS 2, Surat	[2008] 113 ITD 539 (Ahmedabad - ITAT) (SB)	Deduction of tax at source - payment to Contractors/ sub-contractors	Section 194C of the IT Act
440	2008-06-05	B.G. Chitale vs. Deputy Commissioner of Income-tax, Special Range 3, Solapur	[2008] 115 ITD 97 (Pune) (SB)	Whether process of standardization and pasteurization of milk does not amount to manufacture/production	Section 80-I, r/w. section 80HHA of IT Act
441	2008-06-06	Smt. Krishna Verma vs. Assistant Commissioner of Income-tax, Investigation Circle, Faridabad	[2008] 113 ITD 655 (Delhi) (SB)	Time limit for completion of Block assessment in search cases	Section 158BE r/w. section 32 of IT Act
442	2008-07-11	Income-tax Officer, Ward 11(1), New Delhi vs. Ekta Promoters (P.) Ltd.	[2008] 113 ITD 719 (Delhi) (SB)	Whether provisions of section 234D are substantive and they cannot be applied retrospectively	Section 234D of IT Act

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443	2008-07-25	Manoj Aggarwal vs. Deputy Commissioner of Income-tax, Central Circle 3, New Delhi	[2008] 113 ITD 377 (Delhi) (SB)	Undisclosed Income and Undisclosed Investment - Block assessment in search cases - Procedure	Section 69 r. w. s. 68 & 69B, section 158B, section 158BD r. w. s. 158BC & 147, section section 143 r. w. s. 158BD and section 68 of IT Act
444	2008-08-22	Assistant Commissioner of Income-tax, Circle 16(1), Mumbai vs. Prakash L. Shah	[2008] 115 ITD 167 (Mumbai) (SB)	(i) Whether foreign exchange fluctuation gain is part of 'Export turnover' and cannot be treated as 'Income from other sources' (ii) Whether provision of section 155(13) has an overlapping effect on provisions of section 80HHC	Section 80HHC and Section 155 of IT Act
445	2008-08-25	Assistant Commissioner of Income-tax, Circle III, Ferozepur vs. Sonu Verma	[2008] 115 ITD 37 (Amritsar) (SB)	Procedure for Block assessment in search cases	Section 158BC r/w. section 132 of IT Act
446	2008-09-12	Deputy Commissioner of Income-tax vs. Zaveri & Co. Exports	[2008] 119 TTJ 1 (Ahmedabad - ITAT) (SB)	Treatment of DEPB receipt while computing deduction under section 80HHC	Section 80HHC of IT Act
447	2008-09-19	Gujarat Gas Financial Services Ltd. vs. Assistant Commissioner of Income-tax, Circle-4, Ahmedabad	[2008] 115 ITD 218 (Ahmedabad - ITAT) (SB)	(i) Interest Tax - Financial Company - Finance Lease, Inter Corporate Deposit & interest on delayed payment by debtors (ii) Income Tax - Bad Debts	Section 2(5B) and 2(7) of Interest Tax Act and 36(1)(vii) r. w. s. 36(2) of Income Tax Act
448	2008-09-26	Deputy Commissioner of Income-tax, Circle-II, Meerut vs. Padam Prakash (HUF)	[2009] 117 ITD 129 (Delhi) (SB)	Scope of section 254(2)	Section 254 of IT Act

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449	2008-10-17	Assistant Commissioner of Income-tax, Ahmedabad Circle-1, Ahmedabad vs. Ashima Syntex Ltd.	[2009] 117 ITD 1 (Ahmedabad - ITAT) (SB)	Business expenditure - Year in which deductible	Section 37(1) of IT Act
450	2008-10-20	Income-tax Officer, Ward 6(2)(2), Mumbai vs. Daga Capital Management (P.) Ltd.	[2009] 117 ITD 169 (Mumbai) (SB)	14A - shares held as stock in trade	Section 14A of IT Act
451	2008-11-19	Assistant Commissioner of Income-tax, Circle-33, Mumbai vs. Bhaumik Colour (P.) Ltd.	[2009] 118 ITD 1 (Mumbai) (SB)	Deemed dividend u/s. 2(22)(e)	Section 2(22)(e) of IT Act
452	2008-12-29	Maruti Countrywide Auto Financial Services Ltd. vs. Income-tax Officer, Ward 6(2), Delhi	[2009] 29 SOT 151 (Delhi) (SB)	Meaning of Interest	Section 2(7) r/w. 8(2) of Interest Tax Act
453	2009-01-14	Kuber Tobacco Products (P.) Ltd. vs. Deputy Commissioner of Income-tax, Co. Circle 5(1), New Delhi	[2009] 28 SOT 292 (Delhi) (SB)	Notice deemed to be valid in certain circumstances	section 292BB of IT Act
454	2009-03-05	J.M. Baxi & Co. vs. Deputy Director of Income-tax (Intl. Tax)-2(1), Mumbai	[2009] 117 ITD 131 (Mumbai) (SB)	Time-limit for issuance of notice u/s. 148	Section 149 r/w. 163 of IT Act
455	2009-03-06	Income-tax Officer, Company Ward-VI(1), Chennai vs. Sak Soft Ltd.	[2009] 30 SOT 55 (Chennai) (SB)	reight, telecom charges or insurance - Deduction 10B	Section 10B of IT Act
456	2009-04-06	Brahma Associates vs. Joint Commissioner of Income-tax (OSD), Circle 4, Pune	[2009] 119 ITD 255 (Pune) (SB)	Fulfillment of conditions u/s. 80-IB	Section 80-IB of IT Act
457	2009-04-24	Rajalakshmi Mills Ltd. vs. Income-tax Officer, Company Circle III, Coimbatore	[2009] 31 SOT 353 (Chennai) (SB)	(i) Inquiries u/s. 263 (ii) Disallowance of Gratuity	Section 263 and 40A(7) of IT Act

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458	2009-06-23	Assistant Commissioner of Income-tax, Range - II, Moradabad vs. Hindustan Mint & Agro Products (P.) Ltd.	[2009] 119 ITD 107 (Delhi) (SB)	Deduction of Profits and gains from industrial undertakings, etc., after certain dates/infrastructure undertakings	Section 80-IA and 80HHC of IT Act
459	2009-07-10	Tata Communications Ltd. vs. Joint Commissioner of Income-tax, Special Range 1, Mumbai	[2009] 121 ITD 384 (Mumbai) (SB)	Application u/s. 254(2)	Section 254 of IT Act
460	2009-07-31	Shree Capital Services Ltd. vs. Assistant Commissioner of Income-tax, Circle-5, Kolkata	[2009] 121 ITD 498 (Kolkata) (SB)	Speculative Transactions u/s. 43(5)	Section 43(5) of IT Act
461	2009-08-11	Topman Exports vs. Income-tax Officer, (OSD), 14(2), Mumbai	[2009] 33 SOT 337 (Mumbai) (SB)	(i) Business Income - DEPB Scheme - DFRC (ii) Deduction u/s. 80HHC (iii) Income form other sources - Interest on surplus funds	Section 28(iiid), 28(iiie), 80HHC and 56 of IT Act
462	2009-08-13	Asstt. Commissioner of Income-tax vs. Subhash Verma	[2009] 125 TTJ 865 (Delhi) (SB)	Undisclosed Income and Undisclosed Expenditure - Block assessment in search cases	Section 158B and 69C of IT Act
463	2009-09-15	Concept Creations vs. Additional Commissioner of Income-tax, Range, Panipat	[2009] 120 ITD 19 (Delhi) (SB)	Can President, Senior Vice-President, Vice-President and Member of Tribunal practice before Tribunal	Section 254 of IT Act and Rule 13E of ITAT Members (Recruitment and Conditions of Service) Rules, 1963
464	2009-10-16	Kailash Nath & Associates vs. Income-tax Officer, Ward 31(2), New Delhi	[2009] 121 ITD 563 (Delhi) (SB)	Accrual of Income	Section 5, r.w.s. 28(ii) and 4 of IT Act
465	2009-10-16	Deputy Commissioner of Income-tax, 12(2) vs. Manjula J. Shah	[2010] 35 SOT 105 (Mumbai) (SB)	Indexation u/s. 48 in case of capital assets acquired by way of gift	Section 48 of IT Act

Sr. No.	Date	Name	Citations	Issues	Sections
466	2009-10-30	Assistant Commissioner of Income-tax, Central Circle-18, New Delhi vs. Sushila Milk Specialities (P.) Ltd.	[2010] 122 ITD 48 (Delhi) (SB)	Inquiry before assessment - special audit u/s. 142(2A)	Section 142(2A) of IT Act
467	2009-11-27	Income-tax Officer vs. Padam Prakash (HuF)	[2010] 127 TTJ 311 (Delhi) (SB)	Scope of section 254(2)	Section 254 of IT Act
468	2010-01-04	DLF Universal Ltd. vs. Deputy Commissioner of Income-tax, Special Range (Cent.)-I, New Delhi	[2010] 36 SOT 1 (Delhi) (SB)	Capital Gains - stock-in-trade converted into a capital asset and contributed to a firm as capital contribution	section 2(47) of IT Act
469	2010-01-22	Maharashtra State Co-operative Bank Ltd. vs. Assistant Commissioner of Income-tax, Circle 1(3), Mumbai	[2010] 38 SOT 325 (Mumbai) (SB)	section 80P vis-a-vis business of banking,	section 80P of IT Act
470	2010-03-19	CLC & Sons (P.) Ltd. vs. Assistant Commissioner of Income-tax, Circle 3(1), New Delhi	[2010] 38 SOT 439 (Delhi) (SB)	Scope of section 253	Section 253 of IT Act
471	2010-04-07	Triumph Securities Ltd. vs. Deputy Commissioner of Income-tax, Central Circle 40, Mumbai	[2010] 39 SOT 139 (Mumbai) (SB)	Block assessment in search cases - Computation of Undisclosed income	Section 69, 132, 142, 158B and 158BB of IT Act
472	2010-04-09	Joint Commissioner of Income-tax1 vs. Thirani Chemicals Ltd.	[2010] 40 SOT 530 (Delhi) (SB)	Deduction of Profits and gains from hotels or industrial undertakings, etc., in backward areas	Section 80HH r. w. s. 80-I of IT Act
473	2010-05-26	Assistant Commissioner of Income-tax/Deputy Commissioner of Income-tax, Company Circle-IV(1), Chennai-34 vs. Mahindra Holidays & Resorts (India) Ltd	[2010] 39 SOT 438 (Chennai) (SB)	Accrual of Income	Section 5 of IT Act
474	2010-06-30	Income-tax Officer, Ward 3, Panchkula vs. Raghbir Singh (HUF)	[2010] 42 SOT 112 (Chandigarh) (SB)	Liability to pay interest u/s. 234A and 234B	Section 234A and 234B of IT Act

Sr. No.	Date	Name	Citations	Issues	Sections
475	2010-06-30	Deputy Commissioner of Income-tax, Circle 1(3), Mumbai vs. Times Guaranty Ltd.	[2010] 40 SOT 14 (Mumbai) (SB)	Set off of Unabsorbed depreciation	Section 32(2) of IT Act
476	2010-07-02	Rain Commodities Ltd. vs. Deputy Commissioner of Income-tax, Circle-3(1), Hyderabad	[2010] 40 SOT 265 (Hyderabad) (SB)	Power of examining books of accounts for computing book profit of a company under section 115JB	Section 115JB r. w. s. 115J of IT Act
477	2010-07-09	Deputy Commissioner of Income-tax, 2(1), Mumbai vs. Datacraft India Ltd.	[2010] 40 SOT 295 (Mumbai) (SB)	Allowance of Depreciation - routers/switches	Section 32 of IT Act
478	2010-07-14	V.K. Natesan vs. Deputy Commissioner of Income-tax, Central, Circle-2, Kochi	[2011] 9 taxmann. com 76 (Cochin) (SB)	Revision of orders prejudicial to interests of revenue - two possible view	Section 263, r. w. s. 271(1)(c) and 275 of IT Act
479	2010-07-16	Deputy Commissioner of Income-tax, Range 7(2), Mumbai vs. Shreyas S. Morakhia	[2010] 40 SOT 432 (Mumbai) (SB)	Allowability of bad debts written off	Section 36(1)(vii) of IT Act
480	2010-07-30	Tecumseh India (P.) Ltd. vs. Additional Commissioner of Income-tax, Special Range-5, New Delhi	[2010] 127 ITD 1 (Delhi) (SB)	Non-compete fee - revenue expenditure - Allowability	Section 37(1) of IT Act
481	2010-08-13	Deputy Commissioner of Income-tax (International Taxation)-1(1), Mumbai vs. Bank of Bahrain & Kuwait	[2010] 41 SOT 290 (Mumbai) (SB)	(i) Business Loss - Forward Contract (ii) Income - Accrual -Guarantee Commission (iii) Disallowance - 14A	Section 28(i), 5 and 14A of IT Act
482	2010-11-02	Zylog Systems Ltd. vs. Income-tax Officer, Company Ward- III	[2011] 128 ITD 105 (Chennai) (SB)	Deduction - 10B - Export oriented undertaking	Section 10B of IT Act
483	2010-11-10	Sulzer India Ltd. vs. Joint Commissioner of Income-tax - Range 8(3), Mumbai	[2010] 42 SOT 457 (Mumbai) (SB)	Remission or cessation of trading liability	Section 41(1) of IT Act
484	2011-01-07	Shri Padam Prakash (HUF) vs. Income-tax Officer, Ward-2(1), Meerut	[2011] 9 taxmann. com 178 (Delhi) (SB)	Subsequent application u/s. 254(2)-Tribunal-Power to entertain	Section 254 of IT Act

Sr. No.	Date	Name	Citations	Issues	Sections
485	2011-03-04	Rajeev Sureshbhai Gajwani vs. Assistant Commissioner of Income-tax, Circle-6, Baroda	[2011] 129 ITD 145 (Ahmedabad - ITAT) (SB)	Deductions - Profits and gains from export of computer software - Non-discrimination - Non resident Assessee	Section 80HHE of IT Act read with article 26 of DTAA between India and USA
486	2011-03-29	V.K. Natesan vs. Deputy Commissioner of Income-tax, Central, Circle-2, Kochi	[2011] 130 ITD 19 (Mumbai) (SB)	Power of Tribunal to extend stay of demand beyond period of 365 days	Section 254 of IT Act
487	2011-04-25	Income-tax Officer-22(3)(4) vs. United Marine Academy	[2011] 130 ITD 113 (Mumbai) (SB)	Depreciable Asset - Provisions of section 50C	Section 50C r. w. s. 50 of IT Act
488	2011-05-06	Assistant Commissioner of Income-tax, Range-I, Dehradun vs. Clough Engineering Ltd.	[2011] 11 taxmann.com 70 (Delhi) (SB)	Double taxation relief - Where agreement exists	Section 90 of IT Act read with articles 7 and 11 of the DTAA between India and Australia
489	2011-06-22	Dalal Broacha Stock Broking (P.) Ltd. vs. Additional Commissioner of Income-tax Range 4(1), Mumbai	[2011] 11 taxmann.com 426 (Mumbai) (SB)	Allowability - Bonus or commission	Section 36(1)(ii) of IT Act
490	2011-08-10	Deputy Commissioner of Income-tax, Circle 8(2) Mumbai vs. Summit Securities Ltd.	[2011] 12 taxmann.com 372 (Mumbai) (SB)	Procedure of Appellate Tribunal	Section 255 of IT Act
491	2011-08-12	Deputy Commissioner of Income-tax, C.C. XX vs. Rajesh Kumar Drolia	[2011] 12 taxmann.com 410 (Kolkata) (SB)	Profits and gains from industrial undertakings other than infrastructural development undertakings	Section 80IB of IT Act
492	2011-12-09	Nandi Steels Ltd. vs. Assistant Commissioner of Income-tax, Circle-12(2), Bangalore	[2012] 17 taxmann.com 93 (Bangalore) (SB)	Carry forward and set-off of business losses	Section 70 of IT Act

Sr. No.	Date	Name	Citations	Issues	Sections
493	2012-02-13	Assistant Commissioner of Income-tax Circle 2(3), Hyderabad v. Dr. B.V. Raju	[2012] 135 ITD 1 (Hyderabad) (SB)	Taxability of non-compete fee	28(va)
494	2012-03-07	Deputy Commissioner of Income tax, Circle 8(2) v. Summit Securities Ltd	[2012] 135 ITD 99 (Mumbai) (SB)	Computation of capital gains - Slump Sale	50B
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508	2012-10-26	Vinod Kumar Jain v. Income-tax Officer-Ward-1(3), Jammu*	[2012] 140 ITD 1 (Amritsar) (SB)	Refund of excise duty	4
509	2012-11-30	Saffire Garments v. Income-tax Officer, Ward 2, Gandhidham	[2013] 140 ITD 6 (Rajkot) (SB)	Deduction u/s 10A	10A
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511	2013-07-16	Biocon Ltd. v. Deputy Commissioner of Income-tax (LTU), Bangalore	[2014] 144 ITD 21 (Bangalore - Trib.) (SB)	Discount on ESOP	37
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513	2014-03-25	Alkaben B. Patel v. Income-tax Officer, Ward -14(2), Ahmedabad*	[2014] 148 ITD 31 (Ahmedabad - Trib.) (SB)	Term - 'month'	54EC, General Clauses Act
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517	2016-12-02	Neptune Developers & Construction (P.) Ltd., In re vs. [Income tax settlement commission]	[2017] 79 taxmann.com 134 (ITSC – Mumbai) (SB) [02-12-2016]	Admission of application to SetCom - if additional income disclosed in application exceeds threshold limits	245C
518	2017-01-20	Deputy Commissioner of Income-tax, Company Circle I(2), Chennai vs. Bharat Overseas Bank Ltd.	[2017] 81 taxmann.com 179 (Chennai - Trib.) (SB) [20-01-2017]	Interest-tax collected - will not form part of chargeable interest	6 of Interest-tax Act, 1974
519	2017-02-14	Assistant Commissioner of Income-tax, Circle-16(2), Hyderabad vs. Progressive Constructions Ltd.	[2018] 92 taxmann.com 104 (Hyderabad - Trib.) (SB) [14-02-2017]	Construction of road on BOT basis - eligible for depreciation - no amortisation of construction costs S/14A disallownace to be restricted to exempt income	32(1)(ii), 37(1), 14A Circular 9 / 2014
520	2017-06-16	Assistant Commissioner of Income-tax, Circle 17 (1), New Delhi vs. Vireet Investment (P.) Ltd.	[2017] 82 taxmann.com 415 (Delhi - Trib.) (SB) [16-06-2017]	Book Profits - computation of disallowance u/s 14A S/14A disallownace to be restricted to exempt income	115JB r.w.s 14A 14A r.w. Rule 8D
521	2017-09-26	Claris Life Sciences Ltd. vs. Deputy Commissioner of Income-tax, (OSD), Ahmedabad	[2017] 86 taxmann.com 56 (Ahmedabad - Trib.) (SB) [26-09-2017]	Penalty payable when no self assessment tax paid on filing original return	221 r.w.s 140A
522	2018-04-30	Assistant Commissioner of Income-tax, Circle-4, Ahmedabad vs. Goldmine Shares and Finance (P.) Ltd.	[2008] 113 ITD 209 (Ahmedabad - ITAT) (SB)	Computation of deduction u/s. 80-IA, after deduction of notional b/f losses and depreciation of eligible business	Section 80-IA of IT Act
523	2018-06-05	Nokia Networks OY vs. Joint Commissioner of Income-tax	[2018] 194 TTJ (Del)(SB) 137 [05-06-2018]	Permanent establishment - activities carried out are of preparatory and auxiliary nature	Section 90, Art 5 of India-Finland DTAA

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524	2018-06-13	Deepak Sales & Properties (P.) Ltd. vs. Additional Commissioner of Income-tax, Circle 9(1), Mumbai	[2018] 95 taxmann.com 166 (Mumbai) (SB) [13-06-2018]	Penalty - accepting cash loans without proving necessity	269SS r.w.s 271D
525	2018-07-09	Deputy Commissioner of Income-tax, Circle-2 (1), Hyderabad vs. Inventaa Industries (P.) Ltd.	[2018] 95 taxmann.com 162 (Hyderabad - Trib.) (SB) [09-07-2018]	Income from production and sale of Mushrooms is agricultural income	2(1A)
526	2018-07-19	CLC & Sons (P.) Ltd. vs. Assistant Commissioner of Income-tax, Circle- 3 (1), New Delhi	[2018] 95 taxmann.com 219 (Delhi - Trib.) (SB) [19-07-2018]	Depreciation available on genuine Goodwill	32
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528	2018-12-26	Doshi Accounting services (P) Ltd vs. Deputy Commissioner of Income-tax	[2019] 202 TTJ (Ahd)(SB) 845 [26-12-2018]	Applicability of Chapter X - Even if income is exempt under Section 10A - Arm's Length Price to be determined	10A r.w.s. 92C
529	2019-02-25	Assistant Commissioner of Income-tax, Cir. 6, Ahmedabad vs. Himanshu vs. Shah	[2019] 104 taxmann.com 279 (Ahmedabad - Trib.) (SB) [25-02-2019]	Deductions - Infrastructure undertakings (franchisee of telecom service provider)	80-IA(4)(ii)
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532	2019-10-24	Doshi Accounting services (P) Ltd vs. Deputy Commissioner of Income-tax	[2019] 197 TTJ (Ahd)(SB) 273 [24-10-2019]	Stay on recovery of outstanding demand extended as delay not due to assessee	254(2A)

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BENCH	NO. OF BENC.	INSTITUTION	DISPOSAL	PENDENCY	SMC PENDENCY
MUMBAI	11	126	690	12950	1580
PUNE	3	38	150	4122	257
NAGPUR	1	7	7	1078	240
RAIPUR		15	3	1151	51
PANJI	1	7	0	983	217
DELHI	9	108	896	19916	2898
DEHARADUN (Circuit)		3	24	741	55
AGRA	1	41	37	582	117
BILASPUR	-	-	-	-	-
LUCKNOW	2	65	42	1505	144
ALLAHABAD	1	0	55	468	123
VARANASI (Circuit Bench)		4	34	431	125
JABALPUR	1	19	18	622	74
KOLKATTA	5	52	102	2491	477
PATNA	1	29	52	372	50
CUTTACK	1	25	59	770	25
GUWAHATI	1	19	14	591	121
RANCHI(Jhark hand) Circuit Bench	1	3	44	352	53
CHENNAI	4	75	103	5378	478
BANGALORE	3	42	257	3297	111
COCHIN	1	31	0	342	15
AHEMDABAD	4	49	289	5787	1301
SURAT	1	13	57	2510	667
INDORE	1	56	81	1836	187
RAJKOT	1	7	17	1231	410
HYDERABAD	2	62	89	4836	646
VISHAKHA	1	27	78	767	269
PATNAM					
CHANDIGARH	2	10	96	1544	354
AMRITSAR	1	3	32	1571	523
JAIPUR	2	7	52	912	454
JODHPUR	1	0	87	618	158
TOTAL	**63**	**943**	**3465**	**79754**	**12180**
		Vacancy			
Nos. of Members	**126**	**(Present members 78, Vacancy 48 members)**			

Case Laws Index

STATEMENT AS PER PRESS AND REGISTRATION OF BOOKS ACT
FORM IV

[See Rule 8]

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I, Shri Karkala Shivaram Kittanna, hereby, declare that the particulars given above are true to the best of my knowledge and belief.

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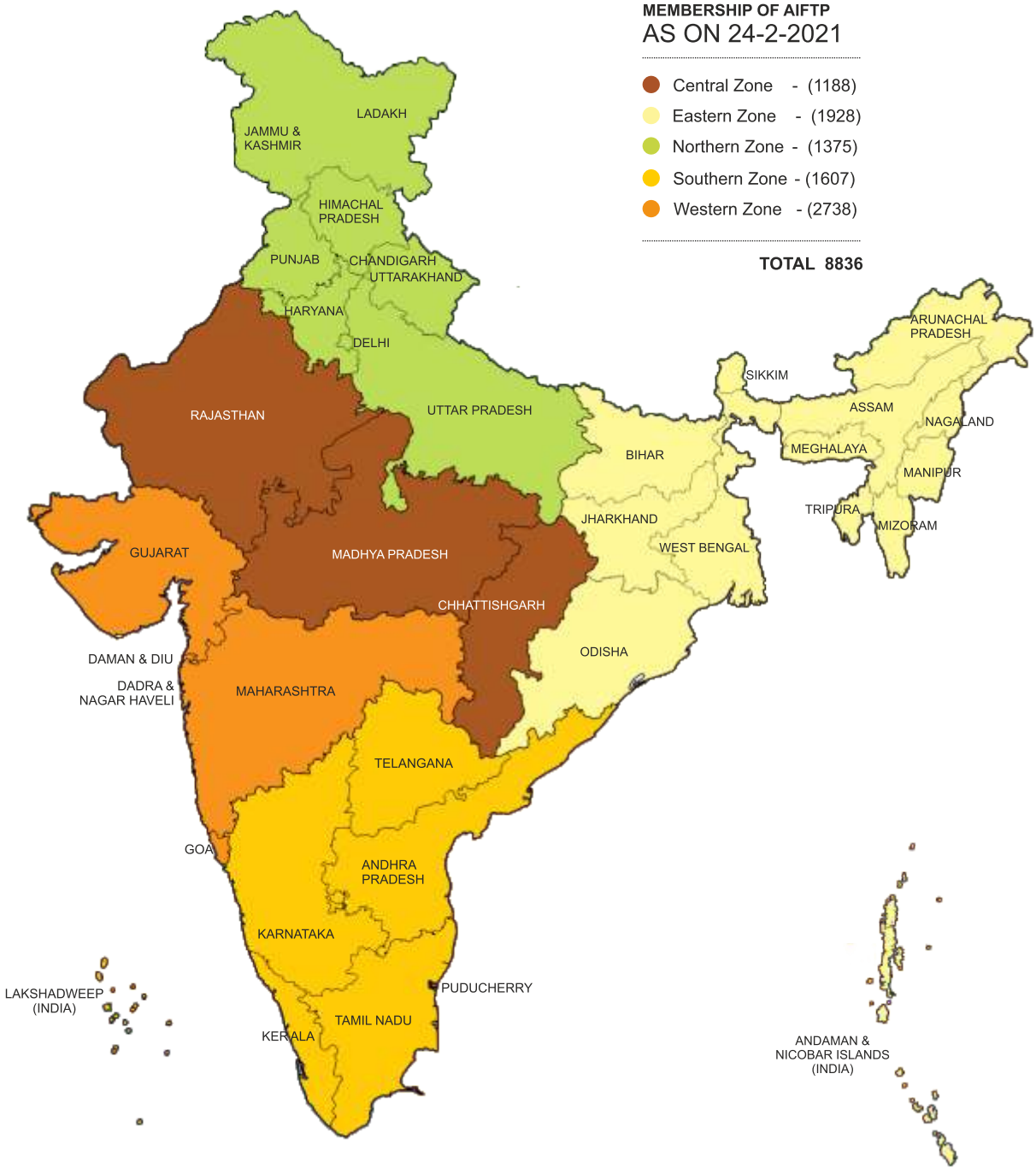
MEMBERSHIP OF AIFTP
AS ON 24-2-2021
Central Zone - (1188)
Eastern Zone - (1928)
Northern Zone - (1375)
Southern Zone - (1607)
Western Zone - (2738)
TOTAL 8836
LADAKH
JAMMU & KASHMIR
HIMACHAL PRADESH
PUNJAB
CHANDIGARH
UTTARAKHAND
HARYANA
DELHI
RAJASTHAN
UTTAR PRADESH
BIHAR
SIKKIM
ARUNACHAL PRADESH
ASSAM
NAGALAND
MEGHALAYA
MANIPUR
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