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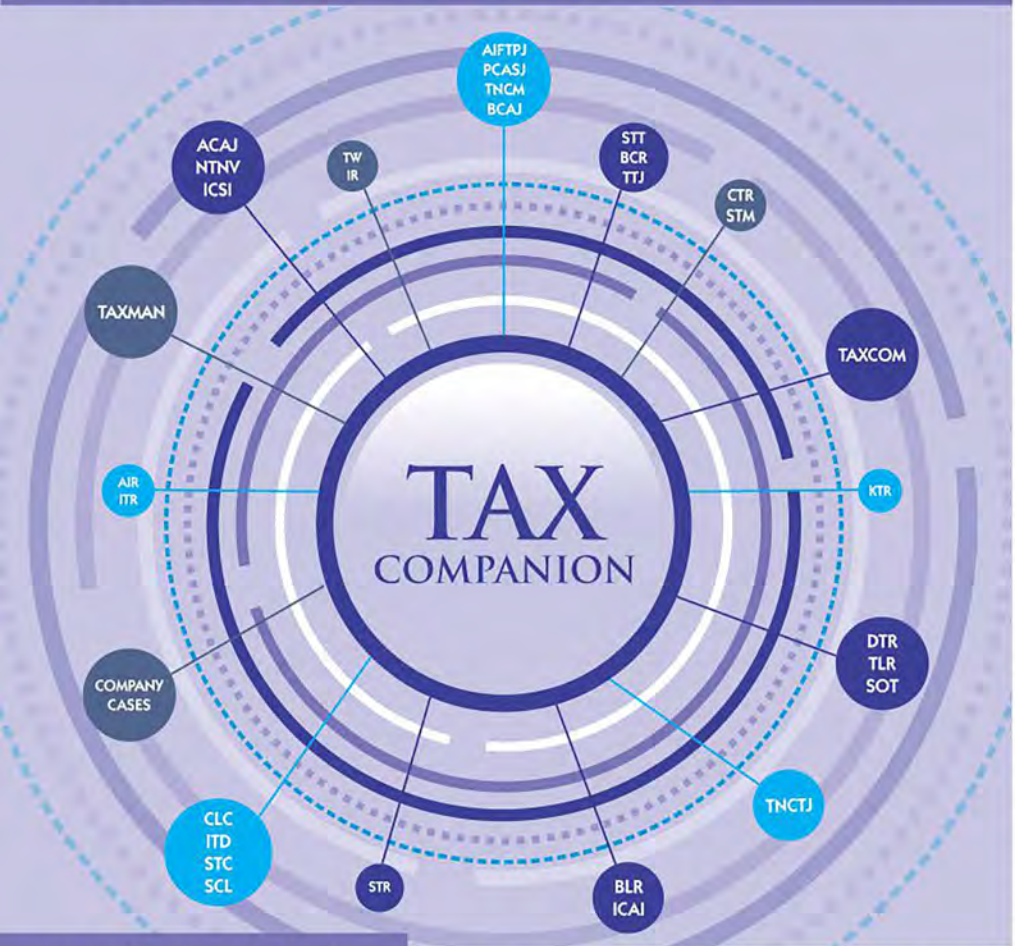

ALL INDIA FEDERATION OF TAX PRACTITIONERS

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TDS Seminar held at Indore

CA Rajesh Mehta
Secretary AIFTP-CZ addressing the gathering on TDS provisions

CIT (TDS) Bhopal (M.P. & C.G) Shri S.C. Sonkar addressing the audience

CA Rajesh Mehta addressing the gathering on TDS Seminar at ICAI

Audience during TDS Seminar

GYANVANI – A Seminar on Service Tax held on 11th January, 2014

(AIFTP-NZ as Knowledge Partner in Collaboration of GMA)

From Left to Right: Mr. Vinay Gupta (GMA), Mr. Arvind Shukla (Chairman – NZ), Mr. J.D. Nankani (National President – AIFTP), FCA Mr. Abhishek Jain, FCA Mr. Saurabh Agarwal & FCA Mr. Naveen Garg (Vice Chairman-Delhi)

Mr. J.D. Nankani (National President – AIFTP) receiving the memento from Mr. Arun Agarwal (President of GMA)

From Left to Right: Mr. Anuj Bansal (Joint Secretary-NZ), Mr. Arvind Shukla (Chairman-NZ) & Mr. Ajay Sinha (General Secretary-NZ)

Mr. Mukul Gupta (National Vice President – NZ) receiving the memento

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FROM THE EDITOR-IN-CHIEF

Can banking transaction tax oust Income-tax Act, 1961 – A thought for debate – Remodelling of tax laws and tax administration is the need of the hour calling for immediate attention of the Government.

Finance Minister's Advisor Mr. Partha Sarthi Shome favoured lowering of corporate taxes saying it would lead to higher growth and development. ***"Lowering of corporate taxes will result in higher job growth and is more development oriented"***, Shome said at an event organised by the Bharat Chamber of Commerce, Kolkata. Shome said the marginal rate of taxation for High Net-worth Individuals (HNIs) in India is not as high as compared to that in countries like the UK and the US. Persons having an income of ₹ 5 crore, for instance are taxed at 30% plus a surcharge. ***"This according to me, is low by any standards and should be raised to bring vertical equity in the taxation structure in the country. In India that can go higher and it is wise to slash top marginal rates. Some equity correction needs to be done"***. He also pointed out that profit shifting by some MNCs was leading to payout of lower effective taxation.

In a recent speech, Hon'ble Mr. Narendra Modi said his party has promised to "substantially reform" the tax structure of the country. His senior party members were talking of abolishing income-tax and supplanting it by a "Banking Transaction Tax" (BTT) of 2% of all transactions routed through the banking channel.

Whether it is the food security bill or provision of free water and subsidised electricity, such populist measures always cheer the general public. The middle class has been reeling under high inflation for quite some time and the proposal to abolish income-tax is likely to generate excitement amongst them. The BTT however does not differentiate between the rich and poor as it is not based on the conventional progressive system of taxation. Anyone with money flowing into his bank account will be charged a 2% tax on the amount. Whether it is a businessman, who makes ₹ 1 Lakh a day, or a humble peon who earns the same amount in a year or less, will be subjected to the same tax rate. Hence, it is most likely to result in hardship for the common man. It may be worthwhile to remember the sagacious words of Aristotle ***"the worst form of inequality is to try to make unequal things equal"***.

It also involves the larger constitutional issues of revenue sharing between the States and the Centre. Here, it is worthy to mention the fate of GST, since the Centre has not promised reimbursement of CST to the States till date.

But, what will be the impact of such a move? To understand the implications, let us consider the following data : In India, less than 3% people pay income tax, as against 45% of the US. Nearly 89% of this meagre 3% fall in the ₹ 0-5 lakh bracket, accounting for less than 10% of the tax collected. Nearly 10% of the tax paying population earns salaries of ₹ 5-20 lakh and their contribution to income tax is 27%. The biggest chunk of tax of around 63% is contributed by those who earned more than ₹ 20 lakh p.a., though they are less than 1.25% of the taxpaying population. In short, less than 0.04% of India's population pays 63% of all income-tax collected. This data-figures conform to the Law of the vital few suggested by Italian economist Vilfredo Pareto in 1906.

Of ₹ 10,38,037 crore of tax collection, income-tax accounted for ₹ 2,06,095 crore i.e. around 20% of the total tax collections. Abolishing income-tax will thus benefit less than 3% of the population, but will cost the country 20% of its tax revenue.

But, the impact on the economy and consumption patterns because of such a move will drive growth. Furthermore, this growth would result in higher income to the Government through indirect taxes. Also, more savings would mean lesser government spending helping to bridge the spiralling fiscal deficit levels.

Income-tax is Central subject whereas Sales Tax is a State subject. Hence, abolition of income-tax and introduction of a tax in the nature of BTT may require a Constitutional amendment which involves consent of the Legislatures of at least two-thirds of the states. It would be interesting to see how the various incentives offered under the Income-tax Act such as those provided for setting up of industries in backward areas would find place under the BTT regime. Considering the fate of GST, it is impossible to think that the States would favour such a move unless their revenue concerns are addressed first. However, BTT has opened space for a much needed dialogue for a revamp in the direct tax set-up in our country.

Being the stake holders in the progress of this country, it is the bounden duty of all tax professionals to debate and provide suggestions on such proposals objectively. However, till the new law, if at all, is introduced, the Government needs to act upon a number of issues. Some of the issues for the immediate consideration of ensuing government are as follows:

1. No retrospective amendment

The frequent and mindless amendments, many of which retrospective, over the last five decades have made the Income-tax law complicated and recondite. The Government would do well to save such retrospective amendments only for the rarest of rare cases restricted to prevention of gross abuse of the law or other exceptional circumstances. Apex court from time to time in various judgments has given guidance on the same lines. However, sadly, the same has been ignored till date.

2. Accountability

Another area that needs to be addressed is the lack of accountability of the Revenue officers. Needlessly and routinely high-pitched assessments are done by the Assessing Officers only due to fear of revenue audit, knowing fully well that the same may not withstand appellate or judicial scrutiny. This problem in our tax administration is causing severe heartburn for a long time. The Government therefore would do well to make the officers accountable as its bounden duty, as suggested by Dr. Raja Chellia in his report [1992] 197 ITR 177 (St.).

3. Finality of decision within reasonable time

Finality and quick resolution of disputes are the hallmark of any efficient tax administration system. According to me, an assessee must know his final tax liability within two years. However, at present, the first stage of determination of tax liability i.e. assessment takes two years after the return is filed. The first and second appellate proceedings take up to five years.

Thereafter, the litigation in High Courts and if it reaches to Apex court is long drawn and protracted. In a city like Mumbai, the tax appeals admitted in the year 2000 have not come up for final disposal due to shortage of Judges. More than 2,500 references of the year 1987 and onwards are pending. For the final decision of the Supreme Court, it may take more than 20 years. In such precarious scenario, the need of the hour is to establish a dedicated tax bench in all High Courts and a dedicated tax bench in the Apex court, as soon as possible, in the mutual interest of the revenue and taxpayer.

4. Streamlining the prosecution procedures

More than 90% tax is collected by way of advance tax and deduction at source. The assessees are made to deduct the tax at source on behalf of the Government. If there is few days delay in depositing the tax deducted at source, the assessee is made liable to pay interest, penalty and even liable for prosecution. In recent years, the assessees are getting notices for prosecution for delay in depositing the tax deducted at source. Is such action is justified especially when prosecution launched more than 15 years ago are still pending before the Magistrate's court?. This factual scenario is quite devastating to the taxpayer, who files the return regularly, who is punished whereas those who do not file return are able to go scot-free as there is no effective mechanism to catch the tax evaders.

5. Presumptive taxation

The scheme of the presumptive taxation may be extended to professionals too. Option may be given to the assessees to file the return under normal provision or under the presumptive scheme. On gross professional

receipts exceeding certain limit, this will depend upon on individuals, firms and corporate bodies, a fixed percentage may be collected as tax. This will substantially reduce compliance burden of assessees, who has to do lot of unproductive clerical work which does not provide job satisfaction to the concerned person.

6. Encourage banking transaction having permanent account number

Citizens must be encouraged to have all transactions above certain limits through banking channels, which will help reduce circulation of unaccounted money.

7. E-benches of the Supreme Court

The matters before the Supreme Court may be heard via video conferencing by linking it to the High Courts. This concept is similar to e-bench of ITAT. This will help the smaller assessees to save on the cost of litigation. (Refer Editorial Jan. 2013).

8. Direct appeal to Supreme Court on interpretation of law which affects large number of assessees

Whenever an important issue affecting large number of assessees is to be decided, power may be given to the Tribunal to refer such matters directly to the Supreme Court after hearing both the parties. This will help the assessees as well as department to reduce the pendency of appeals. (Refer Editorial Dec. 2012)

9. Agricultural income

Agriculture is a State subject. Therefore, income-tax cannot be levied on agricultural income. However, it would be worthwhile to debate whether the agriculturists having more than ₹ 10 lakhs as income be required to file the income-tax returns, though the income is exempt. This will help the Government to know whether the income is really from agriculture or from any other source.

10. Research in taxation

In our country there is no dedicated team which researches on various issues in taxation. There must be an on-going research in this field. Research team may consist of tax officials, member of the higher Judiciary, business and professional organisations. Before any amendment is introduced, it can be discussed and vetted by the research committee.

11. Constitution of a committee of tax professionals and professional organisations to suggest methods for simplification of tax laws

When the erstwhile Income-tax Act was abolished and the present Income-tax Act introduced, the Government has constituted a committee of practicing tax professionals. Eminent tax professionals with their vast experience in the field, can suggest constructive methods to simplify the tax laws while maintaining the basic structure of present Income-tax Act.

12. Tax payers should be treated with honour and respect

Time and again, various High Courts have passed strictures against the tax administration in respect of their high-handed recovery measures. Achieving targets should not be the sole ground for recovery of tax. Officials must be made to follow the due process of law. Under any circumstances, senior citizens of the age of 65 years and above must be respected.

13. Culture of tax service

The approach of the tax department must be service oriented towards tax collection, it being only incidental. If this approach is adopted, tax collections would definitely increase and administration will earn goodwill of the taxpayers.

We hope and trust the professional brothers will deliberate the issues discussed above, and offer their objective inputs in furtherance to take forward the present dialogue.

Dr. K. Shivaram
Editor-in-Chief

PRESIDENT'S MESSAGE

J. D. Nankani
National President

17. S.32A : Investment allowance – Actual cost – Additional liability due to fluctuation in currency rate. [S.43A]

Assessee is entitled to investment allowance on the additional cost of plant and machinery on account of fluctuations in currency rate.

CIT v. Gujarat State fertilizer Co. Ltd. (2013) 93 DTR 468 / 262 CTR 404 (SC)

18. S.80HHC : Export business – Profit on sale of DEPB. [S.28(iiid)]

Topman Exports v. CIT (2012) 342 ITR 49 (SC)) reaffirmed; where export turnover exceeds ₹ 10 crores, assessee does not get benefit of addition of ninety per cent of export incentive under clause (iiid) of Section 28 to his export profits, but he gets a higher figure of profits of business, which ultimately results in computation of a bigger export profit.

Global Agro Products (P.) Ltd. v. ITO (2013) 93 DTR 436 / 262 CTR 273 (SC)

19. S.132B : Application of seized or requisitioned assets – Search and seizure-Seizure of cash – Interest – Assessee is entitled to interest on cash appropriated during search even if refund is directed in appeal proceedings. [S.132(5), 240, 244A]

Pursuant to a search conducted u/s 132, cash of ₹ 2.35 lakhs was recovered. The AO passed an order u/s 132(5) in which he calculated the tax liability and appropriated the seized cash. An assessment order was also passed to the same effect. The AO's order was finally set-aside by the Tribunal and it became final. Consequently, the assessee was refunded the amount of ₹ 2.35 lakhs with interest from 4-3-1994 (date of last of the regular assessments by the AO) until the date of refund. The assessee claimed that he is entitled to interest u/s 132B(4)(b) of the Act for the period from the expiry of period of six months from the date of order u/s 132(5) to the date of regular assessment order. In other words, as the order u/s 132(5) was passed on 31-5-1990, six months expired on 30-11-1990 and the last of the regular assessments was done on 4-3-1994, the assessee claimed interest u/s 132B(4)(b) from 1-12-1990 to 4-3-1994. HELD by the Supreme Court:

The department's argument that the refund of excess amount is governed by s. 240 and that s. 132B(4)(b) has no application is not acceptable. S. 132B(4)(b) deals with pre-assessment period and there is no conflict between this provision and s. 240 or for that matter s. 244(A). The former deals with pre-assessment period in the matters of search and seizure and the later deals with post assessment period as per the order in appeal. The department's view is not right on the plain reading of s. 132B(4)(b) and the assessee is entitled to simple interest at the rate of 15% per annum u/s 132B(4)(b) from 1-12-1990 to 4-3-1994. The court directed that interest shall be paid within two months.

Chironjilal Sharma (HUF) v. UOI (2013) 263 CTR 625 / 96 DTR 305 (SC)

20. S.133 : Power to call information – Notice – Bank – General information – AO empowered to launch fishing and roving enquiry with a view to detect tax evasion. [S.133(6)]

The ITO issued a notice u/s. 133(6) to the assessee-bank u/s. 133(6) of the Act calling for

general information regarding details of all persons who have made cash transactions and time deposits of ₹ 1,00,000/- and above for the period of three years between 1-4-2005 and 31-3-2008. The assessee claimed that s. 133(6) does not empower the ITO to conduct a roving or fishing enquiry into the affairs of the assessee or regarding the deposits made by its customers. It was also contended that the AO can only seek "case specific" or "area specific" information u/s 133(6). The High Court dismissed the Writ Petition. On appeal by the assessee to the Supreme Court HELD dismissing the appeal:

The legislative intention behind s. 133(6) was to give wide powers to the income-tax department to gather general particulars in the nature of survey so that the data so collected can be made use of for checking evasion of tax effectively. It would not fall under the restricted domains of being "area specific" or "case specific." S. 133(6) does not refer to any enquiry about any particular person or assessee, but pertains to information in relation to "such points or matters" which the assessing authority issuing notices requires. This clearly illustrates that the information of general nature can be called for and names and addresses of depositors who hold deposits above a particular sum is certainly permissible (*Karnataka Bank Ltd v. Government of India (2002) 9 SCC 106 followed; M.V. Rajendran & ors. v. ITO (2003) 260 ITR 442 (Ker)* approved) (Civil Appeal No. 7460 of 2013)

Kathiroor Service Co-operative bank Ltd. v. CIT (SC) www.itatonline.org.

21. S.234D : Interest – Insertion of Expl-2 into the provision – Could not be applied retrospectively

Interest u/s. 234D could not be applied retrospectively to Assessment Year 1995-96 as Finance Act, 2012 introduced the same w.e.f. 1-6-2003.

CIT v. Reliance Energy Ltd. (2013) 262 CTR 272 (SC)

22. S.260A : Appeal – High Court – High Court has power to hear the appeal on questions not formulated at the stage of admission of the appeal

The department filed an appeal u/s 260A in the High Court in which it raised several questions. The High Court admitted the appeal and framed two substantial questions of law. The Department filed a SLP claiming that by necessary implication, the other questions raised in the memo of appeal before the High Court had been rejected. HELD by the Supreme Court dismissing the SLP:

The Revenue is under some misconception. The proviso following the main provision of section 260A(4) of the Act states that nothing stated in sub-section (4), i.e., "The appeal shall be heard only on the question so formulated shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question". The High Court's power to frame substantial question(s) of law at the time of hearing of the appeal other than the questions on appeal has been admitted remains under Section 260A(4). This power is subject, however, to two conditions, (i) the Court must be satisfied that appeal involves such questions, and (ii) the Court has to record reasons therefore.

CIT v. Mastek Limited (SC) www.itatonline.org

23. S.275 : Penalty – Concealment – Limitation – Appeal – Supreme Court – Raised first time – Matter set aside to Tribunal. [Ss.261, 271(1)(c)]

Limitation issue raised for the first time before Supreme Court on the applicability of whether Sec. 275(1)(a) or 275(1)(c), The same was set aside to be first answered by the Tribunal and then by the High Court.

CIT v. Jhabua Power Ltd. (2013) 262 CTR 277 / 93 DTR 469 (SC)

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817. S.2(22)(e) : Dividend – Loan – Common shareholder – Not shareholder in lending company – Cannot be treated as deemed dividend

Loan advanced to the assessee cannot be treated as dividend in terms of section 2(22)(e), if the assessee is not a shareholder of the lending company. (A.Ys. 2003-04, 2004-05)

CIT v. G.T.Z. Securities Ltd. (2013) 359 ITR 345 (J&K)(HC)

818. S.2(22)(e) : Dividend – Loan to shareholder – Sum received as advance on sale of land – Not assessable as deemed dividend

Sum received by assessee as advance for sale of land is not loan or advance, and hence, not taxable as deemed dividend. (A.Y. 2004-05)

CIT v. Om Prakash Suri (No.2) (2013) 359 ITR 41 (MP)(HC)

819. S.2(24) : Income – Interest on loan – Resolution not to charge interest – Mercantile system of accounting. [S.145]

The assessee company passed a resolution not to charge interest in view of financial difficulties of borrowing companies. However, in the year under consideration, it was found that the borrowing companies were in sound financial position. Therefore, the addition of interest was held to be justified. (A.Y. 2007-08)

CIT v. Brahmaputra Capital and Financial Services Ltd. (2013) 357 ITR 241 (Delhi)(HC)

820. S.2(29A) : Long term capital asset – Short-term capital gain – Conversion of leasehold rights into freehold rights – Gain would be long term capital gain. [Ss.2(42A), 2(42B), 2(29A), 2(29B), 2(47), 45]

The assessee purchased certain lease hold property on July 7, 1984. The assessee applied for freehold rights, which was granted by the Collector on March 29, 2004. She sold property on March 31, 2004 and declared long term capital gains on the transfer. The Assessing Officer held that since the property was sold within three days on March 31, 2004, the capital gains would amount to short term capital gains. The Tribunal held gain would be long term. On appeal by the revenue the court held that, conversion of property into freehold property was nothing but improvement of the title over the property, as the assessee was the owner even prior to conversion. Therefore, it would not have any effect on the taxability of gain from such property, in so far as the period over which the property was held. Gain was rightly held as long term. (A.Y. 2004-05)

CIT v. Rama Rani Kalia (Smt.) (2013) 358 ITR 499 (All.)(HC)

821. S.4 : Income – Capital receipt or revenue receipt – Non-compete fee – Sale of profitable business is capital receipt – No taxable. [S.28(i)]

The assessee sold a profitable running retail business to a new company. The amount received as non-compete fee prohibiting assessee from carrying on competing business in retail is capital receipt. (A.Y. 2000-01)

CIT v. Spencers and Co. Ltd. (No.1) (2013) 359 ITR 612 (Mad.)(HC)

822. S.9(1)(ii) : Income deemed to accrue or arise in India – Salaries – Dependent personal services – In view of provisions of Treaty between India and Denmark, remuneration paid to Danish nationals was taxable in Denmark and not in India-DTAA-India-Denmark. [S. 5(2), Art.16]

Assessee was a non-resident company engaged in certain businesses in India. In respect of those businesses it employed certain Danish nationals for doing work in India and remunerated them for doing such work. Each of those Danish nationals was remunerated in respect of employment in India for a period not exceeding 183 days in concerned fiscal year and that remuneration was paid by or on behalf of an employer, who was not a resident of country and, in any event, remuneration was not borne by a permanent establishment or a fixed base, which employer had in India. In view of provisions of Treaty between India and Denmark, remuneration paid to Danish nationals was taxable in Denmark and not in India. The court held that where Danish nationals were remunerated in respect of employment in India for a period not exceeding 183 days in concerned fiscal year and such remuneration was paid by or on behalf of an employer, who was not a resident of country and, in any event, remuneration was not borne by a permanent establishment or a fixed base, which employer had in India, said remuneration would be taxable in Denmark and not in India.

DIT (IT) v. Maersk Co. Ltd. (2013) 351 ITR 366 / 215 Taxman 258 (Uttarakhand)(HC)

823. S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Commission paid to non-resident – Effect of withdrawal of circular – Deduction of tax at source – Not liable to deduct tax at source. [S.37(1), 40(a)(ia), 195]

Circular No. 7 of 2009, dated October 22, 2009, withdrawing Circular No. 23 of 1969, 163 of 1975 and 786 of 2000 was operative only from October 22, 2009, and not prior to that date and had no bearing for AY 2007-08. There was no obligation to deduct tax at source under section 195 on the commission paid to a non-resident recipient, who was not liable to pay tax in India. Commission payment cannot be disallowed. (A.Y. 2007-08)

CIT v. Model Exims (2013) 358 ITR 72 (All) (HC)

824. S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Copyright – Customized software – Non-exclusive & non-transferable license to use customized software not taxable as "royalty" under Article 12-DTAA-India-USA. [Article 12, Copy right Act, 1857, S. 14(1)]

The assessee, a USA company, set up a branch office in India for the supply of software called "MX". The software was customised for the requirements of the customer (not "shrink wrap"). The Indian branch imported the software package in the form of floppy disks or CDs and delivered it to the customer. It also installed the software and trained the customers. The AO & CIT(A) held that the software was a "copyright" and the income from its licence was assessable as "royalty" under Article 12 of the India-USA DTAA. On appeal by the assessee, the Tribunal held, following Motorola 270 ITR (AT) (SB) 62, that the income from licence of software was not taxable as "royalty". Before the High Court, the Department argued that in view of *CIT v. Samsung Electronics Co. Ltd. (2012) 345 ITR 494 (Kar.)*, the right to make a copy of the software and storing it amounted to

copyright work u/s. 14(1) of the Copyright Act and payment made for the grant of a licence for the said purpose would constitute royalty. HELD by the High Court dismissing the appeal:

In order to qualify as a royalty payment under Article 12(3) of the India-USA DTAA, it is necessary to establish that there is a transfer of all or any rights (including the granting of any licence) in respect of a copyright of a literary, artistic or scientific work. There is a clear distinction between royalty paid on transfer of copyright rights and consideration for transfer of copyrighted articles. Right to use a copyrighted article or product with the owner retaining his copyright, is not the same thing as transferring or assigning rights in relation to the copyright. The enjoyment of some or all the rights which the copyright owner has, is necessary to invoke the royalty definition. Viewed from this angle, a non-exclusive and non-transferable licence enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. Where the purpose of the licence or the transaction is only to restrict use of the copyrighted product for internal business purpose, it would not be legally correct to state that the copyright itself or right to use copyright has been transferred to any extent. The parting of intellectual property rights inherent in and attached to the software product in favour of the licencee/customer is what is contemplated by the Treaty. Merely authorising or enabling a customer to have the benefit of data or instructions contained therein without any further right to deal with them independently does not, amount to transfer of rights in relation to copyright or conferment of the right of using the copyright. The transfer of rights in or over copyright or the conferment of the right of use of copyright implies that the transferee/licensee should acquire rights either in entirety or partially co-extensive with the owner/ transferor who divests himself of the rights he possesses pro tanto. The license granted to the licensee permitting him to download the computer programme and storing it in the computer for his own use is only incidental to the facility extended to the licensee to make use of the copyrighted product for his internal business purpose. The said process is necessary to make the programme functional and to have access to it and is qualitatively different from the right contemplated by Article 12 because it is only integral to the use of copyrighted product. Apart from such incidental facility, the licensee has no right to deal with the product just as the owner would be in a position to do. Consequently there is no transfer of any right in respect of copyright by the assessee and it is a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Income-tax Act or under the DTAA (ITA No. 1034 of 2009 dt. 22-11-2013.)

DIT v. Infrasoft Ltd. (Delhi)(HC). www.itatonline.org

825. S.10(10C) : Salary – Perquisites – Tax paid by employer to be excluded – Rent free accommodation – Multiple stage grossing up is not applicable. (Ss.17, 195A, Rule 3)

Whenever tax is deposited in respect of a non-monetary perquisite, the provision of section 10(10CC) applies, thus excluding multiple stage grossing up. Taxes were to be excluded while computing the perquisite value of rent-free accommodation provided to an employee, in view of rule 3 of the Income-tax Rules, 1962.

Yoshio Kubo v. CIT (2013) 357 ITR 452 (Delhi) (HC)

826. S.10(23C) : Educational institution – Order of approval is not conclusive

Order of approval is not conclusive and when it was found that the assessee after obtaining

order of approval from prescribed authority did not utilise income for educational purposes, the Tribunal was not justified in granting exemption to assessee. (A.Y. 2001-02)

CIT v. Manipal Academy of Higher Education (MAHE) (2013) 357 ITR 114 (Karn.)(HC)

827. S.10A : Free trade zone – Conversion of domestic tariff area unit into a Software Technology Park of India Unit – Registration – No export was made before registration – Unit entitled to exemption

Since no export was made prior to date of registration under Software Technology Parks of India even though manufacture commenced before registration, the unit was entitled to deduction. (A.Y. 2005-06)

CIT v. Expert Outsource P. Ltd. (2013) 358 ITR 518 (Karn.)(HC)

828. S.10A : Free trade zone – Existing unit – Exemption cannot be denied on the ground of transfer of plant and machinery previously used to export unit

The assessee was in business right from 1999-2000 and got its registration as a Software Technology Park industry on March 27, 2002, the Department accepted the claim of the assessee for two A.Y. 2003-04 and 2004-05 and the assessments had become final. It was not as though the Department did not know the facts relating to the assessee's existence prior to its registration on March 27, 2002, and by mistake allowed the benefit for the A.Y. 2003-04 and 2004-05. In the circumstances, there was no justifiable ground for the Department to question the claim of the assessee from the A.Y. 2005-06. Denial of benefit on the ground that the assessee got registration only on March 27, 2002, whereas, it had commenced production in the financial year 1999-2000 itself, that the assessee unit was an existing unit, the assessee had transferred the plant and machinery previously used to the software technology park unit and the assessee had not registered ever since it commenced production in the financial year 1999-2000, was not justified. (A.Ys. 2005-06, 2006-07, 2007-08, 2008-09)

Nagesh Chundur v. CIT (2013) 358 ITR 521 (Mad.) (HC)

829. S.10A : Free trade zone – Transfer of business – Transferee is entitlement to exemption. [Ss.10B, 80HHE]

The assessee originally claimed relief under section 10B and alternative relief was claimed under section 10A. The Court held that what is prohibited in section 10A(2)(iii) is the transfer of used machinery and plant to a new business undertaking and forming of an industrial undertaking by splitting or reconstruction of the existing industrial undertaking. There is no specific prohibition or even inference to an industrial unit formed by transfer of the entire business.

In 2001, KGISL, which enjoyed exemption under section 10A, transferred the entire undertaking engaged in the export business of medical transcription along with all transcriptions contracts, books, records, all rights, all permits, all warrants, including computer software to the assessee. The transfer was recognised and allowed by the Software Technology Park of India. By reason of the transfer of the entire business, the employees of the transferor company engaged in medical transcription were also transferred and employed by the assessee. Held, the assessee was entitled to exemption u/s. 10A. As the relief was granted under section 10A, the assessee was not entitled to the relief under section 80HHE. (A.Y. 2004-05)

CIT v. Heartland KG Information Ltd. (2013) 359 ITR 1 (Mad.)(HC)

830. S.10B : Export Oriented undertaking – Derived from unit – Training fees is not entitled to exemption

The condition precedent for exemption is that the profits should be derived from unit. Hence, the training fees not entitled to exemption. (A. Y. 1996-97)

Pentamedia Graphics Ltd. v. ACIT (2013) 357 ITR 403 (Mad.)(HC)

831. S.10B : Export oriented undertaking – Manufacture – Export as handicraft items of dried flowers and parts of plants were totally different items and commercially known as a different products – Process involved in producing final product would be 'manufacture' – Entitled to exemption

Whether where what was purchased by assessee as raw material and exported as handicraft items of dried flowers and parts of plants were totally different items and commercially known as a different products, process involved in producing final product would be 'manufacture' in terms of Explanation 4 to section 10B. (A.Y. 2004-05, 2006-07, 2008-09)

CIT v. Deco De Trend (2013) 217 Taxman 179 / 37 taxmann.com 33 / (2014) 264 CTR 78 (Mad.)(HC)

832. S.10B : Export oriented undertaking – Splitting up or reconstruction – Some of the partners are directors in close held company – Firm cannot be said to be mere splitting up of business of company – Exemption cannot be denied

Some members of partnership firm were director of a closely held company and some workmen working in assessee's firm deal were also working in said company. Though both were engaged in similar line of export, while company dealt with low end products, assessee, firm dealt with high end products. Further firm was constituted with capital contribution by partner's personal fund. On the facts the court held that it could not be said that assessee-firm was a mere splitting up of business of company and, thus, relief under section 10B could not be denied. (A.Ys. 2004-05, 2006-07, 2008-09)

CIT v. Deco De Trend (2013) 217 Taxman 179 / 37 taxmann.com 33 / (2014) 264 CTR 78 (Mad.) (HC)

833. S.10B : Hundred per cent export – Exemption granted in earlier years – No change in facts – Exemption cannot be denied

The orders of the lower authorities were based on the order passed by the Tribunal for the A.Y. 1994-95 and there were no materials placed before the court to contend that the assessee had violated the conditions of licence, thereby disentitling the assessee to the benefit of deduction under section 10B. Hence, the assessee was entitled to the exemption under section 10B for all the four assessment years. (A.Ys. 1993-94 to 1997-98)

CIT v. Relco P. Ltd. (2013) 359 ITR 291 (Mad.) (HC)

834. S.11 : Property held for charitable or religious purposes – Depreciation – Cost allowed as deduction as application of income. [S.2(15), 12, 32]

Depreciation on fixed assets of whose cost has already been claimed as application of income and allowed as deduction is permissible.

CIT v. Devi Sakuntala Tharal Charitable Foundation (2013) 358 ITR 452 (MP) (HC)

835. S.12AA : Procedure for registration – Donation to charitable institution – Refusal to grant registration was not justified. [S. 80G(5)]

Once registration to the assessee under section 12AA was granted, it subsisted and had not been withdrawn or revoked. Since there was no discussion in the order of the DIT regarding non-compliance with the conditions, refusal to grant registration was not justified.

DIT v. Neel Gagan Charitable Trust (2013) 357 ITR 86 (Delhi) (HC)

836. S.13 : Charitable trust – Bar of Section 13(2) – Merely because the assessee had given interest free loans to other societies, which were neither investments nor deposits – Provisions of section 13 (2) were not applicable. [Ss.2(15), 11, 12]

The Assessing Officer denied deduction under section 11 of the Act to the assessee on the ground that there was infringement of provision of section 13 of the Act, as the assessee had given interest free loans to its associate concerns. The Tribunal found that the trust to whom loans were given by the assessee were charitable trust engaged in providing education. Further, the Tribunal recorded the finding that provisions of section 13 (3) read with section 13 (2)(a) were invoked to disallow the exemption under section 11 to the assessee. The High Court observed that for invoking provisions of section 13 (2)(a) of the Act, share in profit was required to be 20 percent but, there was no such profit in the society. Thus, the High Court confirming the order of the Tribunal held that there was no infringement of section 13 of the Act so as to disallow exemption to the trust under section 11 of the Act. (A.Y. 2006-07)

CIT v. Maa Vaishnav Education Society (2013) 91 DTR 166 (MP)(HC)

837. S.13 : Charitable trust – Exemption – Bar of S. 13 – If Revenue is not able to establish that the payment made to related person / concern mentioned in section 13 is excessive or unreasonable – Exemption under section 11 cannot be denied. [S.11]

Where the assessee took on lease premises belonging to a associate / related concern wherein the concern also transferred to the assessee its students and also the teaching staff, on assessee agreeing to pay rent as per the lease agreement and royalty for using the name of the related concern being 20% of the total fees received from the students on roll. There was no finding that the amount paid by the assessee was excessive / unreasonable. Exemption under section 11 cannot be disallowed to the assessee invoking provisions of section 13 (1) (c) of the Act. (A.Y. 1998-99 to 2002-03)

Chirec Education Society v. ADIT(E) (2013) 92 DTR 39 (AP)(HC)

838. S.13 : Denial of exemption – Trust or institution – Investment restrictions – Exemption u/s. 11 could not be denied on the ground that rent and electricity was paid to founder trustee and the secretary. [S.11, 12]

The assessee was a registered trust. It filed return showing nil income after claiming exemption under section 11. The Assessing Officer disallowed office rent and electricity paid for the premises, which was partly occupied by the founder trustee and the Secretary respectively as the building was owned by the President and was partly used by the society for official purpose. Thus, the expenses incurred by the Trust were for the personal benefit of its President and secretary. The Tribunal allowed the rent and electricity claim. On Appeal, the

High Court held that the office premises of the president of the trust was taken on reasonable rent. Perhaps other premises might be more costly. By keeping the office in the same building where they are residing, the activities can be looked after without making any expenditure on conveyance. President and secretary are not charging any remuneration or conveyance allowance. They are available round the clock for the activities of the trust. Separate account has been maintained for paying the genuine rent and also the electricity charges. Amount in question is meager one. Exemption u/s 11 could not be denied by invoking provisions of s. 13(1)(c) r.w.s. 13(2)(g). (AY. 2002 – 03)

CIT v. Foundation for Social care (2013) 94 DTR 298 / 37 Taxmann.com 389 (All.)(HC)

839. S.13 : Denial of exemption – Trust or institution – Investment restrictions r.w.s. 12A – Registration – Trust or institution – No finding that funds of society were misappropriated or were not utilized for its objects – Exemption cannot be denied. [S.11, 12A, 80G(5)]

The assessee society is registered u/s. 12A and u/s.80G(5) as well as recognized as an institution established for charitable purposes u/s. 10(23C)(iv). The AO denied exemption u/s. 11 on the grounds that (i) the assessee had filed audit report in Form No. 10 belatedly (ii) the President and Treasurer of the assessee had occupied a building, which was owned by the assessee's sister concern at a nominal rent (iii) the Secretary of the assessee was enjoying car and telephone facilities at the cost of the said sister concern, and (iv) the assessee was passing on its huge fund to the sister concern every year. The CIT(A) confirmed the denial. However, the Tribunal held that the assessee is entitled to exemption u/s. 11.

On appeal by the department the High Court observed that there was no basis for assuming that the amounts passed on to other organizations were in nature of donations/grants of which the members of the assessee would be beneficiaries. The establishment expenditure incurred at the head office was only a fraction of the total of such expenditure, a major portion of which had been incurred on the units carrying on charitable activities. Further the beneficiaries, i.e., the President and the Treasurer of the assessee, who got the accommodation, were also the office bearer of the sister concerns. Thus if at all there is a case of providing benefit to the persons of prohibited category, then it should be invoked in the case of the sister concern and certainly not in the case of the assessee. The High Court also observed that the registration of the assessee was not cancelled. Accordingly, the High Court dismissed the departmental appeal. (AYs. 1994-95 to 1998-99).

CIT v. Bharat Sewa Sansthan (2013) 217 Taxman 337 (All.)(HC)

840. S.14A : Disallowance of expenditure – Exempt income – Expenditure on acquiring shares out of "commercial expediency" & to earn taxable income cannot be disallowed. [Rule 8D]

The assessee borrowed funds and invested ₹ 6 crore in shares of subsidiary companies. It claimed that the said subsidiaries were Special Purpose Vehicles (SPVs) formed out of "commercial expediency" in order to obtain contracts from the NHAI and that the SPVs so formed engaged the assessee as contractor to execute the works awarded to them (i.e. SPVs) by the NHAI. It was pointed that the turnover from the execution of the contracts was shown in the P&L A/c. It was claimed that the interest attributable to the investments made by the assessee in the SPVs could not be disallowed u/s.14A read with Rule 8D because it could not be termed as expense / interest incurred for earning exempted income. The CIT(A) and Tribunal (order attached) upheld the

assessee's claim and held that as the investments in the shares were made out of "commercial expediency" the expenditure incurred for that purpose could not be disallowed u/s 14A and Rule 8D. On appeal by the department to the High Court HELD dismissing the appeal:

This is merely a question of fact and does not involve any question of law much less a substantial question of law, as the Tribunal held that the expenses which have been claimed by the assessee were not towards the exempted income (605/2012, Dt. 15.01.2013)

CIT v. Oriental Engineers Pvt. Ltd. (Delhi)(HC) www.itatonline. org.

841. S.15 : Salaries – Resident but not ordinarily resident – Amount of tax not reimbursed cannot be assessed as salary income

Assessee was a resident but not ordinarily resident individual and an employee of a foreign company. He earned salary income. He received ₹ 77 lakhs in India on which tax payable at maximum rate of 44.8%, came to ₹ 35 lakhs. Assessee included ₹ 35 lakhs to his salary income of ₹ 77 lakhs and offered ₹ 113 lakhs to tax. Total tax liability was ₹ 50 lakhs which assessee paid. Revenue sought to include ₹ 50 lakhs of total tax with salary income of ₹ 77 lakhs to arrive at total income. The High Court held that tax amounting to ₹ 15 lakhs paid by assessee which was not reimbursed by company, could not be added to income of assessee. (A.Y. 1994-95)

CIT v. Jaydev H. Raheja (2013) 211 Taxman 188 (Bom.)(HC)

842. S.28(i) : Business income – Income from house property – Exploitation of immovable property by way of complex commercial activities, must be held as business income. [S.22]

The assessee-company was a real estate developer, providing comprehensive facilities to IT industry including letting out of specialised buildings and office premises in a Software Technology Park (STP) built to cater to the special requirements of the IT industry. The assessee claimed that income received from letting out of such buildings was business income. However, the Assessing Officer held that since there were two separate agreements for letting out of buildings and for provision of amenities, income arising from letting out of buildings constituted 'Income from house property' and income for providing services constituted 'Income from other sources.' On appeal, the Commissioner (Appeals) and the Tribunal held that the income from letting out of specialised building and provision of amenities in Software Technology Park set-up by it was to be assessed as business income. The High Court held that, the doctrine of inseparability of income earned from letting out of buildings and plant, machinery or furniture finds a place in section 56(2)(iii). The inseparability referred to in the said provision is arising from the intention of the parties. The intention of the parties in entering into the lease transaction is to be determined. It is not the number of agreements entered into between the parties, which is decisive in determining the nature of transaction. What is the object of entering into more than one said transactions is to be looked into. However, if for enjoyment of lease, the subject matter of all the agreements is necessary, then notwithstanding the fact that there are more than one agreement or one lease deed, the transaction is one. As all the agreements are entered into contemporaneously and the object is to enjoy the entire property viz.: building, furniture and the accessories as a whole, which is necessary for carrying on the business, then the income derived there from cannot be separated, based on the separate agreement entered into between the parties. The primary object of the assessee while exploiting the property is to be seen. If it is found applying such principle that the intention is for letting out the property or any portion thereof, the same may be considered as rental income or income

from properties. In case, if it is found that the main intention is to exploit immovable property by way of complex commercial activities, in that event it must be held as business income. [A.Y. 2005-06]

CIT v. Velankani Information Systems (P.) Ltd. (2013) 94 DTR 357 / 35 Taxmann.com 1 (Karn.)(HC)

CIT v. Golfink Software Park (P.) Ltd. (2013) 94 DTR 357 / 35 Taxmann.com 1 (Kar.)(HC)

843. S.28(i) : Business income – Labour receipts was held to be business income and not as income from undisclosed source. [S.68]

The Assessee was engaged in giving machinery for labour work produced bills of labour receipts and claimed labour income as business income. The AO, on finding labour receipts as not genuine, held said amount to be income from undisclosed sources. The Tribunal allowed claim of assessee on ground that assessee was engaged in said business since long as evidenced by earlier assessment orders. On appeal by the department the High Court, held that the Labour income received by assessee from commercial exploitation of machinery was treated as business income in earlier assessment years, same was to be followed in current assessment year. The Appeal filed by the department is dismissed.

CIT v. Jayantkumar Motichand Doshi (2013) 217 Taxman 247 (Guj.)(HC).

844. S.28(i) : Business loss – Sale of shares – Loss incurred in the course of business was allowable

The assessee produced copies of bills, contract notes, receipts for sale consideration and share particulars. The Tribunal found that the transaction was genuine. Hence, the loss occurred in course of business was allowable.

CIT v. Spencers and Co. Ltd. (No.3) (2013) 359 ITR 644 (Mad.)(HC)

845. S.32 : Depreciation – Foreign cars – Eligible depreciation

Assessee single entity after the merger of three undertakings by virtue of scheme approved by High Court Order. The Assessee is eligible for the claim of depreciation on the Foreign cars brought into by the said three concerns. (A.Y. 2005-06 to 2008-09)

CIT v. Mira EXIM Ltd. (2013) 359 ITR 70 / 94 DTR 41 / 262 CTR 441 (Delhi)(HC.)

846. S.32 : Depreciation – Lease of vehicles – Lessor is entitled to depreciation

The assessee, engaged in the business of leasing vehicles, was entitled to claim depreciation, as a lessor of the vehicles. (A.Y. 1997-98)

CIT v. Baid Leasing and Finance Co. Ltd. (2013) 359 ITR 413 / 262 CTR 553 (Raj.)(HC)

847. S.32 : Depreciation – Machineries ready to use but not used – Depreciation was allowable

The business of the assessee is a going one and the machinery is ready for use but due to certain extraneous circumstances, the machinery could not be put to use, the fact would not stand in the way of granting relief under section 32. (A.Y. 1998-99)

CIT v. Chennai Petroleum Corporation Ltd. (2013) 358 ITR 314 / 94 DTR 195 (Mad) (HC)

848. S.32 : Depreciation – Obsolescence – Discarding of building after expiry of lease – Loss was deductible. [S.28(i)]

Discarding of building upon the expiry of lease of land on which it was constructed was allowable as business loss. (A.Y. 2001-02 to 2006-07)

CIT v. Children's Education Society (2013) 358 ITR 373 (Karn.)(HC)

849. S.36(1)(iii) : Interest on borrowed capital – Investment in shares from borrowed capital – Strategic business purposes – Interest allowable

The assessee paid interest on borrowed capital from which it made investment in shares for strategic business purposes. The companies promoted as special purpose companies strengthened and promoted assessee's existing business by combining different business segments. Hence, the interest was held allowable. (A.Y. 2003-04)

CIT v. Spencers and Co. Ltd. (No. 3) (2013) 359 ITR 644 (Mad.)(HC)

850. S.36(1)(va) : Any sum received from employees – Income – Employees' contribution to ESIC & PF – Payment before filing return is allowable. [S. 2(24), 43B, 139(1)]

Contributions of employees' State insurance and provident fund deposited prior to filing return under section 139(1) is allowable. (A.Y. 2003-04)

CIT v. Mark Auto Industries Ltd. (2013) 358 ITR 43 (P&H) (HC)

851. S.36(1)(viii) : Eligible business – Special reserve – Financial corporation – Nexus with business – Expenditure is deductible

Processing charges, foreclosure charges and penalty for late payments incurred by a financial corporation had direct nexus with business of providing finance, and hence, were deductible. (A. Y. 1998-99 to 2001-02)

CIT v. Weizmann Homes Ltd. (2013) 357 ITR 74 (Karn.)(HC)

852. S.37(1) : Business expenditure – Bad debts – Nexus between assessee and subsidiary – Allowable

In the presence of business nexus between the assessee and subsidiary companies, the amount written off as bad debts was allowable. (A.Y. 2000-01)

CIT v. Spencers and Co. Ltd. (No.1) (2013) 359 ITR 612 (Mad.)(HC)

853. S.37(1) : Business expenditure – Capital expenditure – Share issue expenses – Registration, listing, stationery, travelling, meeting, bank charges, commission, dispatch and out of pocket expenses are allowable as revenue expenditure

The court held that share issue expenses such as, dispatch and out of pocket expenses, registration fees, listing fees, stationery expenses, travelling and meeting expenses, bank charges and commission and expenses on professional's certificate were allowable as revenue expenditure. (A.Y. 1996-97)

CIT v. Kreon Financial Services Ltd. (2013) 358 ITR 542 (Mad) (HC)

854. S.37(1) : Business expenditure – Capital or revenue – Advertisement expenses for launching of a new product allowable as revenue expenditure

Assessee spent a sum towards advertisements in respect of launching of a new product. Assessing Officer disallowed such advertisement expenses on ground that assessee had treated same as 'deferred revenue expenditure' in its books of account. The court held that, neither the A.O. nor the CIT(A) has disputed the revenue nature of the advertisement expenses of ₹ 77,16,120/-. There is no dispute that such expenses are allowable expenditure. Merely

because the assessee has firstly shown the entire amount in the books of accounts as deferred revenue expenditure and thereafter debited ₹ 29,51,909/- in the P & L A/c cannot be made a ground to disallow the advertisement expenses of ₹ 77,16,120/- when indisputably in the computation of income, the assessee has claimed the entire sum of ₹ 77,16,120/- after adding back ₹ 29,51,909/- to the profit as per P & L A/c. There is no error in the order of the Tribunal setting aside the addition made by A.O. on account of advertisement expenses. (A.Y. 1991 -92)

CIT v. Modi Olivetti Ltd. (2013) 94 DTR 398 / 37 taxmann.com 464 (All.)(HC)

855. S.37(1) : Business expenditure – Capital or revenue – Advertisement expenses was held to be revenue nature

The Assessee incurred expenditure for television advertisement film production and claimed deduction as revenue expenditure. The AO disallowed expenditure on ground that said expenditure amounts to enduring benefit and constitutes a capital expenditure. The CIT (A) affirmed findings of AO. The Tribunal set aside order of CIT (A) and allowed deduction. On appeal by the department the High Court, held that the test of enduring benefit enunciated by the Supreme Court in the *Assam Bengal Cement Co. Ltd. v. Commissioner reported in (1955) 27 ITR 34 (SC)* is not applicable to the facts of the present case. The expenditure incurred was dominantly for advertisement to promote the sales. If the contention of the Revenue is upheld, any expenditure incurred for marketing and promoting sales should have to be held as 'capital expenditure' and in no case, the deduction can be allowed. Such a contention is illogical and untenable. The appeal was dismissed. (A.Ys. 1998-99 to 2000-01)

CIT v. Indo Nissin Foods Ltd. (2013) 217 Taxman 95 (Karn.)(HC)

856. S.37(1): Business expenditure – Capital or revenue expenditure – Acquisition of software is revenue in nature

Expenditure on acquiring software enabling the assessee to carry on business more efficiently is revenue expenditure. (A.Y. 1998-99)

CIT v. IBM India Ltd. (2013) 357 ITR 88 (Karn.) (HC)

857. S.37(1) : Business expenditure – Capital or revenue – Payment to professionals for corporate debt restructuring is allowable in the year it was incurred

Payment to financial consultants for professional services in connection with corporate debt restructuring by negotiating with banks and financial institutions was expenditure for purpose of business and allowable in entirety in year in which incurred. When the assessee itself spread the expenditure over six years, Department was not entitled to object. (A.Y. 2004-05)

CIT v. Gujarat State Fertilizers and Chemicals Ltd. (2013) 358 ITR 323 (Guj.)(HC)

858. S.37(1) : Business expenditure – Capital or revenue – Repairs and maintenance expenses – Increase of life by repairs and maintenance of the existing assets beyond their original estimated economic life cannot be a ground to return a finding that it was not a case of repairs

The assessee claimed certain expenses on account of repairs and maintenance as revenue expenditure. However, the same were held to be capital in nature. On first appeal, the Commissioner (Appeals) found that the expenses

had led to new identifiable assets and had increased life of assets beyond their original estimated life. Also, the profitability of the concern had substantially increased. Therefore, he dismissed assessee's appeal. On second appeal, the Tribunal set aside the findings of Commissioner (Appeals). On appeal by the revenue, the Court held that the increase of life by repairs and maintenance of the existing assets beyond their original estimated economic life cannot be a ground to return a finding that it was not a case of repairs. Repairs and maintenance are in fact necessary not only for achieving the optimum utilization of machinery but also if possible to extend its economic life. Therefore, the fact that such installation has increased the life beyond their original economic life cannot be a ground to return a finding that the expenses incurred were not for repairs and maintenance. Similarly, the ground of increase in the profitability of concern is again a totally alien to determine the nature of the repair and maintenance. Increase in profit would lead to increase in income, which would be separately taxable but could not be a ground for declining the expenses incurred by the assessee for repairs and maintenance. Though the finding returned is that new identifiable assets have been created the Tribunal has returned a finding that though each of the items is usable independently such items have been used for repairs and maintenance. With such finding, the expenditure was allowed.

CIT v. Vishal Paper Industries (2013) 94 DTR 175 / 36 taxmann.com 19 (P& H)(HC)

859. S.37(1) : Business expenditure – Firm – Partner – Goodwill payment to retiring partner was held to be not allowable as business expenditure

The assessee claimed the good will amount paid to retiring partner as allowable revenue expenditure. The Court held that assets and liabilities of the firm continued as such without any change including tangible and intangible. Partner who retired from the firm takes his initial investment and profit, if any payable to him. Similarly, if he is accountable for any loss in a particular assessment year, that would also be worked out at the time of retiring from partnership business. As there is no transfer of any interest and the money paid is only towards the share of the capital investment by that partner along with some profit , if any and nothing beyond that. Goodwill payment to retiring partner was held to be not allowable as business expenditure. (A.Y. 2004-05 to 2007-08)

Oberon Trading Corporation v. ITO (2013) 263 CTR 494 (Ker.)(HC)

860. S.37(1) : Business expenditure – Making up charges – It is not necessary that every expenditure to be backed by confirmation letters

Assessee had claimed expenses under the head making up charges. The assessee could not furnish confirmatory letters to the extent of amount. Consequently, the A.O. disallowed the expenditure to the extent of that particular amount and added it to the income of the assessee. The Tribunal held that the expenditure on account of making up charges had to be allowed. Also held that it was not necessary that in every case expenses were to be allowed only upon confirmation letters being filed from the recipients of the amounts especially, when the expenditure was backed by considerable evidence, including the registers maintained as per the requirement of the central excise authorities. On appeal, held that the finding of the Tribunal with regard to the making up charges was a pure finding of fact. (A.Y. 1997-98)

CIT v. Modern Terry Towels Ltd. (2013) 357 ITR 750 (Bom.)(HC)

861. S.37(1) : Business expenditure – Master copy of software – Expenditure on acquiring master

copy of software subject to obsolescence is deductible as revenue expenditure

The assessee entered into a license agreement with Oracle Corp under which it acquired a non-exclusive & non-assignable right to duplicate software products which were owned by Oracle Corp and to sub-license the same to parties in India. The assessee paid recurring royalty of 30% for the said right. In addition to the royalty, the assessee periodically paid an amount towards "expenditure on import of software master copy". The said master copy was used to replicate the software. The assessee claimed that the said master copies were versions of Oracle's new product offerings which had very accelerated obsolescence and that at any point of time it was not possible to say whether the version will be current for one day or one month. The AO allowed a deduction for the recurring royalty but held that the expenditure for acquiring the software master copy was capital expenditure. On appeal, the CIT(A) reversed the AO on the ground that owing to obsolescence, there was no enduring benefit as there were frequent corrections and up-gradation of the software. On appeal by the department, the Tribunal reversed the CIT(A) and held that the expenditure was capital in nature on the ground that the master copy was an asset of enduring benefit. On appeal by the assessee, HELD reversing the Tribunal:

The assessee's claim that the master copies had high accelerated obsolescence and that even at the point of time of import it was difficult to say whether the version would be replaced by a new or updated version after one day or a month had not been disproved. Also the facts showed that there were periodical imports of the master copies and that the average price per copy was minimal. This was not a case where the master copies contained operating or system software, which normally did not require frequent up-gradation or changes. It is also not the case of an assessee which is the end user of software. It is a case where the assessee is required to repeatedly pay for the master copy media in view of frequent newer or updated versions of the application software from time to time. Once newer or better version of the application software is available, the earlier version is not saleable and does not have any market value for the seller i.e. the assessee. Also, as per the "matching concept" in accountancy, while determining whether expenditure is capital or revenue in nature, the question whether the expenditure would create an asset which is of value in further assessment periods and should be amortised (i.e. depreciated) as long as it has value (subject to the statutory provisions) requires to be considered. If the expenditure does lead to creation of an asset but of a limited or short life, it has to be treated as a liability and not as a fixed asset. The said expenditure cannot be valued for price for future financial years. (Dt. 25th Nov., 2013.)

Oracle India Pvt. Ltd. v. CIT (Delhi)(HC) www.itatonline.org

862. S.37(1) : Business expenditure – Modvat credit – Additional customs duty paid on raw material is allowable. [S.145]

Deduction of unutilized MODVAT credit was denied on the ground that credit in respect of MODVAT had accrued and was still available. The Commissioner (Appeals) observed that the assessee had received refund of the MODVAT credit in the subsequent assessment year 1996-97 but it could not be ascertained whether the refund was against the MODVAT credit available as on March 31, 1995. Also, the refund received from the Excise Department of ₹ 7.16 crores was offered for taxation in the assessment year 1996-97 by the assessee and was accordingly taxed. Held, there was no allegation or averment that the assessee was following the "gross method" and not the "net method" or was following two different methods at the time of purchase/ opening stock and valuation of the stock in hand. The assessee was entitled to MODVAT

credit on account of excess excise duty and additional customs duty paid by it on purchase of raw material. (A.Y. 1995-96)

CIT v. Samtel India Ltd. (2013) 359 ITR 62 (Delhi)(HC)

863. S.37(1) : Business expenditure – Non-compete fees – Capital or revenue- Limited period is allowable as revenue expenditure. [S.37(1)]

Non-compete fees paid for a limited time, whether in installments or as a lump sum payment was allowable as deduction. (A.Ys. 2004-05, 2005-06, 2006-07)

CIT v. Career Launcher India Ltd. (2013) 358 ITR 179 (Delhi) (HC)

864. S.37(1) : Business expenditure – Service benefits from group resources company – Licence fee, legal expenses, retainer fee was held to be allowable

Payment of licence fee towards its share of actual expenses incurred by group company is allowable when valuable benefit for its business operations were derived by assessee. Legal expenses and retainer fee also held to be allowable. Expenses incurred to collect interest free deposit from tenants by initiation of legal proceedings was also held to be allowable. (A.Y. 2001-02)

CIT v. Spencers and Co. Ltd. (No.2) (2013) 359 ITR 630 (Mad.) (HC)

865. S.37(1) : Business expenditure – Subsidy paid by educational institution for hostel facilities is allowable as deduction

Subsidy paid by educational institution for provision of hostel facilities is deductible. (A.Ys. 2001-02 to 2006-07)

CIT v. Children's Education Society (2013) 358 ITR 373 (Karn.) (HC)

866. S.40(a)(ia) : Amounts not deductible – Deduction at source – An entity while paying salaries to the employees on behalf of the assessee-company deducted tax at source – Reimbursement of such salaries made by the assessee – Company to the said entity without deducting tax at source – Not disallowable under section 40 (a)(ia) of the Act

A company deducted tax at source from the salaries paid by it to the employees on behalf of the assessee – company. As per the Memorandum of Understanding entered between the two companies, the assessee company was to reimbursement such salaries to the payer company without deducting tax at source. The High Court confirmed the finding of the Tribunal that as the assessee company had merely reimbursed the salary paid by the other Company it was not required to deduct tax at source. Further, the High Court affirmed the finding of the Tribunal that for the purpose of disallowing expenses from business under section 40 (a)(ia) of the Act the amount should be payable and which is not paid by the end of the year. (A.Y. 2009-10)

CIT v. Vector Shipping Services (P.) Ltd. (2013) 94 DTR 101 / 262 CTR 545 / 357 ITR 642 (All.) (HC)

[Review Petition of the Department dismissed by the Hon'ble High Court vide order dated: 27.09.2013]

867. S.40(a)(ia) : Amounts not deductible – Deduction at source – Capital expenditure – Technical know – Depreciation – Expenditure not claimed as revenue, disallowance cannot

be made for failure to deduct at source. [S.32, 35AB, 37(1)]

The provisions for disallowance for failure to deduct tax at source are not applicable to expenditure which are capitalized and not claimed as revenue expenditure. (A.Y. 2003-04)

CIT v. Mark Auto Industries Ltd. (2013) 358 ITR 43 (P&H) (HC)

868. S.40(a)(ia) : Amounts not deductible – Deduction at source – Payment through agent – No disallowance can be made. [Contract Act, S.185]

The Assessee had proved that M/s. Malhotra Global Eximp Pvt. Ltd. ("MGEPL") was acting as an agent. The question raised by the A.O. as to why should MGEPL act without any profit motive is answered by section 185 of the Contract Act. On appeal by the department the High Court, held that no disallowance can be made u/s. 40(a)(ia) on account of non deduction of TDS on the payment made by assessee to agent, who has in turn deducted and paid TDS before making payment to advertiser for advertising assessee-company.

CIT v. Harbanslal Malhotra & Sons (P.) Ltd. (2013) 217 Taxman 112 (Cal.)(HC).

869. S.40(a)(ia) : Amounts not deductible – Reimbursement of expenses – Deduction at source by the agent sufficient

The assessee claimed deduction of ₹ 6,93,372/- towards reimbursement of CHA charges paid to C&F agent and ₹ 76,00,509/- towards reimbursement of expenses towards consignment agents. The AO disallowed the expenses on the ground that the assessee has not deducted TDS on the aforesaid amounts. The CIT(A) allowed the assessees appeal observing that vis-à-vis the amount of ₹ 6,93,372/-, the agent had already deducted and deposited TDS and hence there was no further liability of the assessee to deduct TDS and that the amount of ₹ 76,00,509/- was towards reimbursement of expenses to the consignment agent incurred on behalf of the assessee and there was no profit element – and hence the assessee was not required to deduct TDS. The Tribunal affirmed the decision of the CIT(A) and observed that the expenses were incurred by the agent on behalf of the assessee for transportation and other charges, which has been spelt out in the bill itself including the commission to the agent so as far as the obligation to deduct tax at source from the payment is concerned, the same has been complied with by the agent and hence no disallowance is called for.

On appeal the High Court dismissing the departmental appeal held that no error has been committed by the Tribunal in confirming the order passed by the CIT(A) and that no question of law, much less substantial question of law, arises in the present appeal.

CIT v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2013) 217 Taxman 114 (Guj.)(HC)

870. S.40(a)(i) : Amounts not deductible – Deduction at source – Outside India – Non-resident – Royalty-liability to pay royalty had accrued and was not contingent and while making provision assessee had also made book entries in respect of tax deductible, such provision for royalty could not be disallowed

The assessee-company made a provision for royalty payable for period 1-1-1990 to 31-3-1991. The tax deductible on this royalty was duly shown in the books of account on 31-3-1991. Said royalty was paid in subsequent assessment year, i.e., 1992-93 and TDS on such payment was deposited. The Assessing Officer disallowed the said provision for royalty on

the ground that the same was an unascertained liability. The Commissioner (Appeals) upheld the disallowance by invoking provisions of section 40(a)(i). The Tribunal deleted disallowance holding that while making provision the assessee had made book entries in respect of tax deductible and thus provisions of section 40(a)(i) could not be invoked. The court held that, out of two conditions as mentioned in section 40(a)(i), namely, 'tax has not been paid' or 'deducted', one condition, namely, 'not deducted' do not exist inasmuch as the tax has been deducted and therefore, the provision of section 40(a)(i) will not be attracted. The aforesaid interpretation is also supported by the proviso to section 40(a)(i) which provides that where the tax has been paid or deducted in any subsequent year then the amount of royalty shall be allowed as deduction in computing the income of previous year in which such tax has been paid or deducted. Thus, the use of two words, namely, 'paid' or 'deducted' do not carry the same meaning. Subsequent amendment by Finance (No.2) Act, 2004, making specific provision of deduction and payment thereof in the previous year or in the subsequent year was not available under section 40(a)(i) as it existed during the relevant assessment year i.e. assessment year 1991-92. Since liability to pay royalty had accrued and was not contingent and while making provision assessee had also made book entries in respect of tax deductible, such provision for royalty could not be disallowed. (A.Y. 1991-92)

CIT v. Modi Olivetti Ltd. (2013) 94 DTR 398 / 37 taxmann.com 464 / 263 CTR 28 (All.)(HC)

871. S.40(a)(i) : Amounts not deductible – Non-resident – Commission – Withdrawal of beneficial circular in October 2009 – Disallowance of payment was not justified

Circulars No. 23, dated July 23, 1969, No. 163, dated May 29, 1975, and No. 786, dated February 7, 2000 which clarified that payments in the form of commission or discount paid to a foreign party were not chargeable to tax in India were withdrawn by Circular No. 7 of 2009. Circular No. 7 of 2009 cannot be classified as explaining or clarifying the earlier circulars issued in 1969 and 2000. Hence, it did not have retrospective effect. Hence, in the relevant accounting year tax did not have to be deducted and no disallowance under section 40(a)(i) was justified on account of such non-deduction. (A.Y. 2009-10)

CIT v. Angelique International Ltd. (2013) 359 ITR 9 (Delhi) (HC)

872. S.43(5) : Speculative transaction – Transactions in derivatives – Delay in notification of stock exchanges – Notification in January 2006 has retrospective effect – Loss was not speculative. [S.73, R.6DDA, 6DDB]

Rules prescribing conditions for notification of stock exchanges were framed with effect from July 1, 2005 and proviso (d) to section 43(5) was inserted w.e.f. 1-4-2006. However, the notification of stock exchanges was only in January 2006. Held, the delay was occasioned as procedure and formalities have to be complied with. This should not disentitle and deprive an assessee, specially, when the transactions were carried through a notified stock exchange. Notification has retrospective effect. Derivative transactions between July 2005 and September, 2005 cannot regarded as speculative. (A.Y. 2006-07)

CIT v. NASA Finelease P. Ltd. (2013) 358 ITR 305 (Delhi)(HC)

873. S.43B : Certain deductions to be allowed only on actual payment – Amount deposited in Excise personal ledger – Disallowance cannot be made

Where in order to clear goods, assessee, a car manufacturer, deposited certain amount on regular basis in Excise Personal Ledger Account

in terms of rule 173G of Central Excise Rules, 1944, said amount could not be disallowed under section 43B on ground that it was not paid in respect of manufactured goods. Amount deposited by assessee, a car manufacturer, in Excise Personal Ledger Account in terms of rule 173G of Central Excise Rules, 1944, in order to clear goods, could not be disallowed under section 43B. (A.Ys 1994-95 to 1996-97)

Maruti Suzuki India Ltd. v. Dy.CIT (2013) 88 DTR 249 (Delhi)(HC).

874. S.43B : Deductions on actual payment – Conversion of sales tax liability into a loan within relevant assessment year is deductible

The circular issued by the Central Board of Direct Taxes permits and allows sales tax liability, which is converted into a loan to be set off in the year in which the liability is so converted and the Government order is issued.

The Honorable High Court held that the assessee converted the sales tax liability into a loan on March 24, 2003, a date which fell within the assessment year 2003-04. Thus, the assessee could not be denied the benefit and the expenditure/deduction was allowed under section 43B. (A.Y. 2003-04)

CIT v. Minda Wirelinks Pvt. Ltd. (2013) 357 ITR 668 (Delhi)(HC)

875. S.43B : Deductions on actual payment – Employees' PF / ESI Contribution is also covered by s. 43B & allowable as a deduction u/s 36(1)(va) if paid by the "due date" for filing ROI. [S.36(1)(va), 139(1)]

In AY 2001-02 etc., the assessee claimed a deduction for payment of (employees' contribution) to GPF, CPF and ESI u/s 36(1)(va) read with s. 43B of the I.T. Act. The basis of the claim was that though the amount was not paid on or before the due date under the respective Act, the same was deposited on or before the due date of furnishing of the Income-tax returns u/s 139 of the I.T. Act and, therefore, in view of s. 43B read with s. 36(1)(va), the entire amount was allowable. The AO rejected the claim for deduction though the Tribunal allowed it. On appeal by the department to the High Court HELD dismissing the appeal:

No substantial question of law arise out of the orders of the ITAT as it is an admitted fact that the entire amount was deposited by the assessee on or before the due date of filing of the returns u/s 139 of the I.T. Act. If the amount has been deposited on or before the due date of filing the return u/s 139 then the amount cannot be disallowed u/s 43B or u/s 36(1)(va) of the Act.

CIT v. Jaipur Vidyut Vitran Nigam Ltd. (Raj.)(HC) www.itatonline.org

876. S.43B : Deductions on actual payment – Tax or duty not actually paid – Amendment not retrospective – Section 43B prior to 1-4-1989 is not applicable

For the assessment year 1987-88 a deduction was claimed by the assessee which was payable towards market fee levied under the Bihar Agricultural Produce Market Act, 1960, and the Bihar Agricultural Produce Market Rules, 1975, on the purchase of sugarcane and sale of sugar. The A.O. held that since no payment was made the assessee was not entitled for deduction, which was confirmed by the Commissioner (Appeals) and the Tribunal held that the assessee was entitled to deduction of market fee. On appeal the court held that market cess or market fee were not taxes under section 43B as it stood prior to its amendment with effect from April 1, 1989, and the section was not applicable to it. (A.Y.1987-88)

CIT v. Moti Lal Padampat Udyog Ltd. (2013) 357 ITR 705 (All.)(HC)

877. S.45(4) : Capital gains – Distribution of capital asset – Retiring partner – Consideration received in cash – Section does not apply if the retiring partner takes only money towards the value of his share and there is no distribution of capital assets among the partners. [S.2(47)]

The assessee partnership firm was constituted on 9-1-1985 with Anurag Jain and Nirmal Kumar Dugar as its partners. On 13-4-1987, Nirmal Kumar Dugar retired from partnership and L.P. Jain entered the partnership and contributed capital for purchase of land to construct a housing complex. The assessee-firm purchased land for a consideration of ₹ 2.5 lakhs. Another reconstitution took place on 1-7-1991 by which L.P. Jain retired from the firm and Pushpa Jain and Shree Jain were inducted as partners. Later, on 28-4-1993, five partners belonging to the Khemka Group were inducted. Prior to the induction of the Khemka Group, the assets of the firm were revalued. The three old partners retired through deed of retirement dated 1-4-1994 and received the enhanced value of the property in FY 1994-95. The AO held that the introduction of the Khemka Group and the retirement of the old partners was a device adopted to transfer the immovable property and to evade capital gains tax and stamp duty. He assessed the firm on capital gains. This was upheld by the CIT(A) though reversed the Tribunal. The Tribunal held that as the land continued to remain with the assessee-firm, there was no transfer u/s. 2(47) and that the retiring partners had merely withdrawn the amounts standing to their credit in the capital account. On appeal by the department to the High Court, it was felt that there was a conflict between, *CIT v. Mangalore Ganesh Beedi Works (2004) 265 ITR 658* and *CIT v. Gurunath Talkies (2010) 328 ITR 59* and the issue was referred to the Full Bench. HELD by the Full Bench:

(i) S.45(4) deals with a distribution of capital assets on the dissolution of a firm or other AOP or BOI or otherwise and provides that if in the course of such distribution of capital asset there is a transfer of a capital asset by the firm, the firm shall be chargeable to tax on capital gains. In order to attract s. 45(4), the conditions precedent are (1) there should be a distribution of capital assets of a firm; (2) such distribution should result in transfer of a capital asset by firm in favour of the partner; (3) on account of the transfer there should be a profit or gain derived by the firm and (4) such distribution should be on dissolution of the firm or otherwise. In other words, the capital asset of the firm should be transferred in favour of a partner, resulting in firm ceasing to have any interest in the capital asset transferred and the partners should acquire exclusive interest in the capital asset. On facts, the partnership firm purchased the property and it was not in the name of any partner. No partner brought that capital asset as capital contribution into the firm. Also, there was no dissolution of the firm because the firm continued to exist even after the retirement of some partners. What was given to the retiring partners is cash representing the value of their share in the partnership. No capital asset was transferred on the date of retirement. In the absence of distribution of a capital asset and in the absence of transfer of capital asset in favour of the retiring partners, no profit or gain arose in the hands of the partnership firm and so the question of the firm being assessed u/s. 45(4) would not arise;

(ii) The department's argument that the transaction by which the five incoming partners brought money into the firm and the three erstwhile partners retired by taking money (leaving the capital asset in the firm) is a device adopted to evade payment of

profits or gains is not acceptable because it proceeds on the premise that the immovable property belongs to the erstwhile partners and that after the retirement the erstwhile partners have taken cash and given the property to the incoming partners. The property belongs to the partnership firm and not to the partners. The partners only had a share in the partnership asset when they retired and took their share in cash, they were not relinquishing their interest in the immovable property. What they relinquished is their share in the partnership. Therefore, there is no transfer of a capital asset and no capital gains or profit arises (*CIT v. Mangalore Ganesh Beedi Works (2004) 265 ITR 658* approved; *CIT v. Gurunath Talkies (2010) 328 ITR 59* reversed. (ITA No. 1414 of 2006, dt. 16-9-2013.)

CIT v. Dynamic Enterprises(FB) (Kan.)(HC)www.itatonline.org.

878. S.45 : Capital gains – Business income – Investment in shares – Income from delivery based transactions with Investment motive was assessable as short term capital gains. [S.28(i)]

It is possible for a taxpayer to have two portfolios, namely, an investment portfolio comprising securities, which are to be treated as capital assets and a trading portfolio comprising stock-in-trade, which is to be treated as trade asset. Held, the delivery based transactions were made with an investment motive and the income there from was in the nature of short-term capital gains whereas the income from futures and options transactions and daily trading in shares, which were mainly through stock broker were with business motive, and income there from was shown as business income only. (A.Y. 2005-06)

CIT v. Om Prakash Suri (No.1) (2013) 359 ITR 39 (MP)(HC)

879. S.45 : Capital gains – Partner – Retirement – Amount received by partner on his retirement is not chargeable to tax as capital gains. [Ss.2(47)(i), 2(47)(ii)]

The assessee, a partner in a firm, received ₹ 66 lakhs over and above his capital contribution on his retirement from the firm. The assessee claimed that the said sum was a capital receipt not chargeable to tax. However, the AO held that the retirement had resulted in a relinquishment of his pre-existing rights in the partnership firm and, therefore, the same was in the nature of capital gain on transfer of goodwill and liable to tax under s. 45 read with s. 2(47)(i) & (ii) of the Act. The CIT(A) and Tribunal reversed the finding of the AO on the ground that when a partner retires from the firm and receives his share of an amount calculated on the value of the net partnership assets including goodwill of the firm, there is no transfer of interest of the partner in the goodwill, and no part of the amount received is assessable as capital gain u/s. 45 of the Act. On appeal by the department to the High Court HELD dismissing the appeal:

The Tribunal has correctly referred to the fact that *N A Mody v. CIT (1986) 162 ITR 420 (Bom)* followed *CIT v. Tribhuvandas G. Patil (1978)115 ITR 95* and that the same has been reversed by the Apex Court in *Tribhuvandas G Patel v. CIT (1999) 236 ITR 515*. This Court in *Prashant S Joshi v. CIT (2010) 324 ITR 154 (Bom.)* has also referred to the decision of Tribuvandas G. Patel rendered by this Court and its reversal by the Apex Court. Moreover, the decision of this Court in Prashant S. Joshi placed reliance upon the decision of the Supreme Court in *CIT v. R. Lingamallu Rajkumar (2001) 247 ITR 801* wherein it has been held that amounts received on retirement by a partner is not subject to capital gains tax (ITA No. 1969 of 2011, dt. 26-2-2013)

CIT v. Riyaz A. Sheikh (Bom.)(HC) www.itatonline.org.

880. S.45 : Capital gains – Shares – Conversion from stock in trade into investments was accepted in earlier years – Sale of shares assessable as capital gains and not as business income. [S.28(i)]

The conversion of shares from stock-in-trade into investments was accepted by the Department in the AY 2003-04 and 2005-06 and gains from such sales were sold were offered under the head "Capital Gains" from the date of conversion from stock-in-trade into investments and prior thereto as business profits. The fact that the assessee was trading in the shares would not estop the assessee from dealing in shares as investments and offer the gain for tax under the head "Capital Gains". The shares sold were held by the assessee as investments, the gains arising out of the sale of investments were to be assessed under the head "Capital Gains" and not under the head "Business profits". (A.Y. 2006-07)

CIT v. Yatish Trading Co. P. Ltd. (2013) 359 ITR 320 (Bom.)(HC)

881. S.48 : Capital gains – Cost of improvement – Claim of tenants – Entitled to indexation benefit. [S.45]

Held, there was no obligation on the assessee to settle claim of tenants for getting vacant possession. Hence, the compensation paid to tenants for delivering vacant possession was not transfer of development rights but cost of improvement, and entitled to indexation benefit. (A.Y. 2003-04)

CIT v. Spencers and Co. Ltd. (No.3) (2013) 359 ITR 644 (Mad.) (HC)

882. S.50C : Capital gains – Full value of consideration – Sale to sister concern – Distress sale- Sale was more than stamp value however lesser value than to sale to other parties – Price at which the assessee sold the property to third party cannot be the basis for determining the capital gain in respect of sale of the property to its sister concern. [S.45]

During the year, the assessee-company sold land to its sister concern at a price which was greater than the guideline value. The assessee submitted that it needed money for its construction work but could not raise it from its financial institution as it had exceeded its limit. Therefore, the property in question was disposed of as a distress sale to a sister concern which could profitably put the property to use. Since the property was not sold outside to a third party, but to its sister concern, which never parted with the property, the sale was claimed to be at arm's length by the assessee. The Assessing Officer did not accept the assessee's contentions and calculated capital gains taking the market value at which the assessee had sold land to a third party. On appeal, the Commissioner (Appeals) and the Tribunal allowed assessee's appeal. On further appeal by the revenue, the High Court held that the legality of the sale of land to sister concern is not questioned and the consideration received has been accepted. Admittedly the said consideration is more than the guidance value prescribed by the guidance value prescribed by the Government for sale of such property. Assessee sold the land as it needed funds. Price at which the assessee sold the property to third party cannot be the basis for determining the capital gain in respect of sale of the property to its sister concern. (A.Y. 2005-06)

CIT v. Velankani Information Systems (P.) Ltd. (2013) 94 DTR 357 / 35 taxmann.com 1 (Karn.) (HC)

883. S.64 : Clubbing of income – Income of minor – Higher income of parent

The income of minor had rightly been clubbed with the income of the mother on the ground that the mother's income was higher.

Anju Mehra v. CIT (2013) 357 ITR 416 (P&H) (HC)

Ragav Mehra v. CIT (2013) 357 ITR 416 (P&H) (HC)

884. S.68 : Cash credit – Gift received through banking channels and copies of cheque issued by donor and acknowledgement of donor having filed return in USA were produced – Deletion was held to be valid

The Assessee was received gift from the brother of the assessee. The gift was received through banking channel; copies of draft/cheque issued by the donor and the copy of the passport and the acknowledgment of the donor having filed the return in USA were produced. The A.O. made addition on account of unexplained gift. The CIT (A) reversed the findings of A.O and concluded that the assessee had discharged his burden to establish the identity, creditworthiness and genuineness of the gift. The Tribunal confirmed the findings of the CIT (A). On appeal by the department the High Court, held that the gift which was made by the brother of the assessee was genuine, and full details were produced during the course of the assessment, no question of law arises.

CIT v. Hatish Ramanlal Patel (2013) 217 Taxman 26 (Mag.) (Guj.)(HC)

885. S.68 : Cash credit – Loan – Confirmation was filed – Addition made on account of unexplained cash credit was deleted

The A.O. made addition on account of "unexplained cash credit" under Section 68 of the Act. The CIT (A) deleted the addition and made observing that "the confirmation letters filed by the assessee from pittalya group. As the credits have been confirmed by them and they have explained source of credits, the said credits are accepted as genuine". Tribunal confirmed the findings of the CIT (A). On appeal by the department the High Court, held that the issue is essentially based on factual matrix and the question having been based on facts, no question of law arises, much less a substantial question of law. (A.Y. 2001-02)

CIT v. Hemant Hasmukhlal Shah (2013) 217 Taxman 25 (Mag.) (Guj.)(HC)

886. S.68 : Cash credits – Advance received for sale of shops – Cannot be added as income of the assessee

One 'R' was a partner in assessee-firm. During search, 'R' made a statement that amount of ₹ 75.50 lakhs found in his account books was drawn from firm. Assessee-firm, in response to notice issued under section 148, read with section 147 for first time, filed a nil return of income the relevant assessment year, claiming that, aforesaid amount did not represent any part of its income, and it had received said amount from as many as 14 persons by way of advance for sale of shops that were being constructed by it. Assessing Officer added aforesaid amount to income of assessee as unexplained cash credits under section 68. The Court held that in view of finding of Assessing Officer that amount of ₹ 75.50 lakhs had not been properly explained by assessee, particularly being in nature of cash credits, Assessing Officer was not justified in adding said amount to income of assessee as unexplained cash credits. [A.Y. 1999-2000]

Kaveri Associates v. ACIT (2012) 210 Taxman 224 (Mag.) (Karn.)(HC)

887. S.68 : Cash credit – Share application money – Deletion of addition was held to be valid

The AO made an addition on account of share application money received from the shareholders on the ground that the assessee has failed to prove genuineness of transactions and creditworthiness of the shareholders. The CIT (A) deleted the addition by relied upon decision of Hon'ble Supreme Court in the case of *CIT v. Stellar Investments Ltd. 251 ITR 263* and also *CIT v. Lovely Exports 172 Taxman 44*. The Tribunal upheld the CIT(A) order. On appeal by the revenue the High Court affirmed the order of the CIT(A) and Tribunal and held that the matter is squarely covered by the decision of Hon'ble Supreme Court in the case of Stellar Investments Ltd. (supra). (A.Y. 2005-06)

CIT v. Kamna Medical Centre (P) Ltd. (2013) 217 Taxman 16(Mag.) (All.)(HC)

888. S.68 : Cash credits – Share application money – Addition merely on the basis of investigation report was not justified

There was no finding that material disclosed untrustworthy or lacked credibility. Hence, the addition solely based on investigation report not justified. (A.Y. 2002-03)

CIT v. Fair Finvest Ltd. (2013) 357 ITR 146 (Delhi) (HC)

889. S.68 : Cash credits – Share application money received through banking channels – existence of the applicants proved–cannot be added as unexplained cash credits

The AO made an addition u/s. 68 of the Act, treating an amount of ₹ 58.40 lakhs, received by the assessee on account of share application money, as unexplained share capital on the ground that the assessee failed to furnish confirmation from the allottees / shareholders. The CIT(A) and the Tribunal deleted the addition.

On appeal filed by the department, the High Court dismissed the departmental appeal following the decision of the Supreme Court in the case of *CIT v. Steller Investment Ltd. [2001] 251 ITR 263 (SC)*. (A.Y. 1997-98).

CIT v. Bhaval Synthetics (2013) 35 taxmann.com 83 (Raj.)(HC)

890. S.73 : Losses in speculation business – CBDT Circular – Carry forward and set off – To be set off against speculative profit of current year before adjusting any other loss. [S. 119]

The assessee for the assessment year 2000-01 set off brought forward loss from speculation business for the assessment year 1999-2000 and 1998-99, against current year's speculative profit. AO disallowed the set off. On appeal the set off was allowed. AO while giving effect first adjusted the current year's loss from all the business of the assessee against current years speculative profits. After this adjustments the balance of speculative loss was allowed to be carried forward. Immediately succeeding the assessment for which loss was first computed, the assessee filed the rectification application, which was rejected. In appeal Commissioner (Appeals) allowed the appeal of assessee. Appeal of revenue was dismissed by the Tribunal following the circular of the Board no 23 of 1960 dated September, 12 1960, though the said circular was issued in the context of section 24 of the Indian Income-tax Act, 1922. On appeal by the revenue, dismissing the appeal the Court held that, beneficial circulars relaxing rigour and other executive Act is binding on Assessing Officer. Court up held the order of Tribunal and held that Carry forward and set off to be set off

against speculative profit of current year before adjusting any other loss. (A.Y. 200-01)

CIT v. Ashok Mittal (2013) 357 ITR 245 (Delhi)(HC)

891. S.73 : Losses in speculation business – Share dealing – Company – Loss from shares dealing cannot be deemed to be from "speculation" under Explanation to s. 73 if company is not engaged in the "business" of shares dealing

The assessee, engaged in the business of trading of crafts paper etc claimed a loss of ₹ 5.53 lakhs arising on account of a transaction whereby it purchased and sold shares. The AO held that under the Explanation to s. 73, the said loss was deemed to be arising from a speculation business and could not be set off against other business profits. However, the CIT(A) and Tribunal allowed the assessee's claim on the basis that the assessee was not engaged in the "business of purchase and sale of shares" so as to fall into the mischief of the Explanation to s. 73. In appeal before the High Court, the department relied on *CIT v. Bhikam Chand Jankilal (1981) 131 ITR 554 (MP)* and argued that even a single transaction of sale or purchase of shares might amount to a "business". HELD by the High Court dismissing the appeal:

The assessee was engaged in the business of trading of crafts paper, installation, job work, consultancy and commission. By all means, the transaction whereby it purchased the shares and incurred loss on account of the fall in the value of the share was a solitary one. The findings of the Tribunal that the transaction did not constitute the business carried on by the company, cannot be termed as perverse or unreasonable. No substantial question of law arises (Standipack 350 ITR 251 (Cal) noted) (ITA No. 112/2000, Dt. 20.11.2013.)

CIT v. Orient Instrument Pvt. Ltd. (Delhi)(HC) www.itatonline.org

892. S.73 : Speculative loss – Explanation to section 73 – Derivative transaction – Definition of speculative transaction in section 43 (5) is confined to its application to that section and cannot be extended to section 73 of the Act. [S.43(5)]

Section 43 defines, certain terms for the purpose of sections 28 to 41 of the Act. Section 43 (5) excludes derivative transactions from the mischief of 'speculative transactions' only for the purpose, that is for computations of business income. Explanation to Section 73 is enacted to clarify that share business of certain types of company are deemed to be speculative in nature. The intendment of Parliament that such derivative transactions are also to be excluded from the provisions of Explanation to section 73 is not born out. (A.Y. 2007-08)

CIT v. DLF Commercial Developers (2013) 91 DTR 49 (Delhi)(HC)

893. S.80HHE : Export business – Export of computer software – Special provision excludes general provision – Assessee has no choice of claiming deduction either under section 80HH or under section 80-O – Order of Tribunal was set aside. [S. 80-O]

The services rendered by the assessee were systems analysis, systems design programme specifications, program me development, documentation, installation and implementation of software packages and the technical services rendered by the assessee were in connection with the development of production of computer software.

Once the nature of services rendered by the company is in connection with the development of production of computer software, it cannot

seek deduction under a provision which deals in general with the deduction on the income earned in technical or professional services rendered outside India. It is true that under sub-section (5), the grant of deduction under section 80HHE has to be claimed by an assessee and allowed by the officer and once it is considered, it will not be allowed under any other provision, either in the same or in any other assessment year. This, however, does not mean that an assessee has a choice to claim the relief either under section 80HHE or under section 80-O. Order of tribunal was set aside. (A.Ys. 1993-94, 1994-95)

CIT v. B.T. System and Service Ltd. (2013) 358 ITR 30 (Mad.)(HC)

894. S.80-I : New industrial undertaking – 10 or more workers – whether the employees are direct employees or engaged through sister concern – Eligible for deduction

The mandatory requirement to employ 10 or more workers by an industrial undertaking with the aid of power specified as quantum number as per sec.80-I(2)(iv). It does not interfere recognise the fact whether the employees are direct employees or engaged through sister concern. (A.Y. 1991-92)

CIT v. Delhi Press Patra Prakashan Ltd. (2013) 260 CTR 253 (Delhi)(HC)

895. S.80-I : Profits and gains from industrial undertakings – Derived from – Service charges – Plant is operated by assessee service charges received by assessee is entitled to deduction

Assessee-company received service charges for operating and maintaining a heavy water plant owned by Government, which was next to its own ammonia plant. Such service charges received were not considered as part of profit of industrial undertaking eligible for deduction under section 80-I, by Assessing Officer as plant was not owned by assessee. The question that arose before the court was whether the service charges received was directly relatable to operation and management of heavy water plant, which was an industrial undertaking and whether these service charges were to be considered as profits of industrial undertaking eligible for deduction as section 80-I does not require ownership of an industrial undertaking. The court answered the question in affirmation and in favour of the assessee. (A.Ys. 1993-94, 1994-95)

Krishak Bharti Co-operative Ltd. v. Dy. CIT (2013) 91 DTR 1 / 358 ITR 168 (Delhi)(HC)

896. S.80-IB : Industrial undertakings – Derived from – Transport subsidy, power subsidy, interest subsidy and insurance subsidy – First degree nexus – Deductions to be granted. [S.80-IC]

The question that arose before the court was whether transport subsidy, power subsidy, interest subsidy and insurance subsidy reduce cost of production of an industrial undertaking, is there first degree nexus between said subsidies and profits and gains derived by industrial undertaking and, therefore, deduction under sections 80-IB and 80-IC has to be granted in respect of subsidies so received. The court held, that since transport subsidy, power subsidy, interest subsidy and insurance subsidy reduce cost of production of an industrial undertaking, there is first degree nexus between said subsidies and profits and gains derived by industrial undertaking and, therefore, deduction under sections 80-IB and 80-IC has to be granted in respect of subsidies so received.

CIT v. Meghalaya Steels Ltd. (2013) 91 DTR 81 / 261 CTR 17 (Gau.)(HC)

897. S.80-IB(10) : Hosing projects – Developing and building – Date of approval-approval for construction of flats on 28-3-2005 and communicated same to assessee on 4-4-2005, as date of approval was 28-3-2005, assessee would be entitled to exemption under section 80-IB(10) on profit earned from assessment year 2005-06 onwards

Assessee company undertook a project with regard to construction of flats in Bangalore. It applied for approval of said project before Bangalore Development Authority [BDA] on 8-10-2004. BDA granted approval on 28-3-2005 and communicated said approval to assessee on 4-4-2005. Assessee filed returns of income claiming exemption under section 80-IB(10) on profit earned. It submitted before Assessing Officer that as approval was granted on 28-3-2005, it was entitled to benefit under section 80-IB(10) from assessment year 2005-06 onwards. Assessing Officer sought clarification from BDA, who wrote a letter to Assessing Officer informing that assessee's project was approved with effect from 4-4-2005 and said approval would be in force till 3-4-2007. Assessing Officer acting on said letter denied benefit of section 80-IB(10) to assessee. Court held that since in instant case date of approval was 28-3-2005, assessee was entitled to benefit under section 80-IB(10) from assessment year 2005-06. (A.Ys. 2005-06 to 2007-08)

CIT v. Akshay Eminence Developers (P) Ltd. (2013) 259 CTR 266 (Karn.)(HC)

898. S.80-IB(10) : Housing projects – Construction and development – Deduction allowable on construction projects approved after 1-10-1998 wherein area of flats was less than 1,500 sq. ft.

The assessee initiated a construction project in the year 1995-96 which was first approved in 1997. However, the revised plan was approved in the year 2002 when the commencement certificate was also issued. The AO denied the deduction u/s. 80-IB on ground that the original plan was approved in 1997 and the area of flats was more than 1500 sq. ft. as found during survey. The CIT(A) held that though the plan was originally approved in 1997, the revised plan was approved only in 2002 and further on examination by the DVO the size of the flats was found to be less than 1500 sq. ft., and hence the assessee was not hit by section 80-IB(10). The Tribunal confirmed the findings of the CIT(A).

On appeal by the department, the High Court observed that the CIT(A) as well as the Tribunal have based their decisions on a concurrent finding of fact that the project approval and also commencement certificate was received in 2002. Further, both the authorities i.e. CIT(A) and the Tribunal have rendered a finding of fact that the area of the flat was less than 1500 sq. ft. on examination by the DVO. Consequently, the Tribunal concluded that the project was approved post October, 1998 and the area of the flat as constructed in the building was less than 1,500 sq. ft. One more fact which would be have to be borne in mind is that the user of the land from agriculture to non agriculture use was received by the respondent assessee only on 8-4-2002. Accordingly, dismissing the departmental appeal, the High Court held that the conclusion reached by the Tribunal based on finding of fact cannot be found fault with as the revenue has not been able to show that the impugned order is perverse. (A.Ys. 2004-05 to 2006-07).

CIT v. Ashray Premises (P.) Ltd. (2013) 34 taxmann. com 165 (Bom.)(HC)

899. S.80M : Inter-corporate dividends – Year of deductibility – Dividend need not relate to year in question

Dividends relating to 1990-91 and 1991-92 distributed in accounting year relevant for assessment year 1993-94 is entitled to deduction in assessment year 1993-94. The condition precedent was that dividends must be received by domestic company from another domestic company and it should be distributed in year in question before due date. The dividend need not relate to year in question. (A.Y. 1993-94)

CIT v. Delhi Tourism and Transportation Development Corporation Ltd. (2013) 357 ITR 95 (Delhi)(HC)

900. S.88E : Rebate for Securities transaction tax – Minimum alternate tax – Rebate is applicable. [S. 115JB]

Section 88E applies to income computed under section 115JB and assessee is entitled to rebate of securities transaction tax which has been paid.

CIT v. MBL and Co. Ltd. (2013) 358 ITR 1 (Delhi) (HC)

CIT v. Multiplex Capital Ltd. (2013) 358 ITR 1 (Delhi)(HC)

901. S.92C : Transfer pricing – Arm's length price – S.147 – Reassessment – Re-opening bad in law in absence of any material to discard the ALP determined by the assessee

The AO reopened the assessment for the reason that as per Form No. 3CEB filed alongwith the return the assessee had international transactions with its Associated Enterprise ('AE') and determination of Arm's Length Price ('ALP') in relation thereto was required. The AO made reference to the TPO who made an adjustment in the ALP and consequently AO made the addition to the declared income of the assessee. The Tribunal observed that on going through the purported reasons it was apparent that the AO allegedly had reason to believe that income of ₹ 1.33 crores had escaped assessment and this income comprised of two components, i.e. ₹ 11 lakhs in respect of the claim of loss on account of foreign exchange fluctuation and an amount of ₹ 1.22 crores on account of claim of expenses under the head 'data usage charges'. In the Assessment Order made by the AO no addition had been made on account of foreign exchange fluctuation loss. However, with regard to the data usage charges 25% of the same had been initially disallowed, but the same had been deleted by the Disputes Resolution Panel. Therefore, no addition on the basis of the reasons recorded for reopening the completed assessment survived. Accordingly, the Tribunal cancelled the addition made by the AO.

On appeal by the department, the High Court held that the methodology for computation of ALP is prescribed u/s. 92C which the assessee has clearly followed and computed the ALP by net margin method. If the AO was not satisfied with the ALP, then during original assessment he should have referred the matter to the TPO and given the assessee an opportunity to be heard. There was no tangible material whatsoever before the AO when the purported reasons were recorded to indicate that the ALP determined by the assessee was not correct. Therefore, the alleged reason for determination of the ALP, as given in the reasons for reopening the assessment, was not a reason at all. Accordingly, the High Court dismissed the departmental appeal. (A.Y. 2006-07).

CIT v. Cheil Communication India (P.) Ltd. (2013) 217 Taxman 275 (Delhi)(HC)

902. S.92C : Transfer pricing – Arm's length price – TNMM under Rule 10B(1)(e) contemplates ALP

determination with reference to the relevant factors (cost, assets, sales etc.) of the assessee and not those of the AE or third party. Assessee's study report cannot be discarded without showing how it is wrong. Finding that assessee is a risk bearing entity should be based on tangible material. [S.92CA]

The assessee, a wholly owned subsidiary in India of Li & Fung (South Asia) Ltd., Mauritius, was set up as a captive offshore sourcing provider. It entered into an agreement with Li & Fung (Trading), Hong Kong, an associated enterprise, for rendering "sourcing support services" for the supply of high volume & time sensitive consumer goods. The assessee was entitled to receive cost plus a markup of 5% for the services rendered to the AE. The assessee claimed that it was a low risk captive sourcing service provider performing limited functions with minimal risk. It adopted the TNMM and computed the PLI at operating profit margin/total cost. Since the operating profit margin at 5.17% exceeded the weighted average operating margin of 26 other comparable companies, the assessee claimed that its remuneration was at arms' length. The TPO did not dispute the TNMM or the comparables but held that the assessee ought to have received 5% on the FOB value of the goods sourced through the assessee (i.e. the exports made by the Indian manufacturers to overseas third party customers). He also held that the assessee was a risk bearing entity and an independent entrepreneur and it could not be said that the assessee is a risk-free entity. The DRP upheld the TPO's order though it reduced the mark up to 3% of FOB value of exports. On appeal by the assessee, the Tribunal {*Li & Fung (India) ltd. v. Dy. CIT (2012) 143 TTJ 201 (Delhi*)} upheld the stand of the TPO. On further appeal by the assessee HELD by the High Court reversing the Tribunal:

(i) The assessee's compensation model is based on functions performed by it and the operating costs incurred by it and not on the cost of goods sourced from third party vendors in India. Allotting a margin of the value of goods sourced by third party customers from Indian exporters/ vendors to compute the assessee's profit is unjustified. To apply the TNMM, the assessee's net profit margin realised from international transactions had to be calculated only with reference to cost incurred by it, and not by any other entity, either third party vendors or the AE. Rule 10B(1)(e) does not enable consideration or imputation of cost incurred by third parties or unrelated enterprises to compute the assessee's net profit margin for application of the TNMM. Rule 10B(1)(e) contemplates a determination of ALP with reference to the relevant factors (cost, assets, sales etc.) of the enterprise in question, i.e. the assessee, as opposed to the AE or any third party. The approach of the TPO in essence imputes notional adjustment/income in the assessee's hands on the basis of a fixed percentage of the FOB value of export made by unrelated party venders;

(ii) The finding that the assessee assumed substantial risk is not based on any material. The assessee made no investment in the plant, inventory, working capital, etc., nor did it bear the enterprise risk for manufacture and export of garments. It merely rendered support services in relation to the exports which were manufactured independently. Thus, attributing the costs of such third party manufacture when the assessee did not engage in that activity and when those costs were clearly not the assessee's costs, but those of third parties, is clearly impermissible. A contrary conclusion would amount to treating the assessee as

the vendor/ exporters' partner in their manufacturing business – a completely unwarranted inference;

(iii) Tax authorities should base their conclusions that the assessee bears "significant" risks on specific facts, and not on vague generalities, such as "significant risk", "functional risk", "enterprise risk" etc. without any material on record to establish such findings. If such findings are warranted, they should be supported by demonstrable reason, based on objective facts and the relative evaluation of their weight and significance;

(iv) Also, as the TPO did not discard the exercise conducted by the assessee of comparing its operating profit margin with that of the comparable companies, and it was not shown that the profit margin and cost plus model adopted by the assessee was distorted, he could not have proceeded to his own determination and calculations. The TPO must first reject the assessment carried out by the assessee before making further alterations. Where all elements of a proper TNMM are detailed and disclosed in the assessee's study reports, care should be taken by the tax administrators and authorities to analyze them in detail and then proceed to record reasons why some or all of them are unacceptable. (A.Y. 2006-07)(ITA No. 306/2012, dt. 16.12.2013)

Li And Fung India Pvt. Ltd. v. CIT (2014) 97 DTR 70 (Delhi)(HC).

903. S.92C : Transfer Pricing – Share premium-Alternative remedy – Existence of income is a jurisdictional requirement for the applicability of T. P. provisions. AO must deal with it after giving personal hearing before making reference to TPO. The dept should not treat the assessee as an adversary who has to be taxed, no matter what-it would be open to the assessee to challenge the decision of DRP on the preliminary issue in a writ petition, in case the assessee makes out a case at that stage that the decision of DRP on the preliminary issue is patently illegal, notwithstanding the availability of alternative remedy before the Tribunal-Matter remanded to DRP. [S. 92, 92CA, 144C, Art.226]

The assessee, an Indian company, issued equity shares at the premium of ₹ 8591 per share aggregating ₹ 246.38 crores to its holding company. Though the transaction was reported as an "international transaction" in Form 3 CEB, the assessee claimed that the transfer pricing provisions did not apply as there was no income arising to it. The AO referred the issue to the TPO without dealing with the preliminary objection. The TPO held that he could not go into the issue whether income had arisen or not because his jurisdiction was limited to determine the ALP. He held that the assessee ought to have charged the NAV of the share (₹ 53,775) and that the difference between the NAV and the issue price was a deemed loan from the assessee to the holding company for which the assessee ought to have received 13.5% interest. He accordingly computed the adjustment for the shares premium at ₹ 1308 crore and the interest thereon at ₹ 88 crore. The AO passed a draft assessment order u/s 144C(1) in which he held that he was bound u/s 92-CA(4) with the TPO's determination and could not consider the contention whether the transfer pricing provisions applied. The assessee filed a Writ Petition challenging the jurisdiction of the

TPO/AO to make the adjustment. On the merits of the adjustment, the assessee filed objections before the DRP. Before the High Court the assessee argued that (i) it was a precondition before the transfer pricing provisions apply that there has to be income arising to the assessee. As the allotment of shares at a premium does not give rise to income, the transfer pricing provisions do not apply, (ii) there was a breach of natural justice because neither the TPO nor the AO had heard the assessee on, or decided, the fundamental issue as to whether the transfer pricing provisions applied at all, (iii) the DRP does not offer an alternative remedy because the DRP has no power to quash the draft assessment order even if it is satisfied that the same is without jurisdiction & (iv) the DRP cannot take an unbiased view because one of its members is the DIT (TP). HELD by the High Court:

(i) The assessee's contention that the DRP does not offer an alternative remedy because it does not have the power to quash the assessment order even if it is satisfied that the same is without jurisdiction is not acceptable because in Vodafone 37 taxmann.com 250 it was held that the DRP's power to confirm would include the power not to confirm and to annul the draft assessment order;

(ii) It is clear from s. 92(1) that there must be income arising/ potentially arising by an international transaction for the application of the transfer pricing provisions. This is a jurisdictional requirement and has to be dealt with by the AO when specifically raised by the assessee before making reference to the AO. Grant of personal hearing before referring the matter to the TPO has to be read into s. 92CA(1) in cases where the very jurisdiction to tax under Chapter X is challenged by the assessee (Veer Gems v. Asst. CIT (2013) 351 ITR 35 (Guj) disagreed with to the extent it holds that no hearing is required at the stage of reference to the TPO even on jurisdictional issues). If, after the hearing the assessee, the AO holds that there is an international transaction, that would be binding on the TPO;

(iii) The department's contention, based on CBDT Instruction No.3 dated 20.05.2003, that the action of the AO in referring the international transaction is a mere administrative act is not acceptable. The AO is bound to hear the assessee in respect of jurisdictional issues before making the reference. The failure to do so is an illegality;

(iv) The assessee's contention that the DRP would not give a fair hearing as one of its members is the DIT (TP) is not acceptable because it overlooks the fact that these are not appeal proceedings but to finalize the draft assessment order. Also, the DIT(TP) who approved the TPO's order is not on the panel;

(v) The Revenue should keep in mind the sage advice of Nani Palkhivala that the department should not cause misery and harassment to the taxpayer and the gnawing feeling that he is made the victim of palpable injustice. In this case it would be natural for the assessee to feel harassed as neither the AO nor the TPO gave a hearing or dealt with the preliminary objection. It is hoped that the revenue will be more sensitive to the just demands of the assessee and not treat the assessee as an adversary who has to be taxed, no matter what;

(vi) The DRP should decide the assessee's objection regarding chargeability of alleged shortfall in share premium as a preliminary issue. In case the DRP's decision on the preliminary issue is adverse, the assessee shall be entitled to challenge it in a writ petition if it can show that the DRP's decision on the preliminary issue is patently illegal notwithstanding

the availability of alternate remedy before the ITAT. (W.P. No. 1877 of 2013, dated 29.11.2013)

Vodafone India Services Pvt. Ltd. (No.2) v. UOI (2013) 96 DTR 193 / (2014) 264 CTR 30 (Bom.) (HC).

904. S.92C : Transfer pricing – Computation of Arm's Length Price – Adjustment of ALP – Captive unit – No adjustment of ALP was permitted

Assessee being a captive unit of a parent company and having assumed only limited risk as compared to parent company with its varied OP/TC ratio, no adjustment of ALP was permitted.

CIT v. Agnity India Techonolgies (P) Ltd. (2013) 262 CTR 291 (Delhi)(HC)

905. S.92CA : Transfer pricing – Determination of arm's length price after notice to assessee and hearing it – Principle of natural justice is followed – Writ is not maintainable. [Art. 226]

The assessee was on notice as to the nature of the enquiry which was being pursued by the TPO. The TPO addressed a communication detailing the information that was required on the basis of which disclosure was sought. The assessee also adduced detailed submissions by its letter. There was no breach of the principles of natural justice which would warrant the interference of the court under Article 226 of the Constitution. Assessee had alternative remedy.

Hindalco Industries Ltd. v. Addl. CIT (2013) 359 ITR 46 (Bom.) (HC)

906. S.115JA : Book profit – Liability to pay interest for failure to pay advance tax can be levied. [S.234B]

Interest u/s 234B for default in payment of advance tax can be levied where income of company is computed under section 115JA. (A. Y. 1998-99)

CIT v. IBM India Ltd. (2013) 357 ITR 88 (Karn) (HC)

907. S.115JA : Book profit – Provision for bad and doubtful debts is not deductible

Provision for bad debts is not deductible in the computation of book profits. (A.Y. 1998-99)

CIT v. IBM India Ltd. (2013) 357 ITR 88 (Karn.) (HC)

908. S.115JB : Book profit – Expenditure estimated on earning of dividend – Addition deleted in normal computation consequently has to be deleted for the purpose of computation of book profit. [S.14A]

When addition u/s 14A was deleted for the purpose of normal computation of income, same had to be deleted for MAT computation as well. (A.Y. 2004-05)

CIT v. Gujarat State Fertilizers and Chemicals Ltd. (2013) 358 ITR 323 (Guj.)(HC)

909. S.115JB : Book profit – Lease equalization reserve and provision for contingencies to be added. [S.36(1)(viii)]

Lease equalisation reserve and provision for contingencies to be added for the computation of book profits. (A.Ys. 1998-99 to 2001-02)

CIT v. Weizmann Homes Ltd. (2013) 357 ITR 74 (Karn.)(HC)

910. S.119 : Instructions – CBDT – Carry forward and set off of speculation loss – Provisions of old and new Acts similar – Circular to be applied – Circular is binding on assessee. [S.73]

Whether the provisions of old and new Acts (i.e. 1922 Act and 1961 Act) are similar, and a circular issued under the Old Act was not withdrawn, the circular is to be applied to the new Act as well. Circular No. 23D of 1960 dated 12-09-1960, Section 24 of the 1922 Act. (A.Y. 2000-01)

CIT v. Ashok Mittal (2013) 357 ITR 245 (Delhi) (HC)

911. S.127 : Transfer of case – Reason for co-ordinate investigations and assessment – Substantial financial transactions of the assessee with the various entities of the group companies – Not perverse or arbitrary – Writ petition not maintainable

For co-ordinated investigation, case of the assessee transferred from Mumbai to New Delhi as there were substantial transactions of the assessee with the related parties. Challenging the transfer of the assessee's case to New Delhi from Mumbai, the assessee filed a writ petition before the High Court under article 226 of the Constitution of India. The High Court held that so long as reasons indicated in the order of transfer are neither arbitrary or unreasonable, the High Court under the writ jurisdiction should not set aside the order passed by the CIT u/s. 127 of the Act.

Sahara Hospitality & Anr. v. CIT & Ors. (2013) 94 DTR 36 (Bom.)(HC)

912. S.127 : Transfer of case – Search and seizure – For co-ordinated investigations was held to be valid

There was search and seizure in group cases at New Delhi and allegation of tax evasion at New Delhi. Though the head office of the company was at New Delhi, the registered office and business activities of group were mostly around New Delhi. It was not possible for the AO in regular charge to undertake detailed and coordinated investigations. The case was transferred to Delhi with the concurrence of Commissioner, New Delhi. The transfer order was within the scope of s. 127.

Continental Mikose (India) Ltd. v. CIT (2013) 351 ITR 292 (Gauhati)(HC)

913. S.132 : Search and seizure – Warrant – Panchnama – Copy of search warrant should be given to the searched person. Defects in the panchnama do not invalidate the search or the s.153A assessment proceedings. [S.153A]

A search u/s. 132 was conducted on the premises of the assessee and its group concerns. Though a panchnama was prepared, the assessee's name did not appear therein. An assessment order u/s 153A was passed to assess the alleged undisclosed income. The assessee claimed that as s. 153B imposed a limitation for passing of a s. 153A order by reference to the last panchnama drawn in relation to the searched person, the absence of the assessee's name in the panchnama meant that the s. 153A assessment order could not be passed. A Writ Petition was filed to challenge the assessment. HELD by the High Court dismissing the Petition:

S.153A(1) does not make any reference to panchnama or the date of panchnama. A panchnama is not a pre-condition for invoking s. 153A. As regards the argument that the time limit u/s 153B is calculated with reference to the date of the last panchnama, a panchnama

was drawn up on the occasion of the search and it referred to documents belonging to the assessee though it did not refer to the assessee by name. The panchnama also does not refer to the conclusion of the search. The non-reference to the name of the assessee and the suspension/ conclusion of the search is a lapse and failure to comply with the requirements of the search and seizure manual. However, this does not affect the validity of the search or the assessment order u/s 153A. The department should take remedial steps and ensure that such lapses do not occur in future. Also, the department should give a copy of the search warrant to the person searched so as to curtail allegations of interpolation, addition of names, etc. (Writ Petition No. 823/2013, dt. 20th Dec. 2013.)

MDLR Resorts Pvt. Ltd. v. CIT (Delhi)(HC) www.itatonline.org

914. S.133A : Survey – Loss set off against surrendered income – Business income – Loss was allowed to be set off. [Ss.28(i), 56]

The assessee claimed set off of loss of ₹ 54,10,054 against the amount offered during survey on the basis of incriminating documents, claiming that the income was from business. The Commissioner (Appeals) as well as the Tribunal had recorded a concurrent finding of fact based on cogent material available before them, that the surrendered amount was income of the assessee from business and not from other sources. The Revenue was unable to point out any perversity in the finding recorded by the Commissioner (Appeals) and the Tribunal. Hence, assessee was eligible to set off the said loss against business income. (A.Y. 2003-04)

CIT v. Ram Gopal Manda (2013) 359 ITR 389 (Raj.) (HC)

915. S.142(2A) : Inquiry before assessment – Special audit – Complexity of accounts – Direction to special audit is justified

The AO found that there was no reference to related party transactions in the audit report furnished by the assessee trust in Form No 10B. The AO directed special audit having regard to the complexity of the accounts. The Assessee challenged the order by Writ. The Court held that the special audit was ordered after obtaining the approval of the Chief Commissioner and considering the complexity of the accounts, accordingly the petition was dismissed. (A.Y. 2010-11)

Hiranandani Foundation v. JCIT (Exemption)(2013) 262 CTR 422 (Bom.)(HC)

916. S.142A : Estimate by Valuation Officer – Where the books of account are not rejected, reference to valuation officer was not valid. [S.145]

Wherever the books of account are maintained with respect to the cost of construction, the matter can be referred to the District Valuation Officer after the books of account are rejected by the Revenue on some legal or justified basis. In the absence of the rejection of books of account, the reference to the District Valuation Officer cannot be upheld. (A.Y. 2007-08)

CIT v. Chohan Resorts (2013) 359 ITR 394 (P&H) (HC)

917. S.143(3) : Assessment – Additional income offered to tax at time of survey for any discrepancy or disallowance found during assessment proceedings – no separate addition required at the time of completion of the assessment

In course of a search operation on the assessee company alongwith its group concerns,

the assessee declared a sum of ₹ 15 crores as additional income. However, during assessment, the AO found that the assessee had claimed set off of speculative loss of ₹ 39 lakhs against business income. He, therefore, added the said sum to the income of assessee. Before the CIT(A), the assessee contended that out of ₹ 15 crores offered ₹ 1.4 crores was towards covering any discrepancy or deficiency found during assessment. Therefore, it pleaded that in absence of any other discrepancy, and disallowance being less than the additional amount offered to tax, addition was not called for. The CIT(A) deleted the addition made by the A.O. The Tribunal confirmed the order of the CIT(A).

On appeal by the department, the High Court held that the Tribunal had arrived at the correct decision in concluding that the said sum of ₹ 39 lakhs which was added by the AO was embedded in the additional offer of ₹ 1.41 crores made by the assessee at the time of the survey proceedings and hence no further disallowance was called for. (A.Y. 2008-09).

CIT v. AKME Projects Ltd. (2013) 35 taxmann.com 605 (Delhi)(HC)

918. S.143(3) : Assessment – Valuation of property – Addition solely on basis of valuation report is not permissible

A property was sold for ₹ 1 crore. The property had two sellers, i.e., (i) the assessee, and (ii) four individual co-owners. The assessee disclosed a sale consideration of ₹ 39 lakhs for sale of its 50 per cent. share, in the property. ₹ 44 lakhs was paid to the four individual co-owners for purchase of the balance 50 per cent. share. Thus, in all they showed a sale consideration of ₹ 83 lakhs. In the assessee's case, the DVO opined that the value of the property at the time of purchase was ₹ 2,84,72,600/- and this became the basis of the addition made by the A.O. The Tribunal held in favour of the assessee. On appeal before High Court held that no addition could be made solely on the basis of the report of the Departmental Valuation Officer. (A.Y. 1999-2000)

CIT v. Lahsa Construction Pvt. Ltd.(2013) 357 ITR 671 (Delhi)(HC)

919. S.143 : Assessment – Service of notice – Issue of notice within prescribed period – Notice served by affixture on last day of limitation was valid. [S.143(2), General clauses Act, 1987, S.27]

The expressions "serve" and "issue" are interchangeable, as has been noticed in section 27 of the General Clauses Act, 1897, and also in a judgment of the Supreme Court in *Banarsi Devi v. ITO [1964] 53 ITR 100 (SC)*. Held, that the notice which was served by affixture on the last day of limitation was valid. (A.Y. 2009-10)

V. R. A. Cotton Mills P. Ltd. v. UOI (2013) 359 ITR 495 (P&H)(HC)

920. S.144C : Reference to dispute resolution panel – Alternative remedy – Writ – Transfer pricing – Arm's length price. [S.92CA, Constitution of India, Article 226]

The AO made reference to the TPO and following his determination of the arm's length price and the AO issued the daft assessment order. The assessee raised objection before the Dispute Resolution Panel. The Panel determined the arm's length price and the AO passed the final assessment order. The Assessee challenged the order of Panel by Writ petition. Dismissing the writ petition the court held that the assessee has the remedy of an appeal hence the Writ is not maintainable.

Lionbridge Technologies Pvt. Ltd. v. Dy.CIT (2013) 358 ITR 599 (Bom.)(HC)

921. S.145 : Method of accounting – Estimation of income – Unexplained investment on sale was held to be not justified. [S.132(4)]

In the return of income assessee shown the gross profit rate at the rate of 4.2% from the sales of 1,67,19,652/-. The A.O. estimated sales at 2,30,00,000/- and by applying gross profit rate @ 5%, the profit would come to ₹ 11,50,000/-. Since the assessee has shown profit of ₹ 7,01,187/- and had also surrendered an amount of ₹ 4,00,000/- under Section 132(4) of the Act, therefore, an amount of ₹ 48,813/- was found to be concealed income of the assessee during the year under consideration. In addition to the said amount, another ₹ 50,000/- was added to the income on the basis of probable investment made by the assessee during the year under consideration. The CIT (A) deleted he addition and reversed the finding of the A.O. The Tribunal upheld the order of the CIT (A). On appeal by the revenue the High Court affirmed the view of the Tribunal and held that no question of law on the basis of finding arises from the order of CIT(A) and the addition of was set aside. (A.Y. 1987-88)

CIT v. Jay Kay Feeds (P.) Ltd. (2013) 217 Taxmann 81 (Mag.) (P&H)(HC)

922. S.147 : Reassessment – After four years – Depreciation – Primary facts relating to claim disclosed – Notice to withdraw the depreciation is not valid. [S.148]

Since the primary facts relating to claim for depreciation furnished and depreciation was allowed after considering facts, notice after four years to withdraw depreciation was not valid. (A.Y. 2002-03)

Vatika Ltd. v. ITO (2013) 357 ITR 170 (Delhi) (HC)

923. S.147 : Reassessment – After four years – Failure to disclose material facts necessary for assessment. [S.143(3), 148]

Assessment was made after detailed enquiry into identity and creditworthiness of share applicants. Notice after four years on ground that share applications not genuine was held invalid as there was no failure to disclose material facts necessary for assessment. (A.Y. 2002-03)

CIT v. Suren International P. Ltd. (2013) 357 ITR 24 (Delhi)(HC)

924. S.147 : Reassessment – After four years – Primary facts relating to claim disclosed – Permanent establishment – Reassessment was held to be bad in law. [S. 148,149]

Notice recording that the assessee had permanent establishment in India but no indication as to why and how permanent establishment had impacted tax payable or income assessed in original assessment. Held, the notice was incomplete and incomprehensible and requisite belief that income had escaped assessment was not possible on basis of reasons recorded. (A.Y. 2002-03)

G. S. Engineering and Construction Corporation v. DDIT(IT) (2013) 357 ITR 335 (Delhi) (HC)

925. S.147 : Reassessment – Avoidance of tax – Transfer pricing – Arms' length price – Re-opening bad in law in absence of any material to discard the ALP determined by the assessee

The AO reopened the assessment for the reason that as per Form No. 3CEB filed alongwith the return the assessee had international transactions with its Associated Enterprise ('AE') and determination of arm's length price ('ALP') in relation thereto was required. The AO made reference to the TPO who made an adjustment in the ALP and consequently AO made the addition to the declared income of the

assessee. The Tribunal observed that on going through the purported reasons it was apparent that the AO allegedly had reason to believe that income of ₹ 1.33 crores had escaped assessment and this income comprised of two components, i.e. ₹ 11 lakhs in respect of the claim of loss on account of foreign exchange fluctuation and an amount of ₹ 1.22 crores on account of claim of expenses under the head 'Data Usage Charges'. In the Assessment Order made by the AO no addition had been made on account of foreign exchange fluctuation loss. However, with regard to the data usage charges 25% of the same had been initially disallowed, but the same had been deleted by the Disputes Resolution Panel. Therefore, no addition on the basis of the reasons recorded for reopening the completed assessment survived. Accordingly, the Tribunal cancelled the addition made by the AO.

On appeal by the department, the High Court held that the methodology for computation of ALP is prescribed u/s. 92C which the assessee has clearly followed and computed the ALP by net margin method. If the AO was not satisfied with the ALP, then during original assessment he should have referred the matter to the TPO and given the assessee an opportunity to be heard. There was no tangible material whatsoever before the AO when the purported reasons were recorded to indicate that the ALP determined by the assessee was not correct. Therefore, the alleged reason for determination of the ALP, as given in the reasons for reopening the assessment, was not a reason at all. Accordingly, the High Court dismissed the departmental appeal. (A.Y. 2006-07).

CIT v. Cheil Communication India (P.) Ltd. (2013) 217 Taxman 275 (Delhi)(HC)

926. S.147 : Reassessment – Effect of s. 14A – Year prior to A.Y. 2001-02 – Reassessment cannot be done. [S.14A]

No reassessment for any AY prior to AY 2001-02 can be done for disallowance of expenditure in relation to exempted incomes, by virtue of proviso to s. 14A. (A.Y. 1999-2000)

CIT v. Dhanalakshmi Bank Ltd. (2013) 357 ITR 448 (Ker) (HC)

927. S.147 : Reassessment – Fresh claim by assessee cannot be entertained – Reassessment proceedings for the benefit of revenue. [S. 148]

Since the reassessment proceedings for benefit of Revenue, fresh claim by assessee regarding interest on investment cannot to be entertained. (A.Ys. 1997-98, 1998-99, 1999-2000)

Satyamangalam Agricultural Producers' Co-operative Marketing Society Ltd. v. ITO (2013) 357 ITR 347 (Mad.)(HC)

928. S.147 : Reassessment – Full and true disclosure – Auditors report – Reopening is bad in law. [S.148]

When there was a full and true disclosure of all material facts in the Statutory Audited Accounts and in the Auditor's Report, reopening of completed assessment based on earlier years is bad-in-law. (A.Y. 2004-05)

Nyk line (India) Ltd. v. Dy.CIT (2013) 262 CTR 309 (Bom.)(HC)

929. S.147 : Reassessment No new material – Change of opinion – Original scrutiny assessment – Reassessment was not valid. [S.115JB, 143(3), 148]

The return was scrutinised and the initial assessment order was passed after thorough examination of the facts. On the basis of the same set of facts, if the Assessing Officer was of the view that it was a case of escaped assessment, then it was a case of change of opinion and not a case of reassessment as there was no new material before the Assessing

Officer. Held, the notices of reassessment were not valid. (A.Ys. 2001-02, 2002-03)

CIT v. Fujistu Optel Ltd. (2013) 359 ITR 67 (MP) (HC)

930. S.147 : Reassessment – Notice after four years – Proviso – No evidence of failure – Notice in valid. [S.148]

A plain reading of the proviso to section 147, makes it more than clear that where the provisions of section 147 are being invoked after the period of four years from the end of the relevant assessment year, in addition to the A.O. having reason to believe that any income chargeable to tax has escaped assessment, it must also be established as a fact that such escapement of assessment has been occasioned by either the assessee failing to make a return under section 139 either, etc., or by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.

The Honorable High court by dismissing the appeal held that in the purported reason for the notice under section 147 there was no mention of the assessee not having made a full and true disclosure of the material facts necessary for assessment. The reasons indicated that the amounts mentioned therein had been shown in the books of account as receipts from the companies mentioned therein. The list of the companies from which amounts had been allegedly received, the name of the assessee had been shown. This meant that the assessee received money from itself which could hardly be an allegation in this case. The notice under section 147 was not valid. (A.Y. 2002-03)

CIT v. Viniyas Finance and Investment P. Ltd. (2013) 357 ITR 646 (Delhi)(HC)

931. S.147 : Reassessment – Notice beyond four years – No allegation of failure to disclose all material facts – Reassessment was held to be invalid. [S.148]

Notice issued u/s.148 beyond four years without any allegation of failure to disclose fully and truly in the reasons becomes invalid. (AY. 2005–06)

Sitara Diamond (P) Ltd. v. Dy.CIT (2013) 262 CTR 299 (Bom.)(HC)

932. S.148 : Reassessment – Notice after four years – Notice was not valid

Failure to disclose all material facts necessary for assessment is a condition precedent for reopening of an assessment beyond the period of four years from the date of assessment. No allegation in notice of failure on part of assessee to disclose any material facts. In the order of rejection no mention was made about failure to disclose material facts. Reassessment was not valid. (A.Y. 2005-06)

E.I. Dupont India Pvt. Ltd. v. Dy. CIT (2013) 351 ITR 299 / 215 Taxman 92 (Mag.)(Delhi)(HC)

933. S.148 : Reassessment – Recording of reasons – Notice – Additional reasons recorded after issue of notice cannot be considered without issuing a fresh notice based on additional reasons recoded. [S.147]

Assessing Officer reopened assessment of assessee and issued on it a notice under section 148. He recorded reasons to effect that in computation of income, assessee had deducted certain amount on account of provision for doubtful debts, but in profit and loss account this amount was not added to other income, therefore, said amount chargeable to tax, had escaped assessment within meaning of section 147/148 - Subsequently, Assessing Officer sometime in October, 2010 recorded two additional reasons and supplied same to assessee on 29-10-2010. Since no notice under section 148 had been issued on assessee pertaining

to purported additional reasons, additional reasons could not be looked into for purposes of determining validity of proceedings initiated under notice dated 19-1-2010. Since from record of assessment nowhere it was coming out that assessee had claimed any deduction on account of provision for bad debts, initiation of proceedings under section 147 was itself bad. Assessing Officer reopened assessment of assessee after recording reasons and served on it a notice under section 148 on 19-1-2010, additional reasons recorded by Assessing Officer subsequent to issuance of notice under section 148 could not be looked into for purposes of determining validity of proceedings initiated under notice dated 19-1-2010. (A.Y. 2006-07)

CIT v. Living Media India Ltd (2013) 35 Taxmann.com 105 (Delhi)(HC)

934. S.158BC : Block assessment – Procedure – Addition cannot be made on the basis of material seized which neither belonged to the assessee nor was recovered from his possession

The assessee was in dairy business and jointly occupied a premises with one 'N'. A search was conducted at said premises and some documents were seized. The AO issued notice u/s. 158BC to assessee and on basis of material seized worked out details of average sale of milk per litre, determined operating profit earned per year and made addition to assessee's income. The CIT(A) deleted the addition as the material seized did not belong to the assessee. The Tribunal confirmed the order of the CIT(A) as the figures on basis of which the AO had made the addition were on the basis of a register which belonged to a third person and further, no material was found from the assessee to establish any unaccounted income from the sale of milk.

On appeal by the department, the High Court confirmed the order of the Tribunal observing that the findings of the Tribunal were on correct on appreciation of the facts and materials before it. (Block period 1-4-1991 to 9-10-2001).

CIT v. Arif Ahmed Nandolia (2013) 35 taxmann.com 465 (Guj.)(HC)

935. S.158BC : Block assessment – Search and seizure – No warrant in the name of assessee – Block assessment was not valid. [S.132]

In the absence of warrant in the name of the assessee, block assessment was not valid.

CIT v. Sonal Constructions (2013) 359 ITR 532 (Delhi)(HC)

CIT v. Urmila Lodhi (2013) 359 ITR 532 (Delhi)(HC)

936. S.158BC : Block assessment – Search and seizure – Search in premises of assessee's father – Block assessment was not valid. [Ss.132, 158BD]

A search was conducted on the premises of the father of the assessees. There was no authorisation of search or search warrant u/s. 132(1) against the assessees. In the course of the search documents and other materials were found which did not belong to the assessees. And on the basis of the same block assessment were made against the assessees.

Held, in a situation when there is no authorisation in respect of the assessees, provisions of s. 158BD and not s. 158BC becomes applicable. Assessees were issued notices u/s. 158BC and assessment orders were passed. In the absence of search warrants u/s. 132(1) assessments could not have been made u/s. 158BC. Such assessments without authorisation were void *ab initio*.

CIT v. Ram Singh (2013) 351 ITR 391 (P&H)(HC)

937. S.158BC : Block assessment – Undisclosed income – Best judgment assessment is not permissible to determine undisclosed income. [S.144]

Undisclosed income in search cases is to be determined on the basis of evidence found during search operations or requisition of books and documents and not on the basis of best judgment. During the search, no cash, bullion, jewellery or any material was found, which could be considered as undisclosed income, and hence, the additions were made on estimate basis after seizing the register from the business premises of the assessee. (Block period 1-4-1986 to 26-6-1996]

CIT v. Dr. Ratan Kumar Singh (2013) 357 ITR 35 (All.)(HC)

938. S.158BE : Block assessment – Search and seizure – Time limit – Last Panchnama – Last panchnama dated 13-4-1999 was being merely a release order same could not extend period of limitation. [S.132(3)]

A search was conducted on 3-2-1999 at assessee's premises and books of account and other documents were seized. An order under section 132(3) was passed in respect of an almirah of assessee and accordingly panchnama was drawn on said date. On 13-4-1999 prohibitory order relating to said almirah was withdrawn and a fresh panchnama was drawn on 13-4-1999. Accordingly block assessment order was passed on 27-4-2001. Commissioner (Appeals) as well as Tribunal treated last panchnama just an empty formality and accordingly, considering date of first panchnama dated 3-2-1999 held that block assessment was barred by limitation. The Court held that the panchnama dated 13-4-1999 itself revealed that nothing was seized on that date nor was anything found on that date, and hence last panchnama dated 13-4-1999 was being merely a release order same could not extend period of limitation. The impugned order passed by Tribunal did not call for any interference and was upheld.

CIT v. Om Prakash Mandora (2013) 94 DTR 209 / 37 taxmann.com 426 / 262 CTR 646 (Raj.)(HC)

939. S.194B : Deduction at source – Winning from lottery or crossword puzzles – Prizes under sales promotion scheme – Payment in kind – Before releasing the winnings provisions cannot be attracted – Assessee cannot be held as assessee in default. [S.2(24)(ix), 201(1), 201(IA)]

Assessee-company was engaged in business of manufacture and sale of various consumer products. It had conducted certain sales promotion schemes, wherein coupons were inserted in packs/containers of consumer products. Some of those coupons indicated that on purchase of packs/containers, customers would get prizes as indicated in coupons. During previous years, assessee distributed prizes wholly in kind of an amount of ₹ 60 lakhs. AO was held that the assessee was obliged to deduct tax at source before the winning was released. For failure to deduct tax at source under section 194B, He initiated the proceedings under Section 201(1) read with section 201(IA). On appeal the Tribunal held that there was no obligation to deduct tax at source in respect of prizes paid in kind and in absence of any such obligation no proceedings under section 201 could be taken against the assessee. On appeal by the revenue the Court held that the assessee was not obliged to deduct tax at source under section 194B in respect of prizes paid in kind (A.Ys. 2001-02, 2002-03)

CIT v. Hindustan Lever Ltd. (2013) 39 taxmann.com 152 / (2014) 264 CTR 93 (Karn.)(HC)

940. S.194C : Deduction at Source – Sale or Works Contract – Sachets of particular specification supplied by suppliers by procuring from a third person – Held to be sale and not works contract – Assessee not liable to deduct tax at source

In the present case, for purchase of sachets of a particular specification, tenders were floated by the assessee and the successful tenderers were to supply the sachets to the assessee. The transaction was held to be sale and did not come under the purview of works contract as defined in Explanation (iv) to section 194 C of the Act, as the tenderers secured the material from a outside party and not from the assessee. Thus, the assessee was no liable to deduct tax at source on the amount paid to the tenderers for supply of sachets. (A.Ys. 1999-2000 to 2004-05)

CIT v. Bangalore District Co-operative Milk Producers Societies Union Ltd. (2013) 91 DTR 29 (Karn.)(HC)

941. S.194C : Deduction at source – Works Contract – Payment to franchise – Not liable to deduct tax at source

Assessee was running coaching classes for competitive exams. Its agreements with franchisees did not amount to works contract, and hence, tax not deductible at source on payments to franchisees. (A.Ys. 2004-05, 2005-06, 2006-07)

CIT v. Career Launcher India Ltd. (2013) 358 ITR 179 (Delhi) (HC)

942. S.194C : Deduction of tax at source – Works contract – Tenderer securing material from other source and supplying material to assessee – Contract amounts to sale and not works contract – Tax not deductible at source

The assessee a milk producers society, for the assessment years 1999-2000 to 2004-05, invited tenders for supply of sachets. The A.O. held that the supply of sachets by the successful tenderers was in the nature of "works contract" and tax should have been deducted at source on payments to them. The Commissioner (Appeals) confirmed the order of the A.O. The Tribunal held that the transaction was not "works contract" but purchase of materials and, hence, the question of deduction of tax at source did not arise. On appeal it was held by dismissing the appeal, that the assessee had not supplied any material. However, the tenderer had secured the material from other sources and had supplied it to the assessee. Some features of works contracts may overlap, but that should not be taken as necessary criteria to determine the nature of work. The expression "works contract" has a definite legal connotation. What is stated in section 194C(1) is for "carrying out any works" between the contractor and the specified person. The work is also defined to exclude a situation where the material is not supplied by the assessee. In view of the specific definition of work, the contract amounted to sale and not works contract. The fact that clause (a) of the definition of "work" was amended subsequently and was not in the statutory book for the relevant years in question would not be of consequence. (A.Y. 1999-2000 to 2004-05)

CIT v. Bangalore District Co-operative Milk Producers Societies Union Ltd.(2013)] 357 ITR 676 (Karn.)(HC)

943. S.194H : Deduction at source – Commission – Agent – Procurement and marketing of products through concessionaires – Difference between MRP fixed by assessee and price concessionaire paid to assessee-

Not liable to deduct tax at source. [S.201(1), 201(IA)]

Assessee was undertaking procurement and marketing of milk and milk products through concessionaires. Concessionaires were making purchases of milk outright. The fact that concessionaires operated out of booths or with equipment provided by assessee or that assessee had right of inspection was not material. The difference between maximum retail price fixed by assessee and price concessionaire paid to assessee was not commission, and hence, tax need not be deducted at source there from. (A.Ys. 2004-05, 2005-06)

CIT v. Mother Dairy India Ltd. (2013) 358 ITR 218 (Delhi) (HC)

944. S.194J : Deduction at source – Fees paid to consultant doctors is not salary – Tax is deductible under section 194J. [S. 192, 201(1A)]

Consultant doctors were employed in hospital in addition to full time resident doctors. The consultant doctors were rendering services under contract. They declared professional fees in their returns and paid tax thereon. Fees paid to them was not salary and tax was deductible under section 194J and not under section 192. Since there was no loss to the Revenue, levy of interest was not justified. (A.Y. 2007-08)

CIT (TDS) v. Apollo Hospitals International Ltd. (2013) 359 ITR 78 (Guj.)(HC)

945. S.194J : Deduction at source – Service tax – Under contract to be paid separately – Not subject to tax deduction at source

The words, "any sum paid", used in section 194J relate to fees for professional services or fees for technical services. According to the terms of the agreement, the amount of service tax was to be paid separately and was not included in the fees for professional services or fees for technical services. Therefore, the orders passed by the Commissioner (Appeals) as well as the Tribunal were in accordance with the provisions of section 194J. Whether the service tax was to be paid separately or not, was purely a question of fact and under the agreement it was to be paid separately and there was a finding of fact in this regard, recorded by the Commissioner (Appeals) as well as the Tribunal. Even if the Circular dated April 28, 2008, was held to be not applicable in the assessee's case, the orders passed by the authorities below were in accordance with the provisions of section 194J looking to the facts and circumstances of the case. (A.Y. 2007-08)

CIT (TDS) v. Rajasthan Urban Infrastructure Development Project (RUIDP) (2013) 359 ITR 385 (Raj.)(HC)

946. S.197 : Deduction at source – Certificate for lower rate – Mutual agreement procedure – Application pending – Nil withholding certificate – If the proceedings are under consideration of the competent authorities under the mutual agreement procedure, the collection and assessment of taxes would stop at least from the date when the mutual agreement proceedings are commenced for the assessment year 2010-11- DTAA-India-USA. [S.90, Art.27]

An identical issue as arising in the current year was the subject-matter of the mutual agreement procedure for earlier assessment years and nil tax withholding orders had been issued. For the instant year, the assessee had moved the competent authority in the USA under the mutual agreement procedure (Article 27 of India-USA DTAA) to resolve its claim that no withholding tax was payable in respect of the

amounts received by it. A memorandum of understanding (MOU) was arrived at between the USA and India which, *inter alia*, provides for deferment of assessment and/or suspension of collection of tax during the mutual agreement procedure.

An application for a certificate of nil withholding tax under section 197 was made to the Assessing Officer while pointing out certificates passed for nil tax withholding orders passed for the earlier assessment years and its application to the competent authority in the USA. Besides, in terms of the MOU, the assessee also furnished a bank guarantee of ₹ 6,07,55,238/-. In the meantime, notice had been issued by the Department to Respondent No.1 to deduct the tax in respect of payment being made by it to the assessee. In the above circumstances, this notice was held invalid. Petition was allowed. (A.Y. 2010-11)

UPS Worldwide Forwarding Inc. v. UPS Jetair Express P. Ltd. (2013) 359 ITR 427 (Bom.)(HC)

947. S.201 : Deduction at source – Failure to deduct – Exempt income – Holiday home scheme – Amount not spent – Fringe benefits tax was paid – No default on failure to deduct tax at source. [S.10(14) 17(1)(iv), 115WB, 201(1), (1A), Rule 3(7)(ii) of Income-tax Rules, 1962]

Payment received under holiday home scheme is exempt in employee's hands only if used towards hotel boarding and lodging facilities for holidays, and the amounts not spent towards holiday home scheme would constitute employee's taxable income. However, as long as the fringe benefits tax regime was in existence, the assessee had already paid the fringe benefits tax under section 115WB. Therefore, there was no default on the part of the assessee under section 201(1).

CIT (TDS) .v. Oil and Natural Gas Corporation (India) Ltd. (2013) 358 ITR 131 (Guj.)(HC)

948. S.201 : Deduction at source – Failure to deduct or pay – Conveyance allowance – Reimbursement of travelling expenses – Bonafide belief – Cannot be treated as assessee in default. [S.201(IA)]

Assessee was deducting tax on conveyance allowance. During relevant year, a bona fide doubt arose as to whether tax was to be deducted on conveyance allowance paid for reimbursement of travelling expenses for which declaration/certificates were given by employees. Assessee obtained declaration from employees and on such declaration, tax was not deducted. Assessee-company took up plea that it had discussions with concerned Income-tax Officer and submitted a letter as proof of in this regard. On facts, findings of the Tribunal was that action of assessee for not deducting tax at source was based on bona fide belief. The Court Held that where Tribunal found that action of assessee for not deducting tax at source on conveyance allowance paid to its employees was based on bona fide belief, assessee could not be treated as assessee in default liable to interest under section 201(1A). (A.Y. 1992-93)

CIT v. I.T.C. Ltd. (2013) 263 CTR 241 (All.)(HC)

949. S.220 : Collection and recovery – Assessee deemed in default – Interest – Sick Industrial company – SICA have to prevail over those the IT Act. [S. 234B, SICA S.32, 72A]

The Petitioner company started incurring heavy losses resulting in closure of its operations. In view of the colossal losses, the net worth of the petitioner eroded pursuant to which it made a reference to BIFR. The BIFR declared the petitioner as a sick company and directed IDBI to act as the operating agency. The BIFR directed winding up of the company. During the pendency of the said appeal, the Department filed an application seeking permission to recover its dues, with an alternative claim that in

the event the scheme is allowed to be formulated then a suitable provision for payment of income-tax dues of the petitioner company ought to be made in the scheme itself. BIFR circulated the draft scheme. The BIFR after considering the objections/suggestions sanctioned the scheme. Against the said scheme the IT Department filed an appeal in respect of income tax reliefs and concessions provided, i.e. waiver of interest u/s 220(2) and 234B. The AAIFR allowed the IT department's appeal and set aside the scheme approved by the BIFR. On further appeal, the court held that, a prior special law will prevail over a later and general law. This is more so, when the prior law contains a non obstante clause. In the case of S. 32 of SICA, the specific exclusion of two enactments, and the express reference to S. 72A, to say that its provisions apply manifest Parliamentary intention that provisions of SICA have to prevail over those the IT Act. The AAIFR orders were quashed and the BIFR sanctioning the scheme including waiver of interest u/s. 220(2) and 234B were restored.

Lord Chloro Alkalies Ltd. v. DIT (2013) 94 DTR 144 (Delhi)(HC)

950. S.220 : Collection and recovery – Grounds for reduction of time period – Action plan of CBDT – Not a ground for reduction of period

Reduction of time of 30 days to pay demand on the basis that according to the action plan decided by the Central Board of Direct Taxes, 30% of the demand raised during the year should be recovered in the financial year 2012-13, is not justified. Mere discussion in a meeting of several high ranking tax officers chalking out a certain action plan for timely recoveries would not satisfy such a requirement which must be observed individually. There was nothing on record to suggest that if the full period of 30 days was allowed, the assessee government-company would have defaulted or would have in any manner frustrated the recovery.

Gujarat State Energy Generation Ltd. v. ACIT (2013) 358 ITR 254 (Guj.)(HC)

951. S.220 : Collection and recovery – Reduction of period for payment of tax to recover the budget deficit of Income-tax Department was held to be invalid

The condition precedent for reduction of period for payment of taxis reason to believe that grant of full period would be detrimental to Revenue. Budget deficit of Income-tax Department is not a ground for reduction of the period. Also, prior permission of Joint Commissioner was not obtained. (A.Y. 2010-11)

Amul Research and Development Association v. ITO (2013) 359 ITR 549 (Guj.)(HC)

952. S.234B : Charge of Interest – No mention in the assessment order – Levy of interest is not valid. [S.156]

Remark in the Assessment Order. if there is no mentioning of interest specifically in the Assessment Order, interest cannot be levied u/s. 156. (A.Y. 1998-99)

CIT v. Deharadun Club Ltd. (2013) 259 CTR 149 (Uttarakhand)(HC)

953. S.234E : Fee – Delay in filing statement – Tax deduction at source and tax collection at source – High Court grants interim stay on levy of fee for failure to file TDS statement. [Art.226]

S. 234E of the Income-tax Act, 1961 inserted by the Finance Act, 2012 provides for levy of a fee of ₹ 200/- for each day's delay in filing the statement of Tax Deducted at Source (TDS) or Tax Collected at Source (TCS). The constitutional validity of s. 234E has been challenged in the Kerala High Court. Vide an interim order dated 18-12-2013, the High Court has admitted the Petition and granted a stay of proceedings for a period of two months. (WP No. 31498/2013, dt. 18-12-2013.)

Narath Mapila LP School v. UOI (Kerala)(HC) www.itatonline.org

954. S.244A : Refund – Quantification of Interest – When the assessee is not paid the full amount of refund due to it but, only a part of the amount is paid – Revenue is liable to pay interest on balance amount outstanding which may consist of taxes paid plus the interest payable till the date of payment of part amount

When the Revenue does not pay full amount of refund due to the assessee, but only a part amount is paid, then, the Revenue authorities are liable to pay interest on balance amount outstanding. The balance outstanding amount may consist of the taxes paid or the interest, which is payable till the date of payment of the part amount and interest payable on the principal amount which remained outstanding thereafter. (A.Ys. 1989-90 & 1990-91)

India Trade Promotion Organisation v. CIT (2013) 93 DTR 425 (Delhi)(HC)

955. S.245D : Settlement Commission – Powers – Settlement Commission is yet to apply its mind whether an enquiry under section 245D(3) should be ordered – Writ petition of revenue was held to be not maintainable. [S.245D(3), 245D(4) Art. 226]

The Commissioner has challenged an order passed by the Settlement Commission under the provisions of section 245D(2C) The Court held that Commission is yet to apply its mind whether an enquiry under section 245D(3) should be ordered hence writ petition of revenue was held to be not maintainable. The Court also held that since the proceedings are pending before the Settlement Commission, it would not be appropriate for this court to entertain the proceedings any further. (W.P.No 9617 of 2013 dated 21-10-2013)

CIT v. Income Tax Settlement Commission (2013) 263 CTR 479 (Bom.)(HC)

956. S.245R : Advance rulings – No jurisdiction where return has been filed. [S.139]

AAR would not have jurisdiction to render ruling where return has been filed. (A.Y. 2009-10)

Netapp B. V. v. AAR (2013) 357 ITR 102 (Delhi) (HC)

957. S.245 : Refunds – Adjustment – Without prior intimation was held to be bad in law

Adjustment of refund against sums due from assessee cannot be made without prior intimation. (A.Y. 2007-08)

Jeans Knit P. Ltd. v. DCIT (2013) 358 ITR 505 (Karn.)(HC)

958. S.245U : Advance ruling – Powers – Authority cannot refuse to give a ruling only on a mere suspicion of illegality or fraud having taken place

Petitioner sought advance ruling on taxability of capital gains arising to it in certain share transactions. Authority admitted application but refused to give a ruling at final hearing on ground that transactions underlying questions formulated were in breach of SEBI Guidelines and, therefore, based on an illegal act. Later, communication received by Director of Income-tax from SEBI showed that there had been no breach of SEBI Guidelines. Court held that Authority can exercise its discretion not to give a ruling only in cases where fraud and/or illegality is ex facie evident or fraud or illegality has been established in some proceedings; such a discretion is not to be exercised on a mere suspicion of illegality or fraud having taken place.

Mahindra BT Investment Co. (Mauritius) Ltd. v. DIT (IT) (2013) 91 DTR 36 / 261 CTR 272 (Bom.)(HC)

959. S.254(1) : Appellate Tribunal – Orders – High Court irked at in-fighting between the Bench and Bar of the ITAT Lucknow Bench

and advises restraint, dignity and decorum to be maintained

Two ARs, Mr. S. K. Garg, Advocate and Mr. Pradeep Kumar Kapoor, CA, evidently had a running feud with Mr. Sunil Kumar Yadav, Judicial Member, Lucknow Bench. Apparently, in the case of Sumit Kumar Rastogi, Garg had made a representation to the President of the ITAT containing "contemptuous and scurrilous allegations" against the Judicial Member. Due to this the Judicial Member recused himself from hearing of those cases which were being represented by Mr. S. K. Garg by passing a speaking order. The Judicial Member sent copies of the proceedings to the Hon'ble President of the ITAT with a request to issue necessary instructions as to how to deal with the situation but the Hon'ble President "instead of issuing necessary instructions in this regard chose to remain silent on the subject". In order to "maintain the dignity of the Institution", the Judicial Member took cognizance of the representation made by S. K. Garg to the Hon'ble President and made a reference to the Allahabad High Court to initiate proceedings for "criminal contempt of court" u/s. 15(2) of the Contempt of Court Act, 1971 against S. K. Garg and Pradeep Kumar Kapoor. However, as almost 25% of the appeal pending before the Lucknow Bench are being represented by S. K. Garg, it was felt by the Judicial Member that it would not be fair to keep all the appeals in abeyance as substantial amount of revenue is involved and the Revenue is pressing hard for its fixation. Accordingly the Judicial Member directed the Registry to list all the appeal for hearing. In the case of *Omkar Nagreeya Sahkari v. DCIT* (order attached), S. K. Garg filed an application before the Vice-President requesting that the case be transferred from the Bench of the J. M. However, this request was turned down. Thereafter, when the appeal was posted for hearing, Mr. Pradeep Kumar Kapoor appeared for the assessee and the appeal was decided in favour of the assessee. In the order sheet, an entry was made that Kapoor "had no objection to appearing before the Judicial Member". Kapoor filed an application "in his personal capacity" claiming that he had never conveyed his no-objection to the matter being heard by the JM and that he could never have done so in view of the pending criminal contempt proceeding against him. Kapoor requested the Bench to expunge the remark in the order sheet regarding the no-objection of the AR to appear before the JM. On the said application, the JM passed a detailed order dated 18-6-2013 (attached) in which severe strictures were passed against Garg and Kapoor for "attempting to scandalise the court and creating hindrance in the proper judicial functioning of the court" and that it is "unheard in the judicial system that some professional can appear before the judicial forum under protest and argue his case". He held the application as being "highly misconceived, contemptuous and is moved with the intention to browbeat and scandalize the court" and directed that Kapoor's action was "gross abuse of process of law" for which costs of ₹ 5,000 should be imposed. He also made a reference to the President of the ICAI to take necessary action as per law against Kapoor for "professional misconduct" and to take "corrective measures and necessary steps to educate its members to behave with the judicial authorities befitting to their status and should not be engaged in scandalizing the judicial authority/courts". Kapoor filed a Writ Petition in the High Court to challenge the said directions of the Bench. HELD by the High Court:

From the record, it appears that originally, the dispute was between Accountant and Judicial Members of the Tribunal and it was not functioning. So, adjournment was sought by the petitioner, but the same was refused. However, on 6-3-2013, the case of the petitioner was decided in favour of the assessee in his presence. During the course of arguments, the petitioner has tendered his unconditional apology orally as well as in writing. When the petitioner has tendered his unconditional apology, no further adjudication is required. Matter is resolved in the Court. Keeping in mind the ratio laid down in *M.P. Special Police Establishment v. State of M.P 2004 (8) SCC 805* (that a Writ Court can

pass appropriate orders to do justice to the parties) the impugned order is modified and the reference made by the Tribunal to the Institute of Chartered Accountant of India is expunged. The cost of ₹ 5,000 is also cancelled. Adverse remark against the petitioner, if any, is also expunged. We hope that in future such type of incident will not be repeated. It is in the interest of justice to maintain the dignity and decorum of the judicial system and the Tribunal is an essential part of it. (W.P. No. 9239 of 2013, dt. 18-6-2013.)

Pradeep Kumar kapoor v. ITAT (All.)(HC) www.itatonline.org

960. S.254(1): Appellate Tribunal – Orders – Tribunal is duty-bound to deal with all judgements cited during hearing of appeal

The assessee filed an appeal against an addition for alleged bogus purchases/sales which was dismissed by the Tribunal. The assessee filed an appeal before the High Court claiming that he had relied on the judgement in *CIT v. President Industries (2002) 258 ITR 654* in the verbal and written submissions and that the Tribunal had not considered it. HELD by the High Court remanding the case to the Tribunal for fresh consideration:

Whenever any decision has been relied upon and/or cited by the assessee and/or any party, the authority/tribunal is bound to consider and/or deal with the same and opine whether in the facts and circumstances of the particular case, the same will be applicable or not. In the instant case, the Tribunal has failed to consider and/or deal with the aforesaid decision cited and relied upon by the assessee. Under the circumstances, all these appeals are required to be remanded to the Tribunal to consider the addition made by the AO towards alleged bogus purchases/sales and to take appropriate decision in accordance with law and on merits and after considering the decision of this Court in the case of *CIT v. President Industries (2002) 258 ITR 654.* (Tax Appeal No. 847/848/849 of 2013. dt 21-10-2013.)

Dattani & Co v. ITO (Guj)(HC). www.itatonline.org.

961. S.254(1) : Appellate Tribunal – Power to grant stay – Ancillary power – Stay of penalty proceedings when quantum appeal pending before Tribunal was held to be valid. [S. 271(1)(c), 275(1)(a)]

Under the circumstances and with a view to see that the penalty appeal before the Tribunal did not become infructuous and to avoid any further multiplicity of proceedings, when the Tribunal had passed an order to stay the penalty proceedings during the appeal before it, it could not be said that the Tribunal had committed any error or illegality. (A.Y. 2004-05)

ACIT v. GE India Industrial Pvt. Ltd. (2013) 358 ITR 410 (Guj.)(HC)

962. S.260A : Appeal to High Court – Territorial jurisdiction of High Court – Assessment order in Jammu – Case transferred to Delhi during pendency of appeal to Tribunal – Delhi High Court had jurisdiction to hear appeal. [S.127]

For the assessment year 2005-06, the assessee was assessed by the A.O. at Jammu. The A.O. had disallowed the deduction claimed by the assessee under section 80-IB(4). The Commissioner (Appeals) allowed the assessee's claim for deduction under section 80-IB(4). Thereafter, the Department filed an appeal before the Tribunal at Amritsar. According to the relevant standing order under the Income-tax (Appellate Tribunal) Rules, 1963, and in, particular, rule 4(1) thereof, the jurisdiction of the Amritsar Bench of the Tribunal extended to, inter alia, the State of Jammu and Kashmir. On March 23, 2011, while the appeals were pending before the Tribunal, the assessee sent a letter to the Commissioner, Jammu seeking transfer of its case to Delhi. Pursuant thereto, by an order dated September 20, 2011, issued under section 127 the case of the assessee was transferred with effect from September 26, 2011, from the Income-tax Officer, Jammu to the Income-tax Officer, New Delhi. In the meanwhile, the order dated

June 24, 2011, was passed by the Amritsar Bench of the Tribunal. An appeal was preferred from that order in February, 2012. An objection was raised that the Delhi High Court did not have jurisdiction to hear the appeal. The Honorable High Court held that on the dates on which the appeals were filed, the A.O. of the assessee was at New Delhi and, therefore, the Delhi High Court would have jurisdiction to entertain these appeals. (A.Ys. 2005-06, 2006-07, 2008-09)

CIT v. AAR BEE Industries (2013) 357 ITR 542 (Delhi)(HC)

963. S.269SS : Acceptance of loans and deposits – Business as "shroff" – Cheque discounting business cannot be considered as taking loan or deposit – Levy of penalty was held to be not valid. [Ss. 269T, 271D, 271E]

Assessee was doing business as "shroff" i.e. cheque discounting business. Assessee used to discount post-dated cheques of farmers for cash. Held, it was not a case of assessee taking loan or deposit from agriculturists or repaying loan to agriculturists and provisions of section 269SS or section 269T not attracted. Hence, there was no question of levy of penalty under sections 271D and 271E.

CIT v. Dineshchandra Shantilal Shah (HUF) (2013) 359 ITR 57 (Guj.)(HC)

964. S.271(1)(c) : Penalty – Concealment – Addition agreed to by assessee – Concealment discovered by appellate authority – AO was not competent to initiate penalty proceedings – Explanation was not false – Deletion of penalty was justified

Merely because the assessee agreed to the addition and the assessment order was passed on the basis of this addition, when the assessee had paid the tax and the interest thereon in the absence of any material on record to show the concealment of income, it could not be inferred that the addition was on account of concealment. Moreover, the assessee had offered an explanation. The explanation was not found to be false. On the contrary, it was held to be *bona fide*. The cancellation of penalty by the Tribunal was justified. Also, since the concealment was discovered by the Appellate Authority, notice by AO was not justified. Deletion of penalty by the Tribunal was upheld. (A.Ys. 2000-01, 2003-04, 2004-05)

CIT v. Manjunatha Cotton and Ginning Factory (2013) 359 ITR 565 (Karn.)(HC)

965. S.271(1)(c) : Penalty – Concealment – Addition on estimate – Rejection of books of account – Penalty cannot be levied

The court held that addition has been sustained purely on estimate basis hence levy of penalty was not justified. (A.Y. 1996-97)

CIT v. Krishi Tyre Retreding & Rubber Industries (2013) 263 CTR 484 (Raj.)(HC)

966. S.271(1)(c) : Penalty – Concealment – Cash credits – Mere failure in proving capacity of shareholders to invest in share capital of assessee, could not be a ground for imposing penalty on company. [S.68]

There was an increase in the share capital of the assessee. During assessment proceedings, the assessee submitted confirmatory letters of shareholders to prove genuineness, except in the case of two persons. A number of defects regarding the new loans and shareholders were found in those letters. As assessment was getting barred and the assessee was unable to produce necessary documentary evidence vis-à-vis capacity of shareholders and depositors to full extent, in order to buy peace and avoid litigation, the assessee filed a revised return and surrendered share capital and unsecured loans to certain extent. The loss as declared in the revised return was accepted by the AO. However, penalty u/s. 271(1)(c) was levied on the ground that the assessee had concealed its income to the

extent of the share capital and unsecured loans which were surrendered in the revised return. The CIT(A) confirmed the levy of penalty. The Tribunal, however, deleted the penalty.

In its appeal to the High Court, the department argued that the revised return filed by the assessee was no return in the eyes of law and filing a revised return cannot absolve the assessee from paying the penalty. The High Court observed that the loss declared by the assessee in the revised return filed, had been accepted in toto and that the bona fide of the assessee is, therefore, established because it was not able to produce the necessary documentary evidence for proving the capacity of the shareholders and depositors to the full extent within a short span of time as the assessment was getting barred by limitation. Accordingly, relying on the decision of Supreme Court in the case of *CIT v. Stellar Investment Ltd. [2001] 251 ITR 263* and *CIT v. Lovely Exports (P.) Ltd. [2008] 216 CTR 195 (SC)*, and holding that factually, *bona fide* of the assessee having been established, failure of the assessee in proving the capacity of various shareholders to invest in the share capital, could not have been a ground for initiating penalty proceedings, the High Court dismissed the departmental appeal. (A.Y. 1989-90)

CIT v. Awadh Fertilisers (P.) Ltd. (2013) 35 taxmann.com 453 (All.)(HC)

967. S.271(1)(c) : Penalty – Concealment – Claim made during scrutiny assessment – Bonafide claim – Penalty is not leviable

The company revised its returns multiple number of times revising its figure of losses. In the last revised return, it claimed that the loss of ₹ 98.55 lakhs on account of loan granted to its subsidiary, which was written off, was deductible as business expenditure or in the alternative should be considered as a capital loss, which was not allowed.

During penalty proceedings, the claim was put forward on the basis that the loan granted to the subsidiary was for a specific purpose and for the benefit of the holding company. The loan in fact was granted and had been also written off. There was no concealment or furnishing of inaccurate facts. The legal position put forward by the assessee that the loan unpaid and written off should be either treated as business loss or alternatively as capital loss was rejected. The full facts were before the Assessing Officer at the time of assessment when this claim was made. The fact that scrutiny assessment was pending was a relevant and important circumstance to show the bona fides of the assessee as it was aware that the claim would be examined and would not go unnoticed. Secondly, the claim was rejected in view of the legal position, which was against the assessee and not because of the statement of incorrect or wrong facts. (A.Y. 2002-03)

CIT v. DCM Ltd. (2013) 359 ITR 101 (Delhi)(HC)

968. S.271(1)(c) : Penalty – Concealment – Disallowance of claim – Levy of penalty was not valid

Disallowance of a genuine claim made during the assessment proceeding does not amount to concealment hence, the levy of penalty not justified as there was no furnishing of inaccurate particulars of facts.

CIT v. DCM Ltd. (2013) 262 CTR 295 (Delhi)(HC)

969. S.271(1)(c) : Penalty – Concealment – Disclosure of particulars in the return of income and accounting policy adopted by assessee was disclosed – Deletion of penalty was justified

The AO held that assignment of deferred sales tax loan liability was held to be sham and addition was made. The AO levied the penalty. Tribunal deleted the penalty. On appeal by revenue the Court held that, where all relevant particulars abound income relating to assignment of business assessee were fully furnished and even accounting policy adopted for determining said income was disclosed penalty for concealment of income was not leviable. (A.Y. 2004-05)

CIT v. Adonis Electronics (P) Ltd. (2013) 218 Taxman 134 (Mag.)(Bom.)(HC)

970. S.271(1)(c) : Penalty – Concealment – Employees' stock option scheme – Revenue treating gains not as long-term capital gains but as short-term capital gains. Assessee surrendering right to contest issue on condition no penalty would be imposed – Not a case of furnishing inaccurate particulars or concealment of income – No penalty is leviable

The Assessing Officer made an addition of ₹ 86,98,461/- to the income of the assessee on account of short-term capital gains holding that the gains arising out of exercising of options and sale of the shares of Citi Bank were not long-term capital gains but short-term capital gains inasmuch as the shares were sold on the very same day. assessee exercised her employees stock option. The date of grant of the employees stock option was not considered by the A.O. as the date of acquisition of the capital asset sold by the assessee. In order to avoid litigation and to buy peace the assessee decided not to contest the assessment order. The assessee also wrote a letter accepting the view of the Department and surrendering her right to contest the issue on the condition that no penalty under section 271(1)(c) would be imposed. However, the A.O. imposed a penalty of ₹ 29,56,610/- which was calculated on 100% of the incremental tax payable on the addition made by the A. O. The assessee contended before the Commissioner (Appeals) that making a wrong claim would not be a ground for imposing penalty under section 271(1)(c) as it did not amount to furnishing inaccurate particulars or concealment of income as the assessee had disclosed all material facts and had claimed exemption under section 54F based on the legal advice that gains from exercise of options would not be taxed. The Commissioner (Appeals) accepted the contentions of the assessee and set aside the order of penalty. The Tribunal upheld the decision of the Commissioner (Appeals) that merely making a wrong claim could not be a ground for imposing a penalty under section 271(1)(c).

On appeal to the High Court held by dismissing the appeal that this was not a case which would attract penalty under section 271(1)(c). The question whether gains arising out of exercise of cashless options were long-term capital gains or short-term capital gains could have been a contentious issue at the material time. Facts of the case did not indicate that the assessee had furnished inaccurate particulars or concealed income. (A.Y. 2008-09)

CIT v. Neenu Dutta (Smt)(2013) 357 ITR 525 (Delhi)(HC)

971. S.271(1)(c) : Penalty – Concealment – Not challenging the order of assessment levying tax and interest, that by itself would not be sufficient to impose penalty. [S.274]

Where Appellate Authority deleted additions made by Assessing Officer as undisclosed investments, but sustained such additions on ground of under valuation of stock, penalty proceedings were required to be initiated by Appellate Authority and not by Assessing Officer, as subject matter of penalty proceedings was Appellate Authority's order, therefore, in such circumstances penalty proceedings initiated by Assessing Officer, in absence of appellate authority's direction to initiate penalty proceedings under section 271(1)(c), were unsustainable. Penalty cannot be imposed merely because assessee accepted assessment order levying tax and interest, unless it is discernible from assessment order that addition was on account of concealment IT (A.Ys. 2000-01, 2003-04)

CIT v. G. M. Export (2013) 263 CTR 153 (Kar.)(HC)

972. S.271(1)(c) : Penalty – Concealment – Search and seizure – Need not specify manner in which income was earned – Deletion of penalty was justified

During search, the assessee admitted expenses were incurred out of business income but were not reflected in books of account. In terms of Explanation 5(2), it was sufficient to disclose this income and since tax was paid before completion

of assessment, there was no scope of penalty. The assessee need not specify manner in which income was earned. It is sufficient if disclosure is made and tax is paid before completion of assessment. Immunity as per Explanation 5 section 271(1)(c) is available. (A.Y. 1992-93)

CIT v. Sidh Nath Goel (2013) 359 ITR 481 (All.)(HC)

973. S.272B : Penalty – Permanent account number – Penalty on deductor for wrong/ non-stating of PAN in TDS return is not applicable if information is not furnished by deductee. Penalty is ₹ 10000 per deductor and not per wrong PAN

The assessee filed a TDS return in which the PAN of 30,706 deductees was either missing or was incorrectly stated. The AO held that as penalty of ₹ 10,000 u/s. 272B was levaible for the non-mentioning of the PAN, the penalty had to be computed per PAN/deductee. He accordingly levied penalty of ₹ 30.70 crore at the rate of ₹ 10,000 per deductee. The CIT(A) restricted the penalty to ₹ 10,000 on the ground that as per the CBDT's letter dated 5-8-2008 bearing No. 275/24/2007-IT(B), s. 272B penalty is linked to the person/ deductor and not with the number of defaults in the PAN quoted in the TDS return. The Tribunal upheld the view of the CIT(A) (order attached). On appeal by the department to the High Court HELD dismissing the appeal:

There are two reasons why the appeal cannot be entertained. Firstly, the AO in the penalty order u/s. 272B has not specifically referred to any default or failure by the assessee mentioning PAN Number even when the said particulars and details were available. The stand taken by the assessee was that the PAN Numbers were not furnished by the truck owners and, therefore, they were not quoted by them or PAN Numbers as informed were quoted. In case, the PAN Numbers are not furnished by the deductees, the assessee cannot be penalized u/s. 272B. S. 139A also imposes the obligation on the deductees to furnish PAN Number to the deductor. Secondly, the stand taken by the revenue is contrary to the stand taken by the CBDT. The AO had imposed penalty of ₹ 10,000/- in each case where PAN Number was not provided by the deductee. However, the CBDT has in letter dated 5-8-2008 vide No.275/24/2007-IT(B) clarified that penalty of ₹ 10,000 u/s. 272B is linked to the person, i.e., the deductor who is responsible to deduct TDS, and not to the number of defaults regarding the PAN quoted in the TDS return. Therefore, regardless of the number of defaults in each return, maximum penalty of ₹ 10,000/- can be imposed on the deductor. Penalty cannot be imposed by calculating the number of defective entries in each return and by multiplying them with ₹ 10,000/-. This also appears to be a legislative intent, as in many cases, the TDS amount may be small or insignificant fraction of ₹ 10,000. (Clarified that the Q whether penalty u/s. 272B can be imposed if the deductor has not correctly recorded the details despite proper representation by the deductee is not decided) (ITA. No. 314/2013, dt. 26-7-2013.)

CIT v. DHTC Logistics Ltd. (Delhi)(HC), www.itatonline.org

974. S.282 : Service of notice – Service by "post" – "Post" includes speed post – Notice under section 143(2) sent by speed post – Valid service. [S.143(2)]

Notice u/s. 282 can be sent by post including "ordinary post", "registered post" and "speed post". "Post" is a generic word and its species are "ordinary post", "registered post", "speed post" and "under certificate of posting", etc. The language of the statute is generally extended to new things which were not known and could not have been contemplated when the Act was passed, when he Act deals with a genus and the thing which afterwards comes into existence was a species of it. The speed post is a new mode of sending post, and, therefore, this new postal mode not mentioned in the statute specifically is included in the generic word "post" or "registered post". (A.Y. 2006-07)

Milan Poddar v. CIT (2013) 357 ITR 619 (Jharkhand)(HC)

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826. S.2(IA) : Agricultural income – Ownership of land is not a prerequisite – Firm can also claim exemption in respect of agricultural income derived from agricultural activity. [S.2(23)]

Assessee firms claimed exemption in respect of its agricultural Income. The AO rejected assessee's claim on two grounds one is assesee was not the owner of the land and secondly being an artificial person, created by law; it could not be an agriculturist, conducting any of the agricultural activities of its own. The CIT(A) allowed assessee's claim. On revenue's appeal in Tribunal, Tribunal dismissed the appeal of the revenue and held that in order to come within the ambit of the Act, the person has to be an agriculturist and it was sufficient if revenue was derived from agricultural activities conducted on a land situated in India. Tribunal further held that a cultivator may be the owner but it is not necessary that he has to be the owner. The revenue was derived from land or from agricultural operations only. Relationship between MSFC Ltd. and the assesee firm could be described as that of the landlord and a tenant. The assessee firm had to make the payment of a fixed sum of ₹ 70 Lakhs every year to "M' during the subsistence of the agreement regardless of production from the agricultural farm. Therefore AO was not correct in taking such a view. (A.Ys. 2002-03 & 2003-04)

ITO v. Gajanan Agro Farms (2013) 142 ITD 571 (Pune)(Trib.)

827. S.2(14) : Capital asset – Pattadar passbook – Agricultural land Capital gain on acquisition of land was held to be exempt. [S.10(37)]

It was noted that as per copy of pattadar pass book, assessee was an agriculturist. Further, returns of income for earlier assessment years had been furnished to submit that agricultural income from said land had been declared for two years immediately preceding date of transfer. Held, on facts, assessee satisfied requirements of section 10(37) and, thus, capital gain was exempt from tax. (A.Y. 2005-06)

Vinumoorthy Varalaxmi (Smt.) v. ITO (2013) 59 SOT 216 (Hyd.)(Trib.)

828. S.2(15) : Charitable purpose – Objects of general public utility – Animal welfare cause. [S.12AA]

Advancement of animal welfare directed towards prevention and suppression of cruelty to animals or prevention or relief of suffering by animal is nothing but charity and society engaged in such activity falls within definition of general public utility as stated in section 2(15). (A.Y. 2010-11)

Retired Race Horse Welfare Society v. DIT (2013) 59 SOT 209 (Hyd.)(Trib.)

829. S.2(15) : Charitable purpose – Teachings, ideals etc. of spiritual leaders with special emphasis on vegetarianism is charitable objects. [S.80G]

The assessee-trust engaged in the activities of propagating messages, teachings, ideals and philosophy of all religious and spiritual reformers, prophets and leading figures of world including Sikh Gurus with special emphasis on vegetarianism was entitled to renewal of exemption under section 80G(5). (A.Ys. 2008-09 to 2010-11)

Kuka Martyrs Memorial Trust v. CIT (2013) 59 SOT 41 (URO) (Chd.)(Trib.)

830. S.2(22)(e) : Dividend – Deemed dividend – Loans and advances – Commercial transaction – Provision is not applicable. [S. 56]

The assessee, having a cold storage, held more than 10% shares of a company 'B', where public was not substantially interested. He received a sum of ₹ one crore from 'B' in advance against transaction of sale of cold storage claimed to be on account of commercial transaction. The assessee furnished copy of board meeting of company 'B', wherein a director of company was authorised to purchase cold storage of assessee up to maximum amount of ₹ 2 crores. Since the assessee had *prima facie* discharged burden in establishing that amount received by him was on account of commercial transaction, the provisions of section 2(22)(e) were not applicable to transaction in question. (A.Y. 2008-09)

Krishan Murari Lal Agarwal v. DCIT (2013) 59 SOT 136 (URO) (Agra) (Trib.)

831. S.2(47) : Transfer – Capital gains – Accrual – consideration received in installments of four years – Capital Gains assessable in the year transfer took place. [S. 45]

The assessee having parted with the possession of the property in January, 2006 and received part consideration during the year ending 31.03.2006, the capital gains arising on the sale of the lands was assessable in A.Y. 2006-07 only, notwithstanding the fact that the consideration was received in installments covering a period of four years. (A.Y. 2008-09 & 2009-10)

Anwar Sadath & Ors. v. ACIT (2013) 90 DTR 362 (Coch.)(Trib.)

832. S.2(47) : Transfer – Capital gains – Joint venture agreement – Handing over of possession – Development agreement – Irrevocable general power of attorney leading to overall control of property in hands of developer would constitute transfer under section 2(47)(v). [S.45, 53A of the Transfer of Property Act, 1882]

The assessee was a member of a housing society which entered into a joint development agreement with two developers, whereby each member was entitled to monetary consideration and a flat in lieu of existing plot. An irrevocable power of attorney was also executed and registered in favour of developers. Held, an irrevocable general power of attorney leading to overall control of property in hands of developer would constitute transfer under section 2(47)(v), even if developer did not have exclusive possession.

Also, non-registration of joint development agreement cannot be reason for non-applicability of section 2(47)(v), and where developers were vigorously pursuing issue of permission/ sanction for executing agreement, requirement under section 53A of Transfer of Property Act, regarding willingness of transferee to perform contract, was also fulfilled. Therefore, capital gain tax had to be paid on total consideration arising on transfer, including consideration already received as well as consideration due and to be received later. (A.Y. 2008-09)

Binder Khokher (Smt.) v. ACIT (2013) 59 SOT 141 (URO)(Chd.)(Trib.)

833. S.4 : Income – Gifts received by amateur cricketer – Not assessable as income

Tribunal held that in subsequent year the Assessing Officer himself has accepted that the assessee is an amateur cricketer and not a professional cricketer, there was no justification to hold that during the years relevant to A. Ys. 1992-93 and 1993-94 the assessee was a professional cricketer. In case of other cricketers the appellate authorities and the courts have decided the issue in favour of assessees. Tribunal directed the Assessing Officer to allow

exemption to the assessee as per circular No. 447 dated 22-1-1986. Tribunal followed the decision of Bangalore Bench of Tribunal in the case of *G. R. Vishwanath v. ITO (1989) 29 ITD 142 (Bang.)* and decision of Delhi Bench of Tribunal in the case of Manoj Prabhakar in ITA No. 564 and others/Delhi/2004. (A.Ys. 1992-93, 1993-94)

ACIT v. Kapil Dev (2013) 157 TTJ 686 (Delhi)(Trib.)

834. S.5 : Scope of total income – Accrual – Release of retention money in respect of ongoing project against bank guarantee is not taxable

Tribunal held that the project was ongoing, so the release of retention money against bank guarantee was not assessable during the relevant year. Tribunal & CIT(A) both followed the decision of Hon'ble Bombay High Court in the case of *CIT v. Associated Cables (P) Ltd. (2006) 286 ITR 596 (Bom.)* (A.Y. 2003-04)

Addl. DIT (IT) v. Ballast Nedam Dredging (2013) 154 TTJ 280 / 85 DTR 307 (Mum.)(Trib.)

835. S.9(1)(i) : Income deemed to accrue or arise in India – Capital gains – Sale of mutual funds – Mutual funds not to be considered as shares of companies – DTAA – India – Swiss. [S. 45, Art.13]

The assessee, an NRI based in Switzerland received capital gain from sale of mutual fund units and he claimed that the same was not taxable in India under the Art. 13(6) of the Indo-Swiss treaty. The A.O. treated the units of mutual fund as shares of Indian Company and held the gain taxable in India. The CIT (A) deleted the order of the A.O. On appeal to the Tribunal held, in absence of any specific provision to deem the unit as shares, it could not be considered so and thus the capital gains could not be taxed in India. (A.Y. 2004-05)

ITO v. Satish Beharilal Raheja (2013) 145 ITD 29 (Mum.)(Trib.)

836. S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Export commission to foreign agent – Did not accrue or arise in India as no services were rendered in India. [S.40(a)(i), 195]

Tribunal held that export commission paid to foreign agent for procuring order and pursuing payment from foreign buyer did not accrue or arise in India as no services were rendered in India. (A.Y. 2008-09)

Allied Nippon Ltd. v. Dy.CIT (2013) 145 ITD 81 (Delhi.)(Trib.)

837. S.9(1)(i) : Income deemed to accrue or arise in India – Purchase of space on website from parent company on principal to principal basis – assessee company was not an agency PE as per article 5 of India-USA DTAA. [S.5, Art 5]

The tribunal held that where foreign holding company sold online advertisement space to assessee-company at cost plus profit, neither party acted or did business on behalf of other. It cannot be said that the assessee is an agency PE of holding company.

ITO v. Pubmatic India (P) Ltd. (2013) 95 DTR 89 (Mum)(Trib)

838. S.9(1)(i) : Income deemed to accrue or arise in India – Business Profits – Constitution of offshore platform and pipelines – Installation PE in India – Contracts divisible in nature – DTAA-India-South Korea [Art.7].

The assessee company was incorporated and a tax resident of South Korea. Assessee was engaged in business of offshore platform construction and laying of pipelines. It had

PE in India. The assessee contended a portion of activities carried outside India was not taxable here. The A.O. held the contracts indivisible and thus taxable. The Tribunal held in assessee's favour that receipts pertaining to designing, fabrication and supply of materials carried outside India before date of arrival of structure would not be taxable in India. (A.Y. 2008-09)

Hyundai Heavy Industries Co. Ltd. v. ADIT (2013) 145 ITD 158 (Delhi)(Trib.)

839. S.9(1)(i) : Income deemed to accrue or arise in India – Business Profits – Interest – Deposit was out of surplus earned by PE – DTAA-India and South Korea. [Art.12]

The assessee company was incorporated and a tax resident of South Korea. Assessee questioned action on authorities below in bringing to tax interests earned from its bank in Chennai at Maximum Marginal Rate under Art. 12(5) of DTAA. Decision of authorities below on this issue remained that interest on deposit in said Chennai Bank was out of Surplus earned by PE and therefore, effectively connected with PE and was to be taxed at normal rate applicable to profits of business of a foreign company. The Tribunal held in favour of the revenue that in absence of rebuttal of this finding of authorities by assessee, there should be no interference. (A.Y. 2008-09)

Hyundai Heavy Industries Co. Ltd. v. ADIT (2013) 145 ITD 158 (Delhi)(Trib.)

840. S.9(1) : Income deemed to accrue or arise in India – Business connection – Fee split arrangement – Fee remitted to head office cannot be taxed in India – DTAA – India-Germany. [Article 7]

The assessee-company and its head office in Germany followed a fee split arrangement, according to which assessee claimed that fee retained or remitted to head office could not be taxed in India. The Revenue contended that since the assessee and its head office were part of the same organization, question of splitting up of fee did not arise. Where the assessee followed a well-defined system of payment, revenue allocated to head office, earned from activities carried on with it could not be taxed in India where fee split arrangement was fully backed by India-Germany DTAA. (A.Y. 2007-08)

Germanischer Lloyd A.G. v. DCIT (2013) 59 SOT 130 (URO) (Mum.)(Trib.)

841. S.9(1) : Income deemed to accrue or arise in India – Business connection – Subscription/ membership fee paid by CA firm – No element of income hence not liable to deduct tax at source. [Ss.40(a)(i), 195]

Where subscription/membership fee paid by CA firm to BTI in England whose membership was restricted to professional firms word wide, practicing profession of accountancy. BTI in UK being a non-profit, non-business organisation did not involve any income element in its hands, amount was not taxable in India, and no tax was required to be deducted at source. (A.Ys.2005-06 to 2007-08)

K. S. Aiyar & Co. v. ACIT (2013) 59 SOT 144 (URO) (Mum)(Trib)

842. S.9(1)(vii) : Income deemed to accrue or arise in India – Reimbursement of expenses cannot be treated as fees for technical services

The tribunal held that the payment being made for the reimbursement of the permission granted to the assessee for using trade mark, such payment cannot be said to be fee for technical services. Even otherwise, such reimbursement of

expenses are not subject to TDS, no disallowance is warranted. (A.Y. 2005-06)

Obeetee (P) Ltd. v. Addl.CIT (2013) 142 ITD 104 (All.)(Trib.)

843. S.9(1)(v) : Income deemed to accrue or arise in India – Additional amount received by assessee, an FII on account of delay in process of buyback of shares – Not to be treated as interest income but part of sale consideration – Capital Gain – DTAA-Indo-Mauritius [S.90, 115AD, Art.13.]

The assessee, a Mauritius based Company, held shares of Castrol India for which an open offer for acquisition of 20% issued Capital was made by Castrol UK. The assessee tendered equity shares held by it under open offer and received additional amount as there was a delay in completing the process of buyback. The A.O. taxed the same as interest income in the hands of the assessee, the CIT(A) upheld the order of the A.O. On appeal by the assessee to the Tribunal, held in favour of the assessee:

The interest received by the assessee is for the period prior to tendering and acceptance of shares, the interest relates to the delay in completing the buyback. It is not an interest received after the transaction of purchase and the sale is over. The interest relates to a period prior to tendering and acceptance of shares and this falls within the ambit of consideration and forms part of the sale consideration and hence, will be treated as part of Capital gain and not income from interest. (A.Y. 2002-03)

Genius Indian Investment Co. Ltd. v. CIT (2013) 145 ITD 1 (Mum.)(Trib.)

844. S.10(15) : Specified securities – RBI Bonds – Discretionary trust – Individuals – Exemption is available to trust. [S.2(31), 164]

Assessment of income in hands of trust has to be made in same manner and to same extent as it would have been made in hands of beneficiaries. Representative of assessee in case of a discretionary trust has to be regarded as individuals, and therefore, the trust would be entitled for exemption of interest income on RBI relief bonds under section 10(15). (A.Y. 2006-07)

Jehan Trust v. ITO (2013) 59 SOT 194(Mum.)(Trib.)

845. S.10(23c) : Exempt Income – Hospital treating illness, mental defectiveness, convalescence, for philanthropic & non – profit purposes – Maternity Hospital cannot be granted deduction. [S.2(15), 11, 12A]

The assessee, a maternity hospital claimed deduction u/s. 10(23c)(iiiae). The A.O. rejected the claim and the CIT(A) upheld the order of the A.O. On appeal by the assessee, the Tribunal held, dismissing the appeal:

Maternity is a natural process and could not be termed as illness or disease which is the primary ingredient envisaged u/s. 10(23C)(iiiae) and that being not fulfilled, the claim is to be disallowed. (A.Y. 2009-10)

Dy.CIT v. Nehru Prasutika Asptal Samiti (2013) 145 ITD 8 (Agra) (Trib.)

846. S.10A : Free trade zone – Deduction to be allowed before set off of brought forward unabsorbed losses from earlier years against the current year profits of the unit eligible for deduction under section 10A of the Act

In the present case there was no dispute on facts that the Appellant had claimed deduction

under section 10A of the Act before set off of brought forward unabsorbed losses from earlier years against the current year profits of the unit eligible for deduction under section 10A of the Act. The Tribunal following the decision of the Hon'ble Bombay High Court in the case of Black and Veatch consulting Private Limited held that the deduction under section 10A of the Act was to be allowed before set off of brought forward unabsorbed losses of earlier years.

The Tribunal also held that when there is no nexus between the interest income and income derived by the undertaking, then same is to be treated as income from other sources not eligible for deduction under section 10A of the Act. (A.Y.2006-07)

Medusind Solutions India (P) Limited v. ACIT (2013) 56 SOT 177 (Mum.)(Trib.)

847. S.11 : Property held for charitable purposes – Delay in filing form – Technical default was condoned. [S.12, Rule 17, Form No.10]

The assessee-society filed a letter conveying its intention of exercising option of carrying forward of unspent funds in next year and claimed exemption under section 11 which was disallowed on the ground of technical default of delay in filing the prescribed form. Where an amount of investment exceeded unspent amount within prescribed period in next year, irregularity and delay in filing prescribed form could be condoned and exemption could be allowed under section 11. (A.Y. 2008-09)

Moti Ram Gopi Chand Charitable Trust v. ACIT (2013) 59 SOT 197 (Delhi)(Trib.)

848. S.11 : Property held for charitable purposes – Depreciation is allowable on assets which came into existence by application of income, which is exempt under section 11. [S.2(45), 12AA, 32(1)(ii)]

The assessee, charitable trust (society) registered under section 12AA, claimed depreciation in respect of capital assets, the total cost of which had already been claimed as an application of income under section 11(1). The AO disallowed the claim holding that it would amount to double deduction. The CIT(A) upheld the action of the AO. The Tribunal held that the depreciation is allowable on capital assets from the income of the charitable trust for determining the quantum of funds which have to be applied for the purposes of the trust in terms of s.11. (A.Y.2008-09)

Chaman Vatika Educational society v. Dy. CIT (2013) 91 DTR 387 (Chd.)(Trib.)

849. S.12A : Registration – Trusts or institutions – Promotion of entrepreneurship – Holding of conferences abroad would not make the activities of the assessee being carried outside India – Registration cannot be refused

The Tribunal applied the decision of Supreme Court in the case of *Addl. CIT v. Surat Art Silk Cloth Manufacturer's Association (1980) 121 ITR 1 (SC)* and held that the main object of the assessee was providing networking facilities to the CEOs and promotion of entrepreneurship and the same was object of public utility. Therefore, the assessee was entitled to registration under section 12A, holding of conferences abroad would not make the activities of the assessee being carried outside India.

CEO Clubs India v. DIT (Exemptions) (2013) 153 TTJ 66 (UO)(Mum.)(Trib.)

850. S.12AA : Charitable Trust – Registration under section 12AA

– Effect of failure to dispose of application within six months – Registration deemed to have been allowed

Tribunal held that the period of six months of the date of application has passed and no order has been passed by the CIT, therefore for this short reason alone, the registration under section 12A should be deemed to have been granted. The Tribunal upheld the grievance of the assessee and directed the CIT to grant registration under section 12A. (A.Y. 2009-10)

Pravat v. CIT (2013) 157 TTJ 777 / 93 DTR 349 (Kol.)(Trib.)

851. S.12AA : Procedure for registration – Trust or institution – Amendment to section 2(15) by introducing Proviso fixing monetary limit – cannot be a reason to cancel registration in exercise of power under section 12AA(3). [S.2(15), 11, 12 & 13]

Registration under s.12AA can be cancelled only if the CIT is satisfied that the object of the trust is not genuine or the activity of the trust was not carried out in accordance with the object. However, amendment to section 2(15) by introducing Proviso fixing monetary limit in respect of public utility services cannot be a reason to cancel registration in exercise of power under section 12AA(3) (A.Y. 2011-12)

Mahatma Gandhi Charitable Society v. CIT (2013) 91 DTR 443 (Coch.)(Trib.)

852. S.12AA : Procedure for registration – Trust or institution – Cancellation of registration – without specifying how the activities of the trust is not genuine or not carried out in accordance of law – not justified. [S.80G]

Where Director (Exemption) nowhere in order specified how activities of trust/institution were not genuine or not being carried out in accordance with objects of trust, cancellation of registration on reason that assessee's activities were in violation of objects of society could not be considered as a valid ground for cancellation of registration in terms of section 12AA(3).

Project Management Institute v. DIT (2013) 142 ITD 239 (Hyd.)(Trib.)

853. S.13 : Denial of exemption – Trusts or institutions – Investment restrictions – Advancing interest free loan to Dr. D.Y. Patil Education Society is no violation of provisions of 13(1)(d) [S.11].

Tribunal held that advancing loan by the assessee trust to another charitable trust is neither a deposit nor an investment and therefore there is no violation of provisions of S.13(1)(d) of the Act.

Dr. D. Y. Patil Pratisthan v. Dy. CIT (2013) 154 TTJ 320 / 87 DTR 97 (Pune)(Trib.)

854. S.13 : Denial of exemption – Trusts or institutions – Investment restrictions – Advertisement expenses no violation of provision of section [S.11].

Tribunal held that similar expenses were allowed in the past and no part of the advertisement expenses should have been disallowed especially when there is no dispute about the genuineness of expenditure. There is no violation of provision of 13(1)(c) and Tribunal directed the Assessing Officer to allow the entire amount of advertisement expenditure as allowable expenditure.

Dr. D.Y. Patil Pratisthan v. Dy.CIT (2013) 154 TTJ 320 / 87 DTR 97 (Pune)(Trib.)

855. S.13 : Denial of exemption – Trusts or institutions – Investment restrictions – Expenditure on mercedez car and depreciation on mercedez car cannot be held to be violation of provision of section 13(1)(c). [S.11]

In earlier and later years, no disallowance of expenditure and depreciation on mercedez car has been made by the Assessing Officer. The Tribunal held that in view of rule of consistency and in absence of any adverse material before the Assessing Officer to take a contrary view we find no justification on the part of Assessing Officer and CIT(A) to hold that there is violation of provision of section 13(1)(c) and the Tribunal directed the Assessing Officer to allow the expenditure claimed and hold that there is no violation of provision of section 13(1)(c).

Dr. D. Y. Patil Pratisthan v. Dy.CIT (2013) 154 TTJ 320 / 87 DTR 97 (Pune)(Trib.)

856. S.13 : Denial of exemption – Trusts or institutions – Investment restrictions – Maintenance expenses of flats there is no violation of provision of 13(1)(c). [S.11]

Tribunal held that the Department has accepted the same expenditure on maintenance of flats from A.Ys. 2000-01 to 2002-03. Thus disallowance of expenses on maintenance of flats could not be made in view of rule of consistency alone. The expenditure would have been much more if the guests had stayed in hotel and in the absence of any material brought to our notice against the order of CIT(A) we find no infirmity in the order of CIT(A) and accordingly uphold the same. (A.Y. 2006-07)

Dr. D.Y. Patil Pratisthan v. Dy.CIT (2013) 154 TTJ 320 / 87 DTR 97 (Pune)(Trib.)

857. S.13 : Denial of exemption – Trusts or institutions – Investment restrictions – Reimbursement of expenses on mobile & telephone by trust there is no violation. [S.11, 13(1)(c)]

The assessee made the payment on account of telephone expenses and in fact it was reimbursement of expenses incurred for the purposes of trust. The Tribunal held that in absence of any contrary material brought on record, we find no infirmity in the order of CIT(A) deleting the disallowance on account of telephone and mobile expenses. Since expenses are allowed, there is no violation of provisions of S.13(1)(c) of the Act.

Dr. D. Y. Patil Pratisthan v. Dy. CIT (2013) 154 TTJ 320 / 87 DTR 97 (Pune)(Trib.)

858. S.13 : Denial of exemption – Trusts or institutions – Investment restrictions – Remuneration to trustees and relatives – Disallowance under section 40A(2)(b) was deleted – there is violation of provision of 13(1)(c). [S.11]

The assessee paid remuneration to trustees and their relatives. The Tribunal held that in past also such type of payments were made and it was accepted by the Department from A. Ys. 2000-01 to 2002-03 and in the absence of any contrary material brought to our notice against the finding given by the CIT(A), we do not find any infirmity in the order of learned CIT(A) deleting the disallowance made by the Assessing Officer under section 40A(2)(b). Since the disallowance has been deleted by us, therefore, we hold that there is no violation of provision of 13(1)(c) of the Act.

Dr. D. Y. Patil Pratisthan v. Dy. CIT (2013) 154 TTJ 320 / 87 DTR 97 (Pune)(Trib.)

859. S.14A : Disallowance of expenditure – Exempt income – disallowance applies to tax – free securities held as stock – in – trade. [Rule 8D]

The assessee claimed that as it was engaged in the business of trading in shares, its main object is to earn profit on purchase and sale of shares and not to earn dividend income from such shares. It claimed that the accrual of tax-free dividend on such shares was merely incidental to the holding of shares as stock-in-trade and that no disallowance could be made u/s 14A and Rule 8D. It also claimed that though the assessee had not incurred any direct or indirect expenditure to earn the said dividend, the AO had made the disallowance on a presumptive basis. The Division Bench referred the dispute to a Third Member in view of the difference of opinion between the Benches. Before the Third Member, the assessee relied on CCI Ltd. 71 DTR (Kar) 141, India Advantage Securities, Yatish Trading etc in which the law had been laid down that s. 14A & Rule 8D does not apply to securities held as stock-in-trade. The department relied on *Godrej & Boyce Manufacturing Co. v. Dy. CIT (2010) 328 ITR 81 (Bom.)* (where it was held that Rule 8D is mandatory) and *ITO v. Daga Capital Management (P) Ltd. (2009) 117 ITD 169 (Mum) (SB)* (where it was held that s. 14A applies to stock-in-trade). HELD by the Third Member:

It is accepted by both parties that the assessee is a dealer in shares and that the shares were held by it as stock-in-trade. The issue under appeal is squarely covered by the principles laid down in *Godrej & Boyce, Dhanuka & Sons v. CIT (2011) 339 ITR 319 (Cal)*, American Express Bank and Damani Estates & Finance in which the issue has been elaborately considered. The argument that the judgement of the Karnataka High Court in CCI Ltd. is the solitary High Court judgement on the point and it should be followed is not correct because the issue has also been considered by the Calcutta High Court in Dhanuka & Sons. Also, while CCI Ltd has not considered the jurisdictional High Court judgement in Godrej & Boyce, Dhanuka & Sons has duly considered Godrej & Boyce in taking the view that s. 14A/ Rule 8D applies to shares held as stock-in-trade. Accordingly, disallowance u/s 14A can be made in conformity with law even where dividend income has been earned on shares held as stock-in-trade. (ITA No. 5724/Mum/2011, A. Y. 2008-09, date 27-11-2013.)

D.H. Securities Pvt. Ltd. v. DCIT (TM)(Mum.) (Trib.) www. itatonline.org

860. S.14A : Disallowance of expenditure – Exempt income – Disallowance at 0.5 per cent towards expenses other than interest – Held to be justified. [Rule 8D]

Assessee received exempt dividend income but he did not claim any expenses to be attributable to earn said income. Assessing Officer invoked provisions of rule 8D and made disallowance at 0.5 per cent towards expenses other than interest. Since disallowance had been computed as per mandate of rule 8D, disallowance was sustainable. (A.Y. 2008-09)

ITO v. RBK Share Broking (P.) Ltd. (2013) 60 SOT 61 (URO) / 37 taxmann.com 128 / (2014) 97 DTR 27 / 159 TTJ 16 (Mum.)(Trib.)

861. S.14A : Disallowance of expenditure – Exempt income – Investment in shares of foreign company – No disallowance can be made. [S.2(22A)]

Tribunal held that definition of domestic company as per section 2(22A) does not extend to foreign company. Therefore, interest in relation to investment in shares of foreign companies could not be disallowed under section 14A. (A.Y. 2001-02)

ITO v. Strides Arcolab Ltd. (2013) 153 TTJ 181 (Mum.)(Trib.)

862. S.14A : Disallowance of expenditure – Exempt income – Onus is on AO to show how assessee's claim is incorrect. AO has to show direct nexus between expenditure & exempt income. Disallowance cannot be made on presumptions. [Rule 8D]

In A.Y. 2009-10 the AO made a disallowance of Rs 58 lakhs u/s.14A read with Rule 8D. The assessee claimed that the disallowance was not permissible on the grounds that (i) the AO had not recorded any satisfaction as to the correctness of the assessee's claim that it had not incurred expenditure of more than 2% of the dividend income earned, (ii) it had not made any fresh investment during the year and the dividend was received from an unlisted company out of an investment made in an earlier year & (iii) the AO had not pointed out any direct nexus between the interest expenditure incurred and the exempt income earned during the year. The CIT(A) accepted the claim & restricted the disallowance to Rs 50,000 On appeal by the department to the Tribunal HELD dismissing the appeal:

(i) A disallowance u/s 14A read with Rule 8D cannot be made without recording satisfaction as to how the assessee's calculation of s. 14A disallowance is incorrect. It is a prerequisite that before invoking Rule 8D, the AO must record his satisfaction on how the assessee's calculation is incorrect. The AO cannot apply Rule 8D without pointing out any inaccuracy in the method of apportionment or allocation of expenses. Further, the onus is on the AO to show that expenditure has been incurred by the assessee for earning tax-free income. Without discharging the onus, the AO is not entitled to make an ad hoc disallowance. A clear finding of incurring of expenditure is necessary. No disallowance can be made on the basis of presumptions, (i) the mere fact that some interest expenses were incurred cannot be the reason for disallowance unless the nexus between the expense and the exempt income is established, (ii) the assessee did not make any fresh investment during the year which could generate exempt income in forthcoming years, (iii) the exempt income earned during the year comprised of dividend received from an investment made in an earlier year, (iv) the interest expenditure of the year is not directly related to the earning of exempt income & (v) the AO has not pointed out any direct nexus between the interest expenditure incurred and the exempt income earned during the year (*CIT v. Hero Cycles Ltd. (2010) 323 ITR 518 P&H) & Godrej and Boyce Mfg. Co. Ltd. v. Dy. CIT (2010) 328 ITR 81 (Bom)* followed) (ITA No. 305/Mds/2013.A. Y. 2009-10, dt. 07.11.2013.)

DCIT v. Allied Investment Housing P. Ltd. (Chennai)(Trib.) www. itatonline.org

863. S.22 : Income from house property – Lease hold rights – Acquiring leasehold rights in property and construction of building thereon – Rental income from the buildings assessable as Income from house property and not as business income. [S.28(i)]

Assessee firm was engaged in construction of residential and commercial complex. Assessee took a piece of land on lease basis from its partner and constructed building thereon. As per the agreement between its partner, a portion of said building was let out to various tenants. Assessee claimed that rental income received from the said building was assessable as business income. The Assessing officer held that whatever be the principal object of the firm, rental income from house property would start to be assessed as per the provisions of the Act i.e . u/s 22 i.e. as Income from House property . Therefore rental income from the house property, including the leasehold building was assessable u/s 22 as Income from house property. (A.Y. 2008-09)

J.B. Estates v. ITO (2013) 142 ITD 355(Hyd.)(Trib.)

864. S.28(i) : Business income – Stock broking – Interest on fixed deposit which was kept as margin money is assessable as business income. [S.56]

Assessee engaged in business of stock broking, earned bank interest on account of 50% of margin money given in form of fixed deposits to obtain bank guarantee in favour of National Stock Exchange so that assessee could have trading limits in cash market segments of NSE. Since assessee was in business of stock broking and said interest income on fixed deposits was connected with business of assessee, such interest income was to be treated as business income. (A.Y. 2009-10)

Oasis Securities Ltd. v. DCIT (2013) 59 SOT 302 (Mum.)(Trib.)

865. S.28(i) : Business loss – Derivatives – Futures and options – Stock in trade – Mark to market loss – Normal rules of valuation of stock will apply

Where derivatives are held as stock-in-trade, whatever rules apply to stock-in-trade, would be applied to their valuation also. Therefore, the assessee had rightly claimed mark-to-market loss on such derivatives. (A.Y. 2008-09)

DCIT v. Kotak Mahindra Investment Ltd. (2013) 59 SOT 4 (Mum.)(Trib.)

866. S.31 : Repairs and insurance of machinery, plant and furniture – Replacement – Integral part of machinery is current repairs

Chamber assembly is one of integral parts of intermix machine and, therefore, expenditure incurred by taxpayer for replacing chamber assembly would come within meaning of current repair. (A.Y.2007-08)

Midas Polymer Compounds (P.) Ltd. v. ACIT (2013) 59 SOT 87 (URO) (Cochin)(Trib.)

867. S.32 : Depreciation – Acquisition of client base be considered as an intangible asset – Depreciation is allowable

The assessee company was engaged in business of micro financial lending services to woman in rural areas. Another company "S" was also in the business of micro finance with 1.10 lakh existing clients. Assessee acquired entire business of "S" in a slump sale. The assessee paid a sum of ₹ 3.97 crores to "S" for acquisition of client base. Assessee claimed depreciation on client's creation cost contending it was an intangible asset. The A.O. disallowed the claim. The CIT(A) upheld the order of the A.O. The Tribunal held in favour of the assessee that client acquisition cost paid by the assessee was towards acquiring an intangible asset and thus eligible for depreciation u/s. 32(1)(ii). (AYs. 2006-07 to 2008-09)

SKS Microfinance Ltd. v. Dy.CIT (2013) 145 ITD 111 (Hyd.)(Trib.)

868. S.32 : Depreciation – Road constructed on Build – Operate – Transfer ("BOT") terms is eligible for depreciation even though assessee is not the legal owner of the road

The assessee, a SPV, was awarded a contract by the NHAI for widening, rehabilitation and maintenance of an existing two lane highway into a four lane one on the Tada-Nellore section of NH-5 on BOT basis. The entire cost of construction of ₹ 714 crore was borne by the assessee. The construction was completed during the FY 2004-05 after which the highway was opened to traffic for use and the assessee started claiming depreciation from AY 2005-06 onwards. The AO rejected the claim on the ground that the assessee had no ownership, leasehold or tenancy rights for the asset in question, i.e., the roads. On appeal, the CIT(A) reversed the AO. On appeal by the department to the Tribunal HELD dismissing the appeal:

Though the NHAI remains legal owner of the site with full powers to hold, dispose of and deal with the site consistent with the provisions of the agreement, the assessee had been granted not merely possession but also right to enjoyment of the site and NHAI was obliged to defend this right and the assessee has the power to exclude others. The very concept of depreciation suggests that the tax benefit on account of depreciation belongs to one who has invested in the capital asset, is utilising the capital asset and thereby losing gradually investment cost by wear and tear and would need to replace the same by having lost its value fully over a period of time. The term "owned" as occurring in s. 32 (1) of the Act must be assigned a wider meaning. Anyone in possession of property in his own title exercising such dominion over the property as would enable others being excluded there from and having the right to use and occupy the property and/or to enjoy its usufruct in his own right would be the owner of the buildings, though a formal deed of title may not have been executed and registered (*Mysore Minerals Ltd. v. CIT (1999) 239 ITR 775 (SC), CIT v. Noida Toll Bridge Co. Ltd. (2013) 213 Taxman 333 etc.* referred) (ITA No. 1184/Hyd/2013, A.Y. 2005-06, dt. 16.01.2014.)

DCIT v. Swarna Tollway Pvt. Ltd. (Hyd.)(Trib.) www.itatonline.org

869. S.32 : Depreciation – Higher rate of depreciation on windmills – Exercise of option for higher claim – Return filed last date is also eligible for higher depreciation. [S.139(1), Rule 5(IA)]

The assessee claimed higher rate of depreciation on windmills in return of income which the Assessing Officer disallowed holding that assessee had not exercised option of claiming higher rate of depreciation under rule 5(1A) before due date of filing return under section 139(1). Held, since there is no specific form or method prescribed for exercising said option, claim of higher rate of depreciation made in return of income and reflected in books of account and audit report filed with return of income, constitutes exercise of option under second proviso to rule 5(1A). Therefore, return of income, in which claim for higher depreciation is made, filed on last day, cannot be held as not filed before due date of filing return under section 139(1). (A.Y. 2004-05)

ACIT v. G.V.D Textiles (P) Ltd. (2013) 59 SOT 12 (Chennai)(Trib)

870. S.32 : Depreciation – Any right (including leasehold rights) which enables carrying on business effectively and profitably is an "intangible asset" & eligible for depreciation

The assessee paid a sum of ₹ 60 lakhs to acquire leasehold rights to premises. The assessee claimed that the said leasehold rights were an "intangible asset" and eligible for depreciation u/s. 32(1)(ii). The AO & CIT(A) rejected the claim of the assessee. On appeal by the assessee to the Tribunal HELD allowing the appeal:

S.32(1)(ii) allows depreciation on "business or commercial rights". The expression "business or commercial rights" means rights obtained for effectively carrying on business or commerce. Commerce is a wider term which encompasses business in its fold. Therefore, any right which is obtained for carrying on business effectively and profitably has to fall within the meaning of the term "intangible asset" (*Kotak Forex Brokerage Ltd. v. asst. CIT (2009) 33 SOT 237(Mum) & CIT v. Smifs Securities Ltd. (2012) 348 ITR 302 (SC)* followed) (ITA No.37/Hyd/2012, A.Y. 2008-09, dt. 28.06.2013.)

Tirumala Music Center (P) Ltd. v. ACIT (Hyd.) (Trib.) www.itatonline. org

871. S.32 : Depreciation – Machine put to use – Depreciation was held to be allowable

The cross objection was filed for disallowing depreciation on the basis that the machine was not put to use. The Tribunal held on the basis of evidence that the machine was put to use during the previous year and directed that the depreciation as claimed by the assessee should be allowed. (A.Y. 2005-06)

ACIT v. Nayan L. Mepani (2013) 156 TTJ 768 (Mum.)(Trib.)

872. S.32 : Depreciation – Tenancy Rights – Not Intangible Asset – Depreciation is not allowable

The assessee claimed depreciation on tenancy rights. The A.O. rejected the assessee's claim. The CIT(A) upheld the order of the A.O. The Tribunal upheld the order of the CIT(A), tenancy rights cannot be construed as "intangible assets" falling within meaning of Explanation 3 to Sec. 32(1) and hence no depreciation can be granted on said rights.

Dabur India Ltd. v. ACIT (2013) 145 ITD 175 (Mum.)(Trib.)

873. S.37(1) : Business expenditure – Club Membership Fees paid by the assessee for its employee is allowable as business expenditure

Assessee paid a sum of ₹ 13,750 to Oberoi Grand, Kolkatta for the membership of its employee and claimed it as an expenditure. According to the Assessing Officer, the said expenditure was the personal expenditure of the employee & it was not allowable as deduction. Assessing Officer disallowed the deduction. CIT (A) confirmed the addition. On appeal in Tribunal, the Tribunal allowed the deduction relying on the decision of *CIT v. United Glass Mfg Co. Ltd.* (Civil Appeal No. 6447 of 2012) wherein the question raised was whether Club Membership fees for employees incurred by the assessee is a business expenditure, liable to deduction u/s 37 of the Act and the Apex Court held in favour of the asseseee that it was pure business expenditure.

KPMG India (P) Ltd. v. ACIT (2013) 142 TD 628 (Mum.)(Trib.)

874. S.37(1) : Business expenditure – Contribution towards celebration of annual event

The assessee participated in certain activities organized by the Indian Navy. The assessee contributed the amount to the function of naval staff which was necessary for the purpose of business being a contractor doing the work in the naval facility. The expenditure is allowable under section 37(1).

Addl. DIT (IT) v. Ballast Nedam Dredging (2013) 154 TTJ 280 / 85 DTR 307 (Mum.)(Trib.)

875. S.37(1) : Business expenditure – Professional fees on defending arrested directors – Nexus of expenditure with offence is held to be not allowable as business expenditure. [NDPS Act, 1985]

Expenditure incurred on professional fees to defend directors of assessee-company who were arrested under NDPS Act, 1985 on being found guilty of offences under relevant sections of said Act could not be allowed being squarely covered within meaning of Explanation to section 37(1). Held, it does not make any difference that expenditure is direct or indirect; so long as there exists a nexus of expenditure with offence, it will continued to be hit by Explanation to section 37(1). (A.Y. 2008-09)

OPM International (P.) Ltd. v. DCIT (2013) 59 SOT 98 (Mum.)(Trib.)

876. S.37(1) : Business expenditure – Provision towards security expenses was held to be allowable

Cross appeals filed by assessee and revenue. The Tribunal held that the provision made for security expenses was an allowable deduction. The mere fact that it was not quantified during the year by way of raising of bills by NFC could not alter the fact that such liability even though on an estimated basis is an accrued and allowable liability. Tribunal followed two decisions of Apex Court 1) *Bharat Earth Moves v. CIT (2000) 245 ITR 428 (SC) 2) Rotrk Controls India (P) Ltd. v. CIT (2009) 314 ITR 62 (SC)* and also assessee's own case for the A.Y. 2004-05. (A.Y. 2007-08)

ACIT v. Electronic Corporation of India Ltd. (2013) 155 TTJ 748 (Hyd.)(Trib.)

877. S.40(a)(ia) : Amounts not deductible – Deduction at source – Amendment to provisions retrospective from 01.04.2005 – Deposited tax deducted at source before due date for filing of income, impugned disallowance to be deleted. [S. 139(1)]

The assessee was carrying on business as transport contractor and deducted tax at source on payment of lorry charges as well as rent, but had remitted after end of previous year. The A.O. disallowed payment on ground that tax ought to have been deposited on or before last day of previous year. The CIT(A) deleted the addition made by A.O. On revenue's appeal, the Tribunal dismissing the appeal held, where tax deducted at source during previous year relevant to and from assessment year 2005-06 was paid to Government on or before due date of filing of return of income, no deadlines u/s. 40(a)(ia) could be made. Since the assessee deposited tax deducted at source before due date for filing of income, impugned disallowance to be deleted. (A.Y. 2009-10)

ACIT v. Vimala S. Warad (2013) 145 ITD 165 (Bang.)(Trib.)

878. S.40(a)(ia) : Amounts not deductible – Deduction at source – Commission – Merely entry in books of Account made in India will not suffice disallowance u/s 40(a)(i) of the IT Act

Assessee Company made payment of commission to the foreign agent outside India for the services rendered outside India. The AO made disallowances u/s. 40(a)(i) of the IT Act for non-deduction of tax at source. CIT(A) allowed the appeal & held that deduction of TDS on payment of commission to foreign agent is not required as the foreign agents are not liable to pay taxes & accordingly allowed an appeal. On departments appeal, the Tribunal upheld the findings of CIT(A) & held that merely because an entry in the books of account is made in India, it cannot be held that non-resident has required deducting tax at source on the payment of commission to non-resident & disallowances was unwarranted. (A.Y. 2008-09)

Reliance International v. ITO (2013) 94 DTR 14 / 157 TTJ 766 (Luck.)(Trib.)

879. S.40(a)(iii) : Amounts not deductible – Deduction at source – Salary payable outside India – Tax before due date of fling of return cannot be disallowed. [S.139(1)]

Where tax deducted at source on salary payable outside India is paid on or before due date for filing return specified under section 139(1), it cannot be disallowed under section 40(a)(iii). Where tax deducted at source is paid after due date specified under section 139(1), such sum shall be allowed as deduction in previous year in which such tax has been paid. (A.Y. 2007-08)

Tianjin Tianshi India (P.) Ltd. v. ITO (2013) 59 SOT 111 (Delhi)(Trib.)

880. S.43(5) : Speculative transaction – Loss on foreign exchange forward

contracts is incidental to the exports business and not a "speculation loss". However, if the contract is prematurely cancelled, the assessee has to justify the loss. [S. 28(i)]

The assessee, an exporter of diamonds, entered into forward contracts with Banks to hedge the exchange loss, if any, in respect of the outstanding receivable in foreign currency. The assessee suffered a loss of ₹ 4.69 crore on account of the maturity & premature cancellation of the said forward contracts. The AO & CIT(A) held that the forward contracts constituted a "speculative transaction" u/s. 43(5) and that the loss suffered thereon was a "speculation loss" which could not be set-off against the other income. On appeal by the assessee to the Tribunal HELD:

(i) Though a forward contract for purchase or sale of foreign currency falls in the definition of "speculation transaction" u/s. 43(5) as it is settled otherwise than by the actual delivery or transfer of the commodity, it cannot be regarded as constituting a "speculation business" under Explanation 2 to s. 28. A forward contract, entered into with banks for hedging losses due to foreign exchange fluctuations on the export proceeds, is in the nature of a "hedging contract" and is integral or incidental to the export activity of the assessee and cannot be considered as an independent business activity. Therefore, the losses or gains constitute business loss or gains and do not arise from speculation activities. The fact that there is a premature cancellation of the forward contract does not alter the nature of the transaction. There is also no requirement in the law that there should be a 1:1 correlation between the forward contracts and the export invoices. So long as the total value of the forward contracts does not exceed the value of the invoices, the loss has to be treated as a business loss. (ii) On facts, the loss arising on cancellation of matured forward contracts is allowable as it is attributable to the genuine failure of the trade debtors to comply with the credit terms and conditions. As regards the loss arising on account of premature cancellation of the forward contracts, the assessee requires to explain the reason for the premature cancellation. The explanation that the maturity of date of some of such premature cancelled forward contracts fell during the week – end and therefore they were cancelled three days prior to the due date is acceptable and the loss is allowable. The explanation that some other forward contracts were prematurely cancelled due to business reasons and to avoid higher loss requires to be examined by the AO. The correspondence with the banks and the RBI guidelines on the issue as well as the accounting treatment by the banks also requires to be examined. The assessee's alternative argument that the said loss is "damages" payable to the banks for breach of contracts or settlement of the contracts also requires examination by the AO. (ITA No. 6169/M/2012, A. Y. 2009-10, dt. 11.10.2013.)

London Star Diamond Company (I) P. Ltd. v. DCIT (Mum.)(Trib.) www.itatonline.org.

881. S.43(5) : Speculative transaction – loss suffered in jobbing transactions carried on in the regular course of business – fall under sub – clause (c) of section 43(5) – Eligible for set off against business income of relevant year

The assessee was carrying on business of brokerage as a member of Multi Commodity Exchange (MCX). Besides doing brokerage business for clients, assessee was also carrying on business in individual capacity on MCX. From the business in individual capacity

on MCX, assessee declared certain loss. The assessee claimed that he was eligible for set off of said loss against income under other heads in terms of provisions of section 43(5)(c). The revenue authorities opined that the transactions entered into by assessee on MCX in his own account were speculative transactions within the meaning of section 43(5). The Tribunal held that where assessee carried out jobbing transactions in regular course of his business, as a member of MCX, loss suffered in said transactions would fall under sub-clause (c) of section 43(5) which is eligible for set off against business income of relevant year. (A.Ys. 2008-09 & 2009-10)

Prakash Chand Jain v. Dy. CIT (2013) 142 ITD 441 (Jaipur)(Trib.)

882. S.43B : Deductions on actual payment – Business expenditure – Certain deductions to be allowed on actual payment – Deduction for sum credited to the employees' accounts in certain funds. [S.36(1)(va)]

Deduction u/s.43B cannot be denied, if assessee deposits contribution before due date of filing the return under I.T. Act, and date of payment was after due date under Employees Provident Fund Act. (A.Y. 2006-07)

Patni Telecom Solutions P. Ltd. ITO v. (2013) 23 ITR 534 (Hyd.)(Trib.)

883. S.45 : Capital gains – Business income – Dealing in shares – High frequency transaction and borrowed funds for making investment in shares cannot be the ground to transaction in shares as business income. [S.28(i)]

The Tribunal held that the assessee shown share trading account and Investment separately. Investment in shares was shown in the balance sheet under the head 'Investment'. Investment in shares was valued at cost. Merely because the assessee was indulged in to high frequency transaction could not be regarded as trading activity. A prudent investor always keeps a watch on the volatility of the market and makes sound investment decisions in accordance with such market fluctuation and has the liberty to liquidate its investments in shares as and when necessary. Tribunal held that borrowed funds cannot constitute a factor to decide the character of investment. (A.Y.2007-08)

Koradia Construction (P) Ltd. v. DCIT (2013) 39 Taxman.com.20 / (2014) 146 ITD 251 (Mum.)(Trib.)

884. S.45 : Capital Gains – dissolution of partnership firm – sale of property – taxable in year of sale and not in year of execution. [S. 2(47)]

The assessee partnership firm executed a dissolution deed. The A.O. held that property had been transferred to partners on date of dissolution and therefore the partners were liable to capital gains on sale of the property. The CIT(A) confirmed the A.O.'s order. The Tribunal held in favour of the assessee, that the property was never transferred to partners on execution of deed of dissolution, there would be no question of owning said property by them in capacity as partners of firm, and hence capital gain on its subsequent sale was taxable in hands of firm, and not assessee partner; it would be taxable in year of sale of property and not in year of execution of deed. (A.Ys. 2001-02 and 2003-04)

S. Balmukund Paper v. ITO (2013) 145 ITD 166 (Pune)(Trib.)

885. S.45 : Capital gains – Long Term or Short Term – flat received under the development agreement – Period of holding starts from date of possession of flat and

not from date of development agreement. [S.2(29A)]

The assessee a land owner, under a development agreement, received flats as consideration and later on sold the same, period of holding of such flats is to be considered taking into account date of possession of flats and not date of development agreement. (A.Y. 2007-08)

ACIT v. Jaimal K. Shah (2013) 90 DTR 350 (Mum.) (Trib.)

886. S.45 : Capital gains – Short Term Capital Gains or Long Term Capital Gains – Cancellation of original allotment by BDA and fresh allotment in an alternative site – Sale to be assessed as long term taking in to original allotment letter. [2(29A), 2(29B), 2(42A), (42B)]

Asssesse paid entire consideration of site originally allotted by BAA in year 1988. BDA could not deliver vacant& possession of site free from encumbrance. BDA undertook alternate site. After subsequent allotments, BDA registered sale deed in respect of alternate property. Thereafter assessee sold property & computed LTCG. AO concluded that property sold & property originally allotted were different & therefore treated gain on sale of property as Short Term Capital. CITA(A) affirmed the findings of AO. On further appeal in Tribunal, Tribunal affirmed the findings of the CIT(A) & held that BDA had allotted property to the assessee on 27th Feb, 2008 in liew of the property originally allotted to him vide lease-cum-sale agreement dt 25-8-1988 & successive allotments & cancellation of alternative sites owing to its failure to deliver vacant possession of such sites, the title to the property ultimately allotted to the assessee can be traced to the original allotment & therefore capital gains arising on the sale of the said property by the assessee on 28th Feb, 2008 has to be treated as Long Term capital Gains.

A. Suresh Rao v. ITO (2013) 94 DTR 1 (Bang.) (Trib.)

887. S.47(xiv) : Capital gains – Transaction not regarded as transfer – Sole proprietary concern succeeded by a company – Allotment of shares after revaluation of shares

The Tribunal held that the receipt of higher number of shares because of revaluation cannot be treated as consideration of benefit received other than by allotment of shares. The Tribunal dismissed the appeal filed by Revenue and upheld the order of CIT(A) that assessee is entitled to exemption. (A.Y. 2005-06)

ACIT v. Nayan L. Mepani (2013) 156 TTJ 768 (Mum.)(Trib.)

888. S.48 : Capital gains – Cost of improvement – Cost incurred by previous owner – Indexation benefit is to be allowed from the year of improvement. [Ss.2(42A), 49]

Cost of improvement to property by previous owner is to be included and indexation benefit has to be allowed on such cost of improvement from year of improvement. (A.Y. 2007-08)

Lalitha Rathnam (Mrs.) v. ITO (2013) 59 SOT 2(URO) (Chd.)(Trib.)

889. S.49 : Capital gains – Cost of acquisition – Gifted property – Cost to previous owner can be adopted on the basis of valuation report. [Ss.242A, 48]

Cost of acquisition in case of property received as gift has to be reckoned with reference to cost to previous owner and

valuation can be adopted on basis of valuation report in absence of any other material on record. (A.Y. 2007-08)

Lalitha Rathnam (Mrs.) v. ITO (2013) 59 SOT 2 (URO)(Chd.)(Trib.)

890. S.50C : Capital gains – Full value of consideration – Stamp valuation – Sale by developer – Sale of stock in trade provision is not applicable. [S.45]

Provisions of section 50C were not applicable to cases where income from sale of residential flats was computed under the head 'profit and gains of business or profession'. (A.Y. 2009-10)

ITO v. Inderlok Infra-Agro (P) Ltd. (2013) 59 SOT 10 (URO) (Mum.)(Trib.)

891. S.54B : Capital Gains – Transfer of Land used for agricultural purposes – Investment to be made in assessee's own name to claim exemption and cannot be extended to kin

The assessee sold agricultural land and made investment in purchase of agricultural land and residential flat in the name of her two married major daughters. While computing LTCG, the assessee claimed exemption u/s. 54B & 54F. The A.O. rejected exemption claimed by the assessee on ground that the properties were not registered in the name of assessee. The CIT(A) upheld A.O.'s order. The Tribunal dismissing the appeal held the 'assessee' used in Sec. 54B/54F could not be extended to include major married daughters. Therefore, assessee was not entitled to claim exemption in respect of investment made in the name of her daughters. (A.Y. 2008-09)

Ganta Vijaya Lakshmi v. ITO (2013) 145 ITD 150 (Vishakapatnam) (Trib.)

892. S.54EC : Capital Gains – Investment in bonds – Limit of investment – Exemption is allowed in each financial year up to ₹ 1 crore.

The assessee sold capital assets and earned long term capital gain of ₹ 1.10 Crores. The Assessee invested ₹ 50 Lakhs each in two different assessment years in REC Bonds but within the period of six months. The Revenue allowed only a claim of ₹ 50 lakhs and the remaining was denied. The Tribunal in the case of *Smt. Sriram Indubal v. ITO [2013] 32 taxmann, 118 (Chennai)* held that if the assessee had invested ₹ 50 Lakhs each in specified assets in two different financial years but within six months from date of transfer of capital asset, restrictive proviso to Sec. 54EC would not limit exemption claim to ₹ 50 Lakhs only and the exemption claimed by the assessee upto ₹ 1 Crore was allowed. (A.Y.2009-10)

Coromandel Industries (P.) Ltd. v. ACIT (2013) 145 ITD 171 (Chennai)(Trib.)

893. S.54F : Capital gains – Investment in residential house – Expression 'a residential house' as appearing in section 54F cannot be interpreted in a manner to suggest that exemption would be restricted to a single residential unit. [S.54]

Expression 'a residential house' appearing in sections 54 and 54F has to be understood in a sense that building should be of a residential nature and word 'a' should not be understood to indicate a singular number. (A.Y. 2009-10)

Vittal Krishna Conjeevaram v. ITO (2013) 144 ITD 325 (Hyd.)(Trib.)

894. S.56 : Income from other sources – gift received from mother's sister's

son is taxable under the head income from other sources

Mother's sister's son is not a relative as per section 56(2)(v) and therefore, gift received from him is taxable under the Act. (A.Y. 2006-07)

ACIT v. Masanam Veerakumar (2013) 143 ITD 664 / 157 TTJ 141 (Chennai)(Trib.)

895. S.70 : Set off Loss – One Source against income from another source – Same head of income – Transaction with different tax rate

The Tribunal held merely because two set of transactions are liable for different rate of tax, it cannot be said that income from these transactions does not arise from similar computation, particularly when computation in both cases has to be made in similar manner under same provisions and, therefore, short-term capital loss arising from STT paid transactions can be set off against short-term capital gain arising from non-STT transactions. (A.Y. 2007-08)

Capital International Emerging Markets Fund v. Dy. DIT (2013) 145 ITD 491 (Mum.)(Trib.)

896. S.80-IA : Industrial undertakings – Infrastructure undertaking – Activity of extension of runway at airport, it was to be regarded as developer – Deduction to be allowed. [S.80IA(4)]

The three conditions as laid down under section 80-IA(4) have to be read separately and, therefore, if an assessee fulfills any of the said three conditions, its claim for deduction under section 80-IA cannot be denied. Therefore, where the assessee was engaged in activity of extension of runway at airport, it was to be regarded as developer within meaning of section 80-IA(4) and, thus, its claim for deduction under section 80-IA was to be allowed. (A.Ys. 2003-04, 2004-05)

TRG Industries (P.) Ltd. v. DCIT (2013) 59 SOT 64 (URO) (Asr.)(Trib.)

897. S.80-IA : Industrial undertakings – Transmission or distribution of power – Eligibility for deduction

Deduction under section 80-IA should be allowed in respect of profits derived from transmission or distribution of power through network of new transmission or distribution lines. (A.Y. 2007-08)

Kinfra Exports Promotion Industrial Parks Ltd. v. DCIT (2013) 59 SOT 57 (URO) (Cochin)(Trib.)

898. S.80-IB : Industrial undertakings – Manufacture – Production – Assembly job would amount to production and eligible for deduction. [S.80-IB(4)]

The processes of mounting bought out components on panel and wiring them undertaken by assessee in making electrical control panels though not 'manufacture' would amount to 'production'. All fabricated components, were assembled in a definite manner, each performing its function, so as to function as a cohesive unit. Therefore, assessee was eligible for deduction under section 80-IB(1) and denial of deduction on the ground that the same was an assembly job was not justified. (A.Y.2007-08)

ITO v. Advance Power Engineering (2013) 59 SOT 79 (URO) (Mum.)(Trib.)

899. S.80-IB(10) : Housing projects – Land was not in the name of firm – Developer had dominance control over project – Exemption is available – Amount disallowed

for failure to deduct tax at source – Deduction is available on such disallowance

The assessee-firm was engaged in business of development of land and construction of residential building. The Assessing Officer denied deduction under section 80-IB to assessee on ground that land was not in name of firm, and assessee acted merely as an agent for collection of land consideration on behalf of land owner. Benefit of section 80-IB(10) would be available if developer had dominance control over project and had developed land at its own cost and risk.

Where transport expenses were disallowed for want of deduction of TDS, deduction under section 80-IB to be allowed on such disallowance. (A.Y. 2005-06)

ITO v. Keval Construction (2013) 59 SOT 13(URO) (Ahd.)(Trib.)

900. S.80-IB(10) : Housing projects – Lay out approval of the assessees project to be considered and not the earlier approval which was not implemented – Entitled exemption

The assessee, a firm engaged in business of developers and builders acquired development rights for a Housing project in respect of a plot of land by way of development agreement 1-10-2004. It obtained layout approval on 19-1-2005 & completion certificate on 30-12-2008 and claimed exemption u/s. 80 1B. The A.O. denied deduction on grounds that original approval was granted on 02.11.2003. The Tribunal on perusal of facts held the earlier approval was obtained by previous owners of plot for another project which did not materialise and therefore land was sold to the assessee. The layout approval was first approval of assessee's project post the assessee firm's constitution on 20-4-2004 and therefore exemption could not be denied to assessee. (A.Y. 2007-08)

ITO v. AV. Bhat Developers (2013) 145 ITD 305 (Pune)(Trib.)

901. S.88E : Rebate – Securities transaction tax – Company book profit – Rebate could not be disallowed. [S.87, 115JB]

Assessing Officer held that tax payable after rebate under section 88E was less than 10 per cent of book profit hence the benefit of rebate under section 88E could not be allowed. Commissioner (Appeals) directed Assessing Officer to allow rebate under section 88E subject to amended provisions of section 87. Tribunal held that, since direction was to allow rebate after verification as per law at end of Assessing Officer, there was no reason to interfere with same. (A.Y. 2008-09)

ITO v. RBK Share Broking (P.) Ltd. (2013) 60 SOT 61(URO) / 37 taxmann.com 128 / (2014) 97 DTR 27 / 159 TTJ 16 (Mum.)(Trib.)

902. S.90 : Double taxation relief – Training and Market awareness & development training to employee – No obligation to deduct tax at source – DTAA-India-UK. [Ss.9(1)(vii), 195, Article 13(4)(c)]

Tribunal held that the fees for training service cannot be brought to tax under Article 13(4)(c) of the DTAA. In this case the assessee made payments to two UK companies for providing in-house training and market awareness and development training to its employees. There is no transfer of technology. Therefore the assessee did not have any obligation to deduct tax at source under section 195. (A.Y. 2008-09)

ITO (IT) v. Veeda Clinical Research (P) Ltd. (2013) 156 TTJ 115 / 90 DTR 324 (Ahd.)(Trib.)

903. S.92B : Transfer pricing – brand promotion expenses of foreign AE – Falls within the purview of 'international transaction'

Expenses incurred in brand building of foreign AE falls within purview of 'International

Transaction' and accordingly, TP adjustment is to be made in ALP. (A.Y. 2007-08)

Panasonic Sales & Services India (P.) Ltd. v. ACIT (2013) 143 ITD 733 (Chennai)(Trib.)

904. S.92C : Transfer pricing – Advertisement, Marketing and Sales promotion expenses constituted international transaction – Where compensation for such higher service was embedded in pricing arrangement of contract goods itself and price charged was adequate to ensure recovery of total costs as well as earning of representative profits, no transfer pricing adjustment was required. [S.92B]

The assessee company wholly owned by a subsidiary of BMW, Germany and engaged in manufacturing, training, marketing and distribution of motor vehicles and related spare parts and accessories. Considering the TP study documentation of the assessee, the TPO show caused the assessee as to why it had not been compensated by its AE for its brand promotion activities which resulted in creating marketing intangibles for its AE, the assessee's contention, that there was no international transaction in incurring AMP expenditure, were not agreed to by the TPO, who was of the view that judicial mandate was that 'form' should prevail over 'substance'; and by incurring expenditure over and above the bright line, the assessee had incurred expenses which were non-routine expenditure far beyond the requirements of a normal distributor, which had resulted in the brand promotion of the AE who was the legal owner of the brand. Consequently, the brand had gained value. Accordingly, he held that for the services rendered by the assessee, it should have been compensated and a mark-up on the costs incurred should also have been received.

The Transfer Pricing Officer (TPO) made adjustment accordingly. In appeal proceedings the Dispute Resolution Panel concurred with the findings of the TPO and it directed the TPO to exclude from the AMP calculation, amounts pertaining to after sales support costs and salesman bonus etc. from AMP cost bundle. On appeal Tribunal held that as per importation agreement between assessee and its foreign associate enterprises, assessee had performed greater intensity of service than a normal distributor, by also performing functions of advertisement, it contributed to brand building for its associated enterprise, and constituted an international transaction. However where compensation for such higher service was embedded in pricing arrangement of contract goods itself and price charged was adequate to ensure recovery of total costs as well as earning of representative profits, no transfer pricing adjustment was required. (A.Y. 2008-09)

BMW India (P.) Ltd. v. ACIT (2013) 28 ITR 716 / 37 taxmann.com 319 / (2014) 146 ITD 165 (Delhi) (Trib.)

905. S.92C : Transfer pricing – Arm's length – Comparables and adjustments

The assessee a company manufacturing and selling of SIM cards in India and abroad. The TPO made Transfer Pricing adjustments after excluding some comparables while introducing new ones. The DRP confirmed the order of the TPO. On appeal to the Tribunal held:

"A company cannot be excluded as a comparable solely because it is a high profit making unit. A persistently loss making company cannot be considered as a comparable. The comparability of an uncontrolled and unrelated transaction with international transaction has to be tested by using current year data, and only when current year data does not give a true picture of results of comparable due to some abnormal circumstances, multiyear data can be considered.

Similarly, transfer pricing adjustment must be restricted only to income from international transaction and not to income of assessee at entity level. Transfer Pricing adjustment can be made irrespective of fact that assessee' associate enterprise suffered losses, as assessee is tested party and not its associate enterprise. (A.Y. 2008-09)

Syscom Corporation Ltd. v. A CIT (2013) 145 ITD 34 (Mum.)(Trib.)

906. S.92C : Transfer pricing – Arm's length price – Adjustment in respect of payment of lease rentals or dredger hector

The Tribunal held that since the price paid is within the +/-5 per cent range of the quotations available at the time of entering into the agreement, there is no need for making any addition on the basis of the data available on record. The Tribunal also accepted the working of the assessee which the assessee demonstrated before the TPO the internal CUP & the VG Bonus certificates as external CUP. Under both workings the assessee is able to justify the price paid and on this reasoning also the Tribunal accepted the assessee's contentions. (A.Y. 2002-03)

Addl. DIT (IT) v. Ballast Nedam Dredging (2013) 154 TTJ 280 / 85 DTR 307 (Mum.)(Trib.)

907. S.92C : Transfer pricing – Arm's length price – ALP determined by TPO and assessee is less than 5 per cent – benefit of proviso to section 92C(2) is available

The tribunal held that where in order to prove that international transactions were carried out at arm's length price, assessee had submitted audited segmental accounts in respect of its associated enterprise and non-associated enterprises, in view of fact that on basis of said accounts difference between ALP determined by TPO in respect of AE transactions and ALP charged by assessee was less than 5 per cent, benefit of proviso to section 92C(2) was available to assessee and, therefore, impugned addition made by authorities below to assessee's ALP was to be deleted. (A.Y. 2008-09)

Tecnimont ICB (P) Ltd. v. Dy. CIT (2013) 95 DTR 57 (Mum.)(Trib.)

908. S.92C : Transfer pricing – Arms' length price – ALP of royalty for trademark usage and technical know-how fee can be determined as per TNMM. Approval of RBI & Govt. means payment is as at arms length

The assessee entered into an agreement with its parent company, Cadbury Schweppes, pursuant to which it agreed to pay royalty for the use of trademarks and royalty for the use of technical know-how at 1.25% each of the net sales. This was approved by the RBI and the SIA (Government). The assessee adopted the Transaction Net Margin Method ("TNMM") for computing the ALP of the international transactions by comparing the net margin of the company at entity level with that of companies engaged in food products, beverages and tobacco business. The TPO held that the transactions pertaining to payment of royalty for trademarks and technical know-how fee had to be separately and independently bench-marked using the Comparable Uncontrolled Prices ("CUP") method. He held that the ALP of royalty and technical know-how fee should be computed at 1% of sales the instead of at 1.25% of the sales. This was reversed by the CIT(A) who held that the royalty and technical know-how fee paid by the assessee were at ALP. On appeal by the department to the Tribunal HELD dismissing the appeal:

The assessee has been paying royalty on technical know-how to its parent AE since 1993. Other group companies across the Globe are also paying the same royalty. Also, the payment

is as per the approval given by the RBI and the SIA. Hence there cannot be any scope of doubt that the royalty payment on technical know-how is at arms length. As regards the royalty on trademark usage, the assessee is in fact paying a lesser amount if the payment is compared with the payment towards trademark usage by other group companies using the brand "Cadbury" in other parts of the world. Accordingly, the royalty payment on trademark usage is also within the arm's length and does not call for any adjustment. The Department's request for a remand to the TPO to examine the AMP expenses in the light of Maruti Suzuki 328 ITR 210 (Del) (and *L. G. Electronics India (P) Ltd. v. Asstt.CIT (2013) 140 ITD 41 (Del)(SB))* rejected (ITA No. 7408/Mum/2010, A.Y. 202-2003, dt. 13-11-2013.)

Cadbury India Ltd. v. ACIT (Mum.)(Trib.) www.itatonline.org

909. S.92C : Transfer pricing – Arms' length price – Applicability

In view of sub-section (2A) of section 92C inserted with retrospective effect from 1-4-2002, benefit of +/-5 per cent under proviso to sub-section (2) as a standard deduction cannot be allowed.

Hellosoft India (P) Ltd. v. Dy.CIT (2013) 153 TTJ 322 (Hyd.)(Trib.)

910. S.92C : Transfer pricing – Arm's length price – Comparable – Benefit of plus/minus 5 per cent as mentioned in proviso to section 92C(2) is required to be given on sale value or purchase price of international transactions and not on profit element embedded in such transactions

While determining arm's length price, benefit of plus / minus 5 per cent as mentioned in proviso to section 92C(2), is required to be given on sale value or purchase price of international transactions and not on profit element embedded in such transactions. Assessee is engaged in trading of diagnostic products only and therefore companies engaged in diagnostic products as well as disposables could not be taken as comparables. (A.Y. 2004-05)

Dy.CIT v. Roche Diagnostics India (P.) Ltd. (2013) 92 DTR 434 / 157 TTJ 708 (Mum.)(Trib.)

911. S.92C : Transfer pricing – Arm's length price – Comparables and adjustments

The assessee, in its TP study chose ten comparables out of which the TPO rejected eight and relied on five fresh comparables. It was noted that Tribunal in case of another company engaged in providing similar pharmaceuticals research services to its AE, had held that five comparables selected by TPO were not proper comparables. Thus, those five comparables adopted in instant case were to be rejected. Also, one of comparables selected by assessee was held to be wrongly rejected taking a view that it was a continuous loss making company. (A.Y. 2007-08)

Apotex Research (P.) Ltd. v. DCIT (2013) 59 SOT 117(URO) (Bang.)(Trib.)

912. S.92C : Transfer pricing – Arms' length price – Comparables and adjustments – Similarity of business

Company engaged in doing same business by itself but not those in functionally different line could be taken as a comparable.

Where there were no details, matter regarding addition of indirect cost separately was to be referred back to Assessing Officer for further verification.

Also, where interest expenditure was not actually incurred by assessee, same could not be included in cost base for purpose of calculating

arm's length price, as for calculation of cost base only actual expenditure incurred is to be taken into consideration. (A.Y. 2002-03)

Pfizer Ltd. v. ACIT (2013) 59 SOT 111(URO) (Mum.)(Trib.)

913. S.92C : Transfer pricing – Arm's length price – Comparables with high controlled/related party transactions – Inclusion/exclusion

TPO was to be directed to exclude, after due verification, those comparables from list having related party transactions or controlled transactions in excess of 15% of total revenue for relevant financial year. In view of above, impugned adjustment was to be set aside and, matter was to be remanded back for disposal afresh. (A.Y. 2007-08)

Delmia Solutions (P.) Ltd. v. DCIT (2013) 59 SOT 151 (URO) (Bang.)(Trib.)

914. S.92C : Transfer pricing – Arm's length price – Contract manufacturer – Sales made to AE's and non – AE's at same rate – No adjustment was required to be made

Where there was no assurance to assessee-company that its entire production will be purchased, and only a small portion of assessee's total sales were made to its AEs, it could not be termed as contract manufacturer. Where assessee paid royalty to its parent-company at same rate on sales made to both AEs and non-AEs, and there was nothing to show that transfer price of goods included royalty as price of intangibles, no transfer pricing adjustment was required. (A.Y. 2007-08)

Samsung India Electronics (P.) Ltd. v. ACIT (2013) 59 SOT 261 (Delhi)(Trib)

915. S.92C : Transfer pricing – Arm's length price – Contract of manufacturing – Payment as per agreement

Since the impugned royalty was payable as per agreement for using technical know-how on value added price which was worked out separately, it constituted a payment for business purpose. Therefore, impugned addition made by TPO on the ground that it was a case of contract manufacturing, no royalty was payable and the ALP was nil, was to be set aside.

Where in course of transfer pricing proceedings, TPO was required to determine arm's length price of royalty payment and then recommend adjustment, he exceeded his jurisdiction in making recommendation for disallowance of entire royalty payment on ground of no justification. (A.Y. 2007-08)

SC Enviro Agro India (P.) Ltd. v. DCIT (2013) 59 SOT 109 (URO) (Mum.)(Trib.)

916. S.92C : Transfer pricing – Arm's length price – CUP method – Comparison with actual figures – It cannot be solely be based on the List prices of unassociated enterprises

For making a comparative study under CUP method, what is required is a comparison with actual sale and purchase with unassociated enterprise or transaction between unassociated enterprises; it cannot solely be based on list prices of unassociated enterprise, which at best can be considered only as a reference point. When an Associated Enterprise sold items to assessee at very same price at which AE had purchased from a non-AE, there cannot be any question of under-pricing or over-pricing. (A.Y. 2006-07)

Redington (India) Ltd. v. ACIT (2013) 59 SOT 152 (URO) (Chennai) (Trib.)

917. S.92C : Transfer pricing – Arm's length price – CUP method deals with price of product and not profit margin earned thereon. [R. 10B of Income-tax Rules, 1962]

Where the Transfer Pricing Officer applied internal CUP method and took profit margin of internal comparable to make adjustment, application of CUP method was incorrect as it deals with prices of a product and not profit margin earned thereon. (A.Y. 2008-09)

Sabic Innovative Plastic India (P.) Ltd. v. DCIT (2013) 59 SOT 138 (Ahd.)(Trib.)

918. S.92C : Transfer pricing – Arm's length price – Expenditure on promotion of foreign brand

The Assessing Officer made disallowance by 10% of the expenditure on advertisement & sales promotion relatable to promotion of 'samsung' brand. CIT(A) deleted the addition. Tribunal held that no part of the advertisement and sales promotion expenditure can be treated as relatable to promotion expenditure of foreign brand in India. There was no allegation by the TPO that the assessee had spent proportionately higher amount of AMP expenses to draw an inference of a transaction between the assessee and its AE of promoting the foreign brand. (A.Y. 2002-03)

ACIT v. Samsung India Electronics (P.) Ltd. (2013) 156 TTJ 44 (Delhi)(Trib.)

919. S.92C : Transfer pricing – Arm's length price – Expenses incurred in brand building of foreign AE falls within purview of 'International Transaction' and accordingly, TP adjustment is to be made in ALP

The Tribunal held that the expenses incurred in brand building of foreign AE falls within purview of 'International Transaction' and accordingly, TP adjustment is to be made in ALP. Expenses which are directly related to sales do not come within the meaning of "brand building". (A.Y. 2007-08)

Panasonic sales & Services India (P) Ltd. v. ACIT (2013) 91 DTR 303 / 157 TTJ 615 (Chennai)(Trib.)

920. S.92C : Transfer pricing – Arm's length price – Income exempt under section 10. [S.10]

The Assessing Officer is not required to prove the shifting of profits by the assessee to its AE before applying transfer pricing provision even if assessee's income is exempt. (A.Y. 2005-06)

Hellosoft India (P) Ltd. v. Dy. CIT (2013) 153 TTJ 322 (Hyd.)(Trib.)

921. S.92C : Transfer Pricing – Arm's length price – Payment of non compete fees – Estimation of control premium – CUP method. [S.28 (va), Rule 10B of I.T. Rules]

The assessee alongwith one RA Group held shares in an Indian Company which were sold to a foreign JV of the holding foreign company of the assessee. Both RA & assessees signed a non-compete agreement. RA Group was paid non-compete fees; however, the assessee was not so paid. The TPO estimated non-compete fees at the same rate as paid to RA Group using the internal comparable uncontrollable price (CUP) method.

On the assessee's appeal to the DRP, it was held that the assessee having a controlling stake must be paid non-compete fees. The Tribunal held no infirmity in the order of the A.O.

The assessee had transferred controlling shareholding of 50.97% to the Jv. but no payment was made for controlling premium. The TPO held the adjustment at the rate of 25%. The assessee raised objections before the DRP which did not accept the contentions raised and on

appeal to the Tribunal, held control premium estimated by TPO at the rate of 25 per cent of share price adopting CUP method would be proper. (A.Y. 2008-09)

Lanxess India P. Ltd. v. Addl. CIT (2013) 145 ITD 53 (Mum) (Trib.)

922. S.92C : Transfer pricing – Arm's length price – Reimbursement of warranty & service expenses.

Tribunal held that the assessee has made no claim for deduction and no debit to P & L account was made. Therefore the CIT(A) was justified in treating the warranty and service expenses as part of operating profit of the assessee. (A.Y. 2002-03)

ACIT v. Samsung India Electronics (P.) Ltd. (2013) 156 TTJ 44 (Delhi)(Trib.)

923. S.92C : Transfer pricing – Arm's length price – Selection of comparables

The Tribunal held that CIT(A) was correct in holding that rejection of comparables selected by assessee is not correct. Therefore ITAT upheld CIT(A) direction that one of the CIT(A) in directing the Assessing Officer must compute the arithmetic mean of comparables selected by him and determine the ALP after computing the adjusted average PLI is upheld.

Hellosoft India (P) Ltd. v. Dy. CIT (2013) 153 TTJ 322 (Hyd.)(Trib.)

924. S.92C : Transfer pricing – Arm's length price – Selection of comparables – Factors to be considered

While selecting comparables to work out ALP of international transactions size of two companies and related economies of scale under which they operate are important factors in comparability. Therefore, companies having turnover exceeding ₹ 200 crores and other companies which were functionally dissimilar to that of assessee were liable to be excluded from TPO's list of comparables. (A.Y. 2007-08)

Transwitch India (P.) Ltd. v. DCIT (2013) 59 SOT 119(URO) (Bang.) (Trib.)

925. S.92C : Transfer pricing – Arm's length price – TNM Method – Internal comparability. [S.92B]

The focus under the TNMM is on transactions rather than operating income of the enterprise as a whole. Once in a given case, there are similar nature of transactions and functions between controlled transactions with the related party and uncontrolled transactions with unrelated party, then internal comparability will result into more appropriate result of ALP, as it will require least amount of adjustments. Since product similarity has to be seen while applying CUP method and not TNM method, rejection of internal TNM method, simply on basis of distinction between alcoholic beverages, holding whisky and non-whisky as two different products, is wholly undesirable and not sustainable. Advertisement, marketing and sales promotion expenses incurred by assessee, resulting in brand promotion of foreign AE, is an international transaction as per section 92B, triggering transfer pricing mechanism. However, sales expenses not related to brand promotion, should be excluded while determining cost of international transactions in respect of AMP expenses. (A.Y. 2007-08)

Diageo India (P) Ltd. v. DCIT (2013) 59 SOT 150 (Mum.)(Trib.)

926. S.92C : Transfer pricing – Arm's length price – where internal comparables are available, the TPO has no mandate to have recourse to external comparables

Where internal comparables are available for computing arm's length price, Transfer Pricing

Officer has no mandate to have recourse to external comparables. Where assessee had benchmarked international transactions with AE by making internal comparison with its international transactions with unrelated parties, rejection of same by Transfer Pricing Officer was not sustainable, on basis of assessee's own case for preceding two assessment years. (A.Y. 2008-09)

Birla Soft (India) Ltd. v. DCIT (2013) 59 SOT 156 (URO) (Delhi) (Trib.)

927. S.92C : Transfer Pricing – Computation of Arm's length Price – Comparables and adjustments

The assessee, a manufacturer and dealer of basic liquid and solid resins as well as formulations and exported finished goods to its AE's. The assessee had selected two comparables and claimed that PLI of comparables being at 8.04 per cent against assessee's at 12.55 per cent, no T.P. adjustment was required. The TPO rejected one comparable of assessee and selected three more comparable. The Tribunal held in assessee's favour, that since one comparable of T.P.O was having related party transactions and remaining two were functionally different from assessee, they should be rejected from list of comparables. (A.Y. 2005-06)

Dy.CIT v. Petro Araldite (P.) Ltd. (2013) 145 ITD 182 (Mum.)(Trib.)

928. S.92C : Transfer Pricing – Computation of Arm's length Price – Comparables and Adjustments – difference in capacity utilization – affects profit margin

The assessee, a manufacturer and dealer of basic liquid and solid resins as well as formulations and exported finished goods to its AE's. The Tribunal held difference in capital utilization at level of assessee and at level of comparables affects profit margin; hence adjustment is to made to profit margins of comparables. Depreciation cannot be excluded for purpose of computing O.P. There was difference in capacity utilization of assessee and comparables. The Assessee claimed that profit margin was to be taken before excluding depreciation. T.P.O. included depreciation to work out total operating cost and after deducting same from total sales, he worked out O.P. to sales at 8.63 per cent. However, CIT(A) upheld assessee's stand. The Tribunal held depreciation for computing operating profit was to be included and the A.O. was directed to make adjustment on account of difference in capacity utilization after verifying stand of assessee. (A.Y. 2005-06)

Dy.CIT v. Petro Araldite (P.) Ltd. (2013) 145 ITD 182 (Mum.)(Trib.)

929. S.92C : Transfer Pricing – Computation of Arm's length Price – Comparables and Adjustments – when only one comparable

The assessee, a manufacturer and dealer of basic liquid and solid resins as well as formulations and exported finished goods to its AE's. It was held by the Tribunal in favour of revenue that where only one comparable is available, for purpose of comparability analysis in order to determine ALP, benefit of +/-5 per cent adjustment as per proviso to section 92C (2) would not be available to assessee. (A.Y. 2005 -06)

Dy.CIT v. Petro Araldite (P.) Ltd. (2013) 145 ITD 182 (Mum.)(Trib.)

930. S.92C : Transfer pricing – Computation of arm's length price – Internal comparables

In the present case transfer pricing analysis has been made by the assessee as well as the authorities below only on the basis of internal comparables. At the same time, there is no case that instances of external comparables are

unavailable. External comparables are available in the industry carried on by the assessee company. Thus the assessees as well as lower authorities have erroneously overlooked the necessity of analyzing external comparables as well. In an environment where sufficient numbers of external comparables are available, it is imperative to examine those external comparables also alongwith internal comparables so as to come to a balanced finding on the matters relating to determination of ALP and consequential adjustment called for, if any. Therefore the matter is remitted back to the TPO to redo the exercise of transfer pricing analysis taking into consideration both external and internal comparables. (A.Y. 2007-08)

California Software Co. Ltd. v. ACIT (2013) 82 DTR 59(Chennai)(Trib.)

931. S.92C : Transfer Pricing – Computation of Arm's length Price – Profit margin of comparables – value of international transactions

The assessee, a manufacturer and dealer of basic liquid and solid resins as well as formulations and exported finished goods to its AE's. It was held by the Tribunal in assessee's favour, that profit margin of comparables should be applied only to value of international transactions of assessee with its AE's to determine ALP of the said transactions and TP adjustment has to be worked out on the basis of ALP so determined. (A.Y. 2005-06)

Dy.CIT v. Petro Araldite (P.) Ltd. (2013) 145 ITD 182 (Mum.)(Trib.)

932. S.92C : Transfer Pricing – Computation – Arm's Length Price – Comparables and Adjustments – Safe Harbour Rules – TNM Method

The Assessee entered into various international transactions such as rendering of technical services. Assessee benchmarked its International transactions using TNMM with PL1 as operating Profit to operating revenue. To prove transactions were carried out at ALP, assessee submitted audited segmental accounts in respect of its AE and Non AE. TPO found that it was not clarified as to whether material/services taken from AE's were utilized for Non AE's jobs. In absence of information, it was not clear whether AE or Non AE segmental accounts as submitted by assessee were actually insulated, TPO concluded it were not reliable and rejected the same. TPO having adopted PLI at entity level made certain adjustment to assessee's ALP. The Tribunal held that entire work of assessee depended on man hours and it was maintaining a system known as TMA which generated monthly reports for purpose of tracking man hours. Assessee gave details regarding man hours utilized by it for purpose of each project and on basis of such system assessee had prepared segmental accounts. It was undisputed that results declared by assessee on segmental basis if accepted then difference between ALP determined by TPO in respect of AE transactions and ALP charged by the assessee was less than 5 per cent. The benefit of proviso to section 92C(2) was available to assessee and therefore impugned addition made by authorities below was to be deleted. (A.Y. 2008-09)

Tecnimont ICB (P.) Ltd. v. Dy.CIT (2013) 145 ITD 388 (Mum.)(Trib.)

933. S.92C : Transfer Pricing – Computation – Arm's length price – Comparables and adjustments – TNMM

The assessee, a wholly owned subsidiary of GB International, B. V. Netherlands, engaged in processing of intermediaries and Bulk drugs. Basic raw material penicillin (Pen G) was imported from 'D' Netherland and 'Z' China. Assessee adopted TNMM for T.P. analysis with Operating Profit/Sales ratio as PLI. It selected companies engaged in manufacturing of Drug

intermediaries and bulk drugs and certain filters were used for rejecting non-comparables Arithmetic mean of operating profit margins earned by those comparable companies was (-) 105.91 per cent whereas assessee had earned operating profit margin (-) 7.3 per cent and hence was claimed to be at arm's length. In T.P. proceedings, basic filter applied by TPO was that only those companies using 'Pen-G' as raw material were to be selected. Some of assessee's comparables were rejected and TPO included some new. On basis of new list of comparables, average ratio of operating profit/sale was computed at 0.17 per cent. The Tribunal held, companies selected should be functionally comparable and not identical. TPO was not justified in rejecting two comparables selected by the assessee merely on basis of low percentage of PEN-G as raw material and an entity with whom related party transactions do not exceed 25 per cent of total revenue has to be regarded as an uncontrolled entity. Applying above said filter to facts TPO was justified in selecting one comparable with related party transactions of 21.77 per cent to sales. The matter was remanded back. (A.Ys. 2005-06 and 2006-07)

DSM Anti Infectives India Ltd. v. Dy.CIT (2013) 145 ITD 454 (Chandigarh)(Trib.)

934. S.92C : Transfer Pricing – Computation of arm's length price – Comparables and adjustments

The Assessee provided ITES to its AE and claimed its transaction to be at arm's length. TPO selected 23 comparables and made adjustments. Assessee claimed that its margin would be within safe harbour of +/-5 per cent, requiring no adjustment. The Tribunal held where assessee carried out its own activities, company which outsourced its activities could not be taken as comparable. Where profit of a company taken as comparable was claimed to have been not calculated properly, matter was to be remanded. Segmental profits of company were required to be considered to facilitate comparison. (A.Y. 2008-09)

Nomura Fin Services (India) (P.) Ltd. v. ACIT (2013) 145 ITD 424 (Mum.)(Trib.)

935. S.92C : Transfer Pricing – Computation of arm's length price – Comparables and Adjustments

The assessee company was engaged in providing software development services. It entered into international transactions with its AE. In T.P. proceedings, TPO on the basis of some new comparables made an adjustment of ₹ 2.45 Crore to ALP determined by assessee. It was noted that one of the comparable selected by TPO had related party transactions in excess of 25 per cent and the same was excluded, another comparable was excluded on grounds of higher turnover filter and the other comparable was not functionally comparable. The Tribunal held that after excluding the above three comparables, margin earned by the assessee came within +/-5 per cent safe harbour provided under proviso to Sec. 92C(2), impugned adjustment made by TPO was set aside. (A.Y. 2006-07).

Bind view India (P.) Ltd. v. Dy. CIT (2013) 145 ITD 436 (Pune)(Trib.)

936. S.92C : Transfer Pricing – Computation of arm's length price – comparables and adjustments – number of years of data to be considered. [Rule 10B (4)]

In view of proviso to rule 10B(4), where data of more than two years prior to such financial year is to be considered, it is required to be demonstrated that such data reveals facts which could have an influence on determination of transfer price in relation to transactions being compared. (A.Y. 2006-07)

Bind view India (P.) Ltd. v. Dy. CIT (2013) 145 ITD 436 (Pune)(Trib.)

937. S.92C : Transfer Pricing – Computation of arms length price – Comparables and adjustments [Rule 10B]

The Tribunal held remanding the matter that unless and until there are specific reasons and factors as provided under rule 10B, an entity cannot be excluded from list of comparables solely on basis of high profit/ loss making entity, because no such factor finds place either in Rule 10B(2) or Rule 10B(3). The Profit or Loss arising from forward contracts entered for hedging of foreign currency exposure on underlining trade receivable or payable has to be treated as part and parcel of operating profit while determining ALP. Transfer pricing adjustment is required to be made only in respect of transactions between assessee and AE. (A.Y. 2008-09)

Rusabh Diamonds v. ACIT (2013) 145 ITD 499 (Mum.)(Trib.)

938. S.115JB : Book profit – Minimum alternate tax – Amount disallowable under section 14A can be added back. [S.14A]

Amount disallowable under section 14A can be added back while computing book profit under Explanation 1 to section 115JB. (A.Y. 2008-09)

ITO v. RBK Share Broking (P.) Ltd. (2013) 60 SOT 61 (URO) / 37 taxmann.com 128 / (2014) 97 DTR 27 / 159 TTJ 16 (Mum.)(Trib.)

939. S.115JB : Book profit – Exempt income [S. 14A, Rule 8D]

The amount disallowable u/s. 14A is covered under clause (A) of exp. 1 to Sec. 115JB(2) and thus said amount has to be added back while computing amount of book profit. (A.Y. 2009-10)

Dabur India Ltd. v. ACIT (2013) 145 ITD 175 (Mum.)(Trib.)

940. S.132B : Application of seized or requisitioned assets – Cash seized during the course of search proceedings can be adjusted only against existing tax liability referred to in section 132B(1)(i)

During the course of search and seizure action under section 132 of the Act at the residence of assessee, certain cash was found and the same was seized. The assessee admitted same to be its undisclosed income and requested to foreclose same and adjust the proceeds thereof towards its tax liability. The A.O. issued notice as per the provisions of section 153A, asking the assessee to file a return of income by 5-11-2009. However, the assessee filed return of income only on 29-4-2010. The A.O. finalized the assessment under section 153A and levied interest under sections 234A, 234B and 234C. Before the Ld. CIT(A), the assessee pleaded that interest under sections 234A, 234B & 234C was not a penalty and was only compensatory, therefore to the extent the money of the assessee was lying with the department, the same had to be considered as paid while determining the taxes due and thereafter only on the remaining sum after such set off, interest should be levied. However, the Ld. CIT(A) confirmed the action of action of A.O. The Appellate Tribunal also confirmed the order of the Ld. CIT(A) and held that Cash seized in search proceedings can be adjusted only against existing tax liability. (A.Ys. 2008-09 & 2009-10)

M.J. Ramani v. Dy.CIT (2013) 142 ITD 281 (Bang.) (Trib.)

941. S.132B : Application of seized or requisitioned assets – Explanation w.e.f 1-6-2013 is prospective in nature. [S.234B, 234C]

During the course of search conducted at the residential premises of the assessee, aggregated cash of ₹ 43 Lakhs was seized. The assessee submitted that out of ₹ 43 Lakhs seized, ₹ 10 Lakhs was to be treated as towards payment of advance tax in its case. The AO invoked

explanation to s.132 B according to which the existing liability did not include advance tax payable. He thus adjusted the cash seized towards self-assessment tax and levied interest u/s. 234 B & 234C. CIT (A) confirmed the action of the AO. On appeal in Tribunal, the Revenue relied on the amendment made to s/132 B vide Finance Bill of 2013 and held that it was found that as per the amendment the existing liability would not include advance tax payable and the explanation has been made applicable w.e.f. 1-6-2013. Allowing the appeal, the tribunal held that when the legislature has made explanation operative prospectively by words expressed therein, its operation shall have to be confined to the future date. Further when a statute & particularly when the same has been made applicable w.e.f. a particular date, should be construed prospectively and not retrospectively. (A.Y. 2007-08)

Kanishka Prints (P) Ltd. v. ACIT (2013) 143 ITD 716 (Ahd.)(Trib.)

942. S.144C : Reference to dispute resolution panel – Draft assessment order – Objections before DRP can be filed by agent or assessee. [S.140, Form 35A, Income Tax (Dispute Resolution Panel) Rules, 2009, R.4]

Assessee entered into international transaction with associate enterprises. A reference was made to TPO and draft assessment order was passed with intimation to assessee to file objections. Assessee filed application in Form 35A. DRP rejected objections on ground that Form 35A, appeal and statement have not been signed by MD or director relying on s. 140 and appeal was dismissed in limine. AO passed assessment order against which appeal was preferred before CIT(A). CIT(A) dismissed the appeal, as according to him AO had passed order pursuant to DRP's directions.

Held, objections against the draft order u/s. 144C can be filed in person or through his agent within the specified period in Form 35A under Rule Under rule 4 of the Income-tax (Dispute Resolution Panel) Rules, 2009. — Under these Rules it is not prescribed that the objection should be filed by assessee in person or in case of company, by the MD, Director, Chartered Accountant or any other person. Reliance placed by the DRP on s. 140 in case of Form No.35A was without jurisdiction. (A.Y. 2007-08)

Nomura Services India (P) Ltd. v. ITO (2013) 81 DTR 20 (Mum.)(Trib.)

943. S.145 : Method of accounting – Weighted average method – Shares and bonds – Cannot be discarded

Weighted average method is a recognised method of valuation of stock and, therefore, value of shares and bonds taken on basis of weighted average method cannot be held as notional. (A.Y. 2005-06)

ACIT v. Agrawal Enterprises (2013) 59 SOT 17 (URO) (Pune)(Trib.)

944. S.145A : Method of accounting – Valuation – Addition on account of adjustment to the closing stock without making corresponding adjustment to the opening stock – Not justified

The Tribunal held that any adjustment is made in the valuation of stock, will affect both; opening as well as closing stock. Therefore, before making any adjustment to the closing stock, corresponding adjustment be made in opening stock. (A.Y. 2005-06)

ITO v. Navjivan Synthetics (2013) 142 ITD 96 (Ahd.)(Trib.)

945. S.147 : Reassessment – Capital gains – Stamp valuation – Failure to compute capital gains u/s. 50C does not lead to escapement of income. [S.45, 50C]

The assessee sold property for ₹ 6 lakh and offered capital gains on that basis. The AO accepted the claim without examining the applicability of s. 50C. He later (within 4 years from the end of the A.Y.) reopened the assessment on the basis that the stamp duty valuation was ₹ 25 lakhs and the capital gains had to be computed on that basis u/s 50C. The assessee challenged the reopening *inter alia* on the ground that the failure to apply s. 50C did not mean income had escaped assessment. The CIT(A) accepted the plea. On appeal by the department to the Tribunal HELD dismissing the appeal:

S. 50C is not a final determination to prove that it is a case of escapement of income. The report of the approved valuer may give estimated figure on the basis of facts of each case. Therefore, mere applicability of s. 50C would not disclose any escapement of income in the facts and circumstances of the case. The AO at the original assessment stage considered all the documents and material produced before him and has accepted the cost of property as was declared by the assessee. The reassessment is on change of opinion which is not justified (ITA No. 282/Agra/ 2013, A.Y. 2004-05, 20-12-2013)

ITO v. Hares Chand Agarwal HUF (Agra)(Trib.) www.itatonline.org

946. S.147 : Reassessment – Notice under section 143(2) of the Act is mandatory – Section 292BB inserted by Finance Act, 2008 w.e.f. 1-4-2008 is prospective. [Ss.143(2), 292BB]

In the absence of notice under section 143 (2) of the Act, the reassessment is not valid. Section 292BB of the Act has been inserted by Finance Act, 2008 w.e.f. 1st April, 2008 prospectively and is not applicable in the A.Y. 2001-02. It was further held that even otherwise, in the absence of notice; the same was not a curable defect under section 292BB of the Act and therefore C.I.T. (A) was justified in setting aside the reassessment. (A.Y. 2001-02)

ITO v. Aligarh Auto Centre (2013) 83 DTR 418 (Agra) (Trib.)

947. S.147 : Reassessment – Validity of service of notice – Notice was issued at the incorrect address and the same cannot be said to be valid issue of notice if the same is wrongly addressed – Reassessment was held to be bad in law. [S.148]

The Department filed the appeal before the Tribunal and the assessee filed cross-objection.

The Tribunal heard the cross objection which raised the point of jurisdiction that the notice was bad and illegal.

The Tribunal held that the notice was issued at the incorrect address and the same cannot be said to be valid issue of notice if the same is wrongly addressed. Secondly the reasons given did not satisfy the requirement of section 147. The Tribunal followed following decisions:

a) *Signature Hotels (P) Ltd. v. ITO & Others (2011) 338 ITR 51 (Delhi)*

b) *Sarthak Securities Co. P. Ltd. v. ITO (2010) 329 ITR 110 (Delhi)*

and for address the Tribunal followed the decision of Hon'ble Gujarat High Court in case of *Kanubhai M. Patel (HUF) v. Hiren Bhatt* or his successors to office & Ors. (2011) 334 ITR 25 (Guj.) (A.Y. 2001-02)

ITO v. On Exim (P) Ltd. (2013) 157 TTJ 633 (Delhi) (Trib.)

948. S.148 : Reassessment – Handed over to postal authorities on 1st April, 2008 – Service of notice beyond 6 years – Reassessment notice was held to be invalid. [Ss.147, 149]

The notice u/s.148 was handed over to the postal authorities on 1st April, 2008 & not only that it was addressed to the wrong postal authorities on 1st April, 2008. Also the reasons given for reopening was vague since the basis for reopening was as per the information gathered from the Investigating wing. Tribunal, allowed the appeal of the assessee and held that Department having handed over the impugned notice u/s 148 to the postal authorities on 1st April, 2008, which was beyond the period of limitation of 6 years provided in s. 149 and also wrongly addressed the same, notice was not valid. Also quashing reassessment, Tribunal held that AO having reopened the assessment on the basis that the assessee has received accommodation entries from the company ASB Ltd., pursuant to the information received from the Investigating wing, without indicating the nature of transactions made by the assessee, much less anything to establish that the said transactions are in the nature of the accommodation entries, the reasons forming the basis of reopening of assessment did not satisfy the requirement of s.147 of the IT Act. (A.Y. 2001-02)

ITO v. On Exim (P) Ltd (2013) 94 DTR 140 (Delhi) (Trib.)

949. S.148 : Reassessment – Notice under section 148 after transfer of jurisdiction – Notice was held to be bad in law. [S.127]

The CIT Delhi transferring the jurisdiction from ITO New Delhi to ITO Kolkata under section 127, the jurisdiction in respect of every action for all assessment years lies with the ITO, Kolkata and only he is competent to issue notice under section 148. The Tribunal held that the notice issued under section 148 by the ITO New Delhi is bad and illegal.

Chanakya Finvest (P) Ltd. v. ITO (2013) 157 TTJ 625 (Kol.)(Trib.)

950. S.158BFA : Penalty – Concealment – Addition on estimate basis – Levy of penalty was not justified

The Tribunal followed the decision of Hon'ble Rajasthan High Court in the case of *CIT v. Giriraj Agarwal Giri (2012) 253 CTR 109 (Raj.)* and held that the addition sustained was only on estimated basis. Therefore, penalty under section 158BFA(2) is not leviable. (BP. 1989-90 to 1998-99)

Anil Kumar Jain v. ACIT (2013) 157 TTJ 76 (UO) (Jd.) (Trib.)

951. S.158 BFA : Block assessment in search cases – Levy of interest and penalty in certain cases – Periods of limitation – In computing period of limitation for purpose of levying penalty, period for which A.O. waited for result of M.A. could not be excluded – Penalty order was time barred. [S. 253, 254(2)]

The Tribunal held section 158 BFA (3)(c) refers to assessment which remained subject matter of appeal before Tribunal u/s. 253, i.e. main appeal filed by assessee challenging quantum addition; there is no reference of Section 254(2) in Section 158 BFA (3)(c) for extending period of limitation for purpose of levying penalty order. In computing period of limitation for purpose of levying penalty, period for which A.O. waited for result of M.A. could not be excluded. [BP 1-4-1990 to 29-11-2000]

Arvind Kumar Jain v. ACIT (2013) 145 ITD 271 (Agra)(Trib.)

952. S.194C : Deduction at source – Contractors and sub – contractor – Services received by the assessee on contract basis were not technical services, S.194C is applicable and not 194J.[Ss.194J, 201(1), 201(1A)]

Assessee was engaged in the business of exploration, development, extraction, transportation of crude oil & natural gas, transportation of finished petroleum products & production of liquid field Petroleum gas. For the aforesaid business, assessee engaged contractors having expertise in the respective fields. It treated the contracts with the service providers as works contract & deducted TDS u/s. 194C. AO was of the view that the contract with the service providers was a technical service contract & therefore the provisions of S.194J were applicable instead of provisions of S.194C. CIT (A) upheld the findings of AO. On further appeal in Tribunal, Tribunal allowed the appeal & held that the services received by the assessee on contract basis were not technical services. AS per CBDT No. 202, dt. 5-7-1976, the expression "Fees for technical services" were not applicable in the case of any mining or like project. Further assessee had been consistently collecting TDS from the contractors u/s. 194C and depositing the same with the Government in line with the practice followed in the other offices/ projects and also in other upstream oil and gas companies and the department has treated such contracts as works contracts liable to TDS u/s. 194C in all the earlier years. Therefore impugned demand u/s. 201(1) & 201(1A) was deleted. (A.Y. 2008-09, 2009-10)

Oil India Ltd. v. DCIT (2013) 94 DTR 273(Jd.) (Trib.)

953. S.201 : Deduction at source – Failure to deduct or pay – Short deduction – Demand cannot be raised for Short deduction of tax at source. [S.201(1A)]

The Tribunal held that short deduction of tax at source, by itself does not result in a legally sustainable demand under s. 201(1) and s. 201(1A) The Tribunal further held that taxes cannot be recovered once again from the assessee in a situation in which the recipient of income has paid the taxes on income embedded in the payments from which tax withholding requirements were not fully or partly complied with. (A.Y. 2008-09)

ICICI Bank Ltd. v. Dy. CIT (2013) 90 DTR 401 (Luck.)(Trib.)

954. S.206C : Collection at source – Meaning and scope of scrap – Definition of scrap as given in Expln. (b) to s.206C – not limited to scrap arising from the manufacture or mechanical working of materials alone but extends to cover waste also. [Explanation (b) to s.206C]

The Tribunal held that the applicability of s.206C is not restricted to sale of scrap generated from the business of manufacturing undertaken by the assessee himself but also covers sale of scrap in the business of trading in scrap. (A.Y. 2009-10 & 2010-11)

Bharti Auto Products v. CIT (2013) 92 DTR 345 (SB)(Rajkot)(Trib.)

955. S.226 : Collection and recovery – Recovery without following due process of law is liable to be refunded – AO's action of recovering outstanding taxes without affording reasonable time to take remedial steps is a misuse of powers and a gross violation of

the directions laid down by the Courts. AO has to refund the taxes recovered

The assessee received the order of the CIT(A) on 16-11-2013. It filed an appeal before the Tribunal on 18-11-2013 which was the next working day. The assessee also filed an application before the Tribunal requesting stay of demand. The said application was fixed for hearing on 22-11-2013. However, the AO, without awaiting the outcome of the stay application, attached the assessee's bank account u/s. 226(3) on 18-11-2013 and withdrew ₹ 159.84 crore. The assessee argued before the Tribunal that the coercive action of the AO was wrong because (i) the AO had taken coercive action before the expiry of time of filing the appeal against the order of the CIT(A), (ii) the action was taken even prior to the disposal of the stay application by the Tribunal and (iii) no prior notice was given to the assessee before taking the recovery action u/s 226(3). HELD by the Tribunal:

The action of the AO in recovering the outstanding without affording the assessee minimum reasonable time to take remedial steps is a misuse of powers and a gross violation of the directions laid down by the Courts as well as the basic rule of law and principles of natural justice. Accordingly, we direct the Revenue to refund the entire amount of ₹ 159.84 crore to the assessee within 10 days from the receipt of this order (*Mahindra & Mahindra Ltd. v. UOI 59 ELT 505, Mahindra & Mahindra W.P. 2164/2007, UTI Mutual Fund 345 ITR 71 (Bom), RPG Enterprises 251 ITR 20 (Mum) & MSEB v. Jt. CIT (2002) 81 ITD 299 (Mum.) followed) (ITA No 6678/M/2013. A.Y. 2010-11, Dt. 25-11-2013.*)

Maharashtra Housing & Area Development Authority v. ADIT (Mum.)(Trib.) www.itatonline.org

956. S.249 : Appeal – Commissioner (Appeals) – Form of appeal and limitation – Condonation of delay. [S.30 of Indian Income Tax Act, 1922, Sec. 5 of the Limitation Act, 1963]

The assessee filed appeal before the Assistant Commissioner against assessment order. After a period of three years, the assessee moved an application before Assistant Commissioner for transfer of Appeal CIT(Appeals). The assessee also moved an application for Condonation of delay before the CIT(Appeal). The CIT(A) dismissed appeal of the assessee. The Tribunal upheld the order of CIT(A) as no action was taken by the Assessee for a long period. (A.Y. 2005-06)

Prashant Projects Ltd. v. Dy. CIT (2013) 145 ITD 202 (Mum.)(Trib.)

957. S.253 : Appellate Tribunal – Cross objection – Jurisdictional issue of reassessment can be raised in cross objection though not raised before lower authorities. [S.253(4)]

The Tribunal held that the assessee is duly entitled to raise plea by way of cross-objection as the same goes to the root of the matter even through the assessee has not raised the plea of jurisdiction in reopening the assessment before the Assessing Officer as well as CIT(A).

ACIT v. Sterling Infotech Ltd. (2013) 153 TTJ 20 (UO)(Chennai)(Trib.)

958. S.253 : Appellate Tribunal – Jurisdiction – Where the asseessment order is passed in a particular state, that particular state has jurisdiction to hear an appeal. [S.127]

The assessment of the assesee was framed by the Assessing Officer, New Delhi *vide* his order dated 29-12-2010. Assesse appealed before CIT (A), Laxmi Nagar, Delhi on 31 -1- 11. Thereafter

jurisdiction of the Assessing Officer over assessee was transferred by commissioner vide his order dt 12-8-11 w.e.f 23-8-11 u/s 127(2) from Delhi to Kanpur. In view of the said transfer, revenue filed an appeal against order of CIT(A) before Luknow Bench of Tribunal. Dismissing the appeal of the revenue the Tribunal held that since office of the Assessing Officer who passed assessment order was located in Delhi and order u/s.127 was passed by the Commissioner after passing assessment order, Delhi Bench of Tribunal had jurisdiction over assessee to hear appeals & not Lucknow Bench of the Tribunal. (A.Ys. 2006-07 & 2007-08)

ACIT v. Lata Jain (Smt.) (2013) 56 SOT 102 (Luck) (URO)(Trib.)

959. S.254(1) : Appellate Tribunal – Adjournment – CA/Advocate does not want to appear before particular member – Judicial forum cannot be forced to adjourn all matters for an unlimited period

If a particular Advocate or a Chartered Accountant is not comfortable or has reservation with a particular judicial forum, he can make a representation before judicial forum, but for that reason judicial forum cannot be forced to adjourn all matters for an unlimited period where stakes of revenue are substantial. Hearing cannot be adjourned. (A.Y. 1997-98)

Kanpur Plastipack Ltd. v. ITO (2013) 95 DTR 201 (Lucknow)(Trib.)

960. S.254(1) : Appellate Tribunal – Binding precedent – Interpretation – Special Bench – Intervenor – OECD guidelines and International jurisprudence – Persuasive value

Assessee was not intervenor before Special Bench, therefore not bound by the Special Bench, but the order may be binding to the extent applicable to facts. Orders in transfer pricing adjudication not necessarily always to be taken as binding precedent unless facts are *pari material*. In the absence of judicial interpretation, OECD guidelines and international jurisprudence accepted and have persuasive value. (A.Y. 2008-09)

BMW India (P.) Ltd. v. ACIT (2013) 28 ITR 716 / 37 taxmann.com 319 (2014) 146 ITD 165 (Delhi)(Trib.)

961. S.254(1) : Appellate Tribunal – Orders – Benefit of Telescoping – can be raised first time in Tribunal. [S.69]

The Assessing Officer estimated the profit @ 40% on imported goods & the goods were found short by the custom authority. The assessee submitted that since there was a search by custom authority and goods did not come to the hands of Shri K.R. Maru & R.K. Mehta & after the proceedings of custom authority, no goods were sold by any person in the market and therefore the question of estimation of profit did not arise. The Assessing Officer estimated the profit @40% & it was deleted by the CIT(A) on the ground that the final outcome of fate of those goods were not available & allowed the benefit of telescoping. On further appeal in Tribunal, Tribunal held that there was no statutory condition for availing telescoping benefit that the assessee should raise the issue of telescoping before the Assessing Officer and CIT (A). This issue can be raised or allowed for the first time at the stage of telescoping. Further in view of the fact that addition of ₹ 18 Lakhs on account of undisclosed investment in purchase of goods by the assessee for his proprietary concern as well as addition of profit thereon stand confirmed, assessee was entitled to the benefit of telescoping in respect of addition of ₹ 4,47,500 & ₹ 1,26,900 being the estimated value of imported goods & estimated profit from goods found short respectively. (A.Y. 1984-85)

R.K. Mehta v. ITO (2013) 94 DTR 57 (TM)(Raj.) (Trib.)

962. S.254(1) : Appellate Tribunal – Orders – CIT – DR's behaviour termed "totally irresponsible, contemptuous and malicious". Costs imposed & action for contempt of court to be initiated

In a rare and unfortunate incident of conflict between the Departmental Representatives and the Bench, the ITAT has passed severe strictures against the CIT-DR. Apparently he was not present in the court room when the matters were called out for hearing. Adjournment applications were also not filed. When he did appear, he was not prepared to argue the matter. When the Bench rejected his application for time and decided to hear the matter he alleged "in a malicious and contemptuous manner" that the "Bench is hurrying the justice and burying the justice". After the hearing, he barged into the Chamber of the Sr. Member without permission and threatened that the Bench has insulted him and that he is going to lodge a complaint against them. The Bench has stated that the unprovoked utterances from the CIT-DR has come as a shock to them and that it cannot be taken lightly. It stated that the CIT-DR is not aware of his responsibilities, court discipline, procedure and proper court mannerism. It has termed his accusation that the Bench was hurrying justice and burying the justice as being "totally irresponsible, contemptuous and malicious" and against the glaring facts and proceedings which happened in the open court. It has stated that the CIT-DR's behaviour deserves to be visited with appropriate action to "inculcate sense of judicial discipline and awareness of responsibilities of duties and further to protect the dignity of the court, which stands offended by the contemptuous conduct" It has directed the CIT-DR to pay costs of ₹ 1000 which should be deducted from his salary. The Registry has been directed to forward a copy of the order to the CCIT and the CBDT Chairman for appropriate action. It has also directed that separate and appropriate action for initiating contempt of court proceeding would be taken in due course. (A.Y. 2006-07 ITA No. 2555/Del/2012, dated 28-11-2013.)

Lala harbhagwan Das / Lakshobs v. CIT (Delhi) (Trib.) www. itatonline.org

963. S.254(1) : Appellate Tribunal – Orders – Failure to file power of attorney – Seeking adjournments – Failure to comply with the criterion necessary to represent the matter before the Tribunal, in time, renders appeal liable for dismissal. [Income-tax (Appellate Tribunal) Rules, 1963, Rule 24]

The assessee filed an appeal before the Tribunal but repeatedly sought adjournments. He also did not file a letter of authority authorising his CAs to appear in the appeal. The Tribunal dismissed the appeal on the ground that the assessee is not interested in pursuing the appeal. Thereafter, the assessee filed a Miscellaneous Application seeking restoration of the appeal. The Tribunal restored the appeal even though no power of attorney was filed even at this stage. Even after recalling the appeals the assessee continued to seek adjournments on one pretext or the other. The Tribunal dismissed the appeals and also awarded costs. The assessee again filed a Miscellaneous Application seeking restoration of the appeal. At the hearing of the MA, the power of attorney of the Counsel was not filed. HELD by the Tribunal dismissing the MA:

(i) It deserves to be noticed here that in Mumbai, despite repeatedly pointing out in each and every case, learned counsels rarely follow the practice of filing the power of attorney and many Members of the Tribunal, who do not believe it to be their obligation to verify the availability of power of attorney, may not point out

the same to the counsels and it results in counsels appearing without filing a power of attorney. There are equal number of occasions where several other Members, including Members of this Bench, have had occasion to point out that there was no power of attorney and counsels filed Xerox copies or take further time to file power of attorney. In fact some would go to the extent of stating that they assumed that the power of attorney is on record and when we verify the file (though it is their duty to file power of attorney) and inform the counsel that there is no power of attorney then fresh power of attorney is filed. Particularly in the Bench which is presided over by the Vice President, the registry notes on the file that the power of attorney of a person, who is representing the matter, is not on record and then the power of attorney is filed, notwithstanding the fact that before filing the power of attorney the same counsel or Chartered Accountant must have already taken adjournments on several occasions.

(ii) On facts, there is no sufficient cause for restoration of the appeal under the proviso to Rule 24. The power of attorney has not been filed. The appeals were dismissed twice as adjournments were sought on spurious grounds. The assessee and his counsels have done lacklustre attempt to represent the matters by not fulfilling all the criterion necessary to represent the matter before the Tribunal, in time. (ITA Nos. 7149 & 7150/Mum/2008. A.Y. 1988-89, dt. 20-9-2013.)

Paresh S. Shah v. ITO (Mum.)(Trib.) www.itatonline.org

964. S.254(1) : Appellate Tribunal – Power – Power to stay the proceedings – CIT(A) needs to keep penalty appeals in abeyance till disposal of quantum appeal. [Ss. 250, 271(1)(c)]

During assessment proceedings AO made certain disallowances. On appeal in CIT(A), CIT(A) deleted net disallowance on account of non acceptance of revised return and enhanced the income of the assessee and having found that assessee had furnished inaccurate particulars of income with respect of enhancements made by him, initiated penalty proceedings in abeyance till disposal of appeal by Tribunal was not accepted by CIT(A). On appeal in Tribunal regarding stay application till disposal of final appeal in Tribunal, the Tribunal allowed the stay application of the assesee and held that there was no dispute about the fact that as per the provision of Section 275(1)(a) of the Act learned CIT(A) will get six months time to dispose of the penalty proceedings from the end of the month in which the order of the Tribunal is received by the Commissioner or the Chief Commissioner. Further the Tribunal held that learned CIT(A) was allowed to proceed with the penalty proceedings, already undertaken by him, prejudice will cause to the assessee as it will have to face multiplicity of the proceedings. In case assessee succeeds in quantum appeal, the penalty order passed by CIT(A) will have no legs to stand while in a situation the assessee fails CIT(A) will get ample time of six months to dispose of the penalty proceedings. Therefore, Tribunal exercising their appellate powers conferred u/s. 254(1) of the Act, and as interpreted by Hon'ble Apex Court in the case of M.K. Mohammad Kunhi (supra) and to prevent multiplicity of proceedings and harassment to the assessee, Tribunal directed CIT(A) to keep the penalty proceedings in abeyance till the disposal of quantum appeal by the Tribunal. Stay Application filed by the assessee was allowed. (A.Y. 2004-05).

GE India Industrial (P.) Ltd. v. CIT(A) (2013) 83 DTR 173 (Ahd.)(Trib.)

965. S.254(2) : Appellate Tribunal – Orders – Rectification of mistake apparent from the record – rectification application filed by the Authorised Representative without the consent of the assessee – not maintainable

The Tribunal held that no professional has any right to invoke the judicial machinery for his own interest without any reasons. If he does so it would amount to professional misconduct on the part of the professional. In the instant case, CA has moved this application with a request to either recall or expunge the order sheet entry but he could not identify the particular observations of the Tribunal which are injurious to the interest of the assessee or even to him. In view of above, this application is highly misconceived, contemptuous and is moved with the intention to browbeat and scandalise the Court. (A.Y. 2005-06)

Omkar Nagreeya Sahkari Bank Ltd. v. Dy.CIT (2013) 143 ITD 703 (Luck.)(Trib.)

966. S.263 : Commissioner – Revision of orders prejudicial to revenue – Doctrine of merger – Revision jurisdiction cannot be invoked where issues raised were subject matter of appeal

Commissioner set aside assessment orders passed in case of assessees observing that assessees had made investments in various immovable properties in name of 'JK' and 'MK' but no addition on account of said income was made in hands of assessees. Assessing Officer invoked revision proceedings. On appeal in Tribunal it was held that Assessing Officer had conducted all enquiries of transactions of property raising queries during assessment proceedings of assessees also filed affidavits of 'JK' and 'MK' wherein they admitted that all transactions of property were on their own account and, therefore, assessment orders could not be termed erroneous and prejudicial to interest of revenue. Further issues raised by Commissioner were subject-matter of appeal before Commissioner (Appeals) in case of 'JK' and 'MK' and also assessee, therefore provisions of section 263 were not attracted. (A.Y. 2004-05 to 2008-09)

Parminder Singh v. ACIT (2013) 81 DTR 321 (Luck.)(Trib.)

967. S.263 : Commissioner – Revision of orders prejudicial to revenue – Revision of order without stating any valid reasons how the assessment order is erroneous cannot be sustained

Assessee filed a NIL return of income and the AO completed the assessment. CIT recalled records and set aside AO's order holding it erroneous and prejudicial to interest of revenue. Revisional order of CIT was challenged.

Held, revisional power conferred on CIT u/s. 263 is of wide amplitude-Assessment order can be revised only if twin-conditions of 'error in order' and 'prejudice caused to Revenue' co-exist. CIT should exercise revisional power within the bounds of the law and in accordance with principle of *audi alteram partem* as envisaged in Constitution of India as well as in s. 263. AO had examined each and every issue in accordance with the law. There was no lack of inquiry or inadequate inquiry. Order of CIT was directory in nature and substituted his view for the one taken by AO. CIT failed to give valid reason as to how assessment order was erroneous-Order of CIT set aside and that of AO was restored. (A.Y. 2009-10)

Pradeep Bandhu v. CIT (2013) 81 DTR 289 (Jodh.)(Trib.)

968. S.271(1)(c) : Penalty – Concealment – Additions to income under section 153A – Not concealed any

particulars of income. Penalty was not sustainable. [S.153A]

The Tribunal held that the assessee has not concealed any particulars of income. Therefore, penalty under section 271(1)(c) was not sustainable. The assessee having not concealed any particulars of income, penalty under section 271(1)(c) is not leviable simply because additions have been made on account of unexplained investments and disallowance of certain claims made by the assessee which were not found to be bogus. Tribunal followed the decision of Hon'ble Supreme Court in case of *CIT v. Reliance Petro Products (P) Ltd. (2010) 322 ITR 158 (SC)*. (A.Y. 2007-08)

Om Prakash Lohiya v. Dy. CIT (2013) 157 TTJ 65 (UO) (Jd.)(Trib.)

969. S.271(1)(c) : Penalty – Concealment – Amount surrendered in the return filed under section 153A – Levy of penalty was not justified on the basis of original return under section 139(1). [Ss.139(1), 153A, 153C]

In the return of income u/s 153A, the assessee offered certain sum for levy of tax on a/c of cash available with the assessee out of books. It was out of cash available at the time of search & offered for levy of tax / surrendered by the assessee in his statements as recorded during the course of search. Further, the assesee showed certain Income as amount on account of difference between the sale value & the value as adopted by sub-Registrar considering the provisions of S.50C as he was unaware of the provisions of s.50C. Therefore the assessee was not liable for penalty on the differential amount of tax offered by the assessee. AO levied penalty u/s. 271(1)(C) since there was difference between the income declared in the return filed u/s. 139(1) & that disclosed in the proceedings u/s. 153A. CIT (A) confirmed the penalty. On further appeal in Tribunal, the Tribunal held that the AO has accepted cash available with the assessee. Therefore earlier cash available with the assesse cannot be treated as undisclosed income for the purpose of levy of penalty u/s. 271(1)(c). The other difference was in capital gain which was on account of difference between the sale value & the value as adopted by the sub-registrar as per the provisions of S/50C. Tribunal held that the assessee had disclosed all the relevant facts relating to capital gain in his return of Income. Further the assessee had agreed to pay tax on legitimate & correct amount of income on agreed basis. The letter was made to be treated as statement u/s. 132(4). The AO had nowhere stated that the contents of the said letter were wrong &that the same have not been accepted. When AO, had accepted whatever was offered by the assessee in his return of Income while framing the assessment u/s. 143(3) r.w.s. 153A, no penalty was leviable. (A.Y. 2005-06)

Devidas Sukhani v. DCIT (2013) 94 DTR 21 (Jodh.) (Trib.)

970. S.271(1)(c) : Penalty – Concealment – Amount surrendered in the return filed under section 153A – Levy of penalty was not justified on the basis of original return under section 139(1). [S.139(1), 153A, 153C]

In the return filed u/s. 153C, assesse surrendered unexplained credits of ₹ 95000 involving small amounts as he wanted to have peace of mind & avoid litigation. The assesse contended that the Short Term Capital Gain of ₹ 2,86,589 on the sale of plot was earlier shown in the return of the subsequent year which was mistake & that the said mistake was rectified in the return u/s. 153C which was not controverted so there was no question of concealment of income or filing inaccurate particulars of income. The Assessing Officer levied penalty & CIT (A) confirmed the findings of Assessing Officer. On appeal in Tribunal, the Tribunal deleted the penalty & held that the Addition of ₹ 50000 was made on estimate basis & as regards addition of ₹ 2,81,965 was shown as capital gains, it was claimed that

the same was shown as business income in earlier years. Therefore it was a case of wrong claim by the assesse in the original return which was corrected while filing return u/s. 153C. The assessment was framed by the Assessing officer on the basis of the return filed u/s. 153C & not on the basis of original return filed u/s. 139(1). Therefore penalty was unjustified. (A.Y. 2004-05)

Mahaveer Jain v. DCIT (2013) 94 DTR 25 (Jd.)(Trib.)

971. S.271(1)(c) : Penalty – Concealment – Revised return accepted by the Department – Penalty was deleted

The Tribunal deleted the penalty levied by the Assessing Officer and sustained by the learned CIT(A) on the basis that the revised return in which the additional income was disclosed by the assessee was accepted by the Assessing Officer in its entirety and the other additions were made only on the basis of the estimated income by applying the GP rate declared by the assessee itself. (A.Ys. 2000-01 & 2002-03 to 2004-05)

Poonam Marbles (P) Ltd. v. Dy. CIT (2013) 157 TTJ 59(UO) (Jodh.)(Trib.)

972. S.271(1)(c) : Penalty – Concealment – Wrong claim of repair and maintenance expense when the same was capital in nature – Not a basis for imposition of penalty. [S. 37(1)]

The Tribunal held that in a case where repair and maintenance expenses in respect of plant and machinery and building which were in the actual sense, capital in nature, when genuineness of expense not disputed, just a wrong claim not basis for imposition of penalty. The Tribunal held where disallowance of miscellaneous expenses were made on estimated basis for want of supporting voucher and there was no case that any bogus expenses not relating to its business were claimed by assessee, penalty u/s. 271(1)(c) was not justified. (A.Y. 2004-05)

Dresser-Rand India (P.) Ltd. v. Dy.CIT 145 ITD 91 (Mum.)(Trib.)

973. S.271AA : Penalty – Failure to maintain information as required by section 92D – Levy of penalty was held to be not justified. [S.92D, R.10D]

The Tribunal deleted the penalty under section 271AA on the basis that the penalty has been levied only on the ground that the assessee had not maintained particulars as per Rule 10D which is not justified because the details enlisted in clauses show caused by Assessing Officer were not required to be maintained by the assessee and further that no opportunity of hearing was afforded by the officer imposing the penalty. The Tribunal held that on merit also penalty under section 271AA is not leviable because the international transaction entered upon by the assessee with its associate concern has been held to be at arm's length. (A.Y. 2006-07)

Dy.CIT v. Bebo Technologies (P.) Ltd. (2013) 157 TTJ 602 (Chd.)(Trib.)

974. S.275 : Penalty – Bar of Limitation for Imposition – Block Assessment has no bearing with orders passed under sections 271D and 271E

The Block assessment order was passed in the month of June 2001. Penalty proceedings u/s. 271D and 271E were initiated on 15-1-2001 by issue of show cause notice and penalty orders were passed on 30-3-2006. CIT(A) held that block assessment had no bearing with orders passed u/s. 271D & 271E and held that impugned penalty orders were barred by limitation in terms of Section 275(1)(c). Judicial member upheld order of CIT(A) while Accountant member held otherwise. The Third Member bench held the judicial member was justified in setting aside penalty orders on ground of limitation in view of order passed by Rajasthan High Court in case of *CIT v. Jitendra Singh Rathore [2013] 352 ITR 327*. (BP. Ending-8-6-1999)

ACIT v. Dipak Kantilal Takwani (2013) 145 ITD 35 (Rajkot) (Trib.) (TM)

975. S.288 : Appearance by authorized representative – Retired additional commissioner – Income tax practitioner (ITP) – Registration and procedure for grant of certificate – Without any certificate of registration retired Additional Commissioner cannot practice before the Income-tax authorities and the Tribunal – Joint power of attorney advocate and ITP is not valid. [Income – tax Rules, 1962) Rule 49 to 57]

Retired additional commissioner, appeared before the Tribunal on behalf of assessee and he had signed power of attorney as ITP. He did not have any certificate of registration in his favour as ITP. Before Tribunal he contended that he was retired departmental officer, therefore without any certificate of registration as ITP he could practice and was not required get himself as ITP with Commissioner. Tribunal held that mere possession of educational qualification without undergoing departmental examination conducted by Board itself was not sufficient to have any right to practice as ITP. Retired Additional Commissioner could not practice without any certificate of registration granted in his favour by Chief Commissioner or Commissioner under provisions of section 288 read with rules 49 to 57. Therefore, 'B' could not practice without any certificate of registration granted in his favour by Chief Commissioner or Commissioner under provisions of section 288 read with rules 49 to 57. Tribunal forwarded the copy of order to the Chief Commissioner Gwalior for necessary action. Tribunal also held that law could not provide any unauhorised person/representative to appear before the Income-tax authorities or the Tribunal.

Samagra Vikas Mahila Samiti v. CIT (2013) 59 SOT 293 (Agra)(Trib.)

Wealth – tax Act

976. S.2(e)(a) : Asset – Agricultural land – Stock in trade – Even otherwise agricultural land is not an asset

The assessee was in the business of land development, buying agricultural lands and developing them into plots after obtaining N.A. permission and approval from local authority. It claimed that land in question constituted stock-in-trade & therefore not an 'Asset' u/s. 2 (ea). The A.O. objected this claim. The CIT(A) accepted it as a part of stock in trade & also that the said land was an agricultural land and no conversion yet and therefore also not an 'asset' within meaning of Sec. 2(ea). The Tribunal upheld the CIT(A) order. (A.Ys. 2003-04 to 2006-07)

ACIT v. Vasantrao Sudam Pingle (2013) 145 ITD 97 (Pune)(Trib.)

977. S.2(ea) : Asset – Urban Land – Agricultural Land

In the facts of the all the below cases, Land owned by the assessee comes within the purview of urban area, even though the assessee is carrying on agricultural activities on the same. There is nothing on record to show that construction on of building on the assessee's land is prohibited. Therefore, when the lands are situated in urban area classified by the revenue authorities as either residential or industrial or commercial, there is no material on record to come to a conclusion that these lands are prohibited from construction of building and section 2(ea) (v) (b) of wealth-Tax Act, 1957 has no application. Therefore the same are very much covered under the definition of 'Urban land' within the meaning of section 2(ea) (v) (b) for being assessable to wealth-tax. (A.Y. 2008-09)

Abdul Kareem v. ACIT (2013) 82 DTR 55 (Chennai) (Trib.)

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4. S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Production of programmes for purpose of broadcasting and telecasting shall be specifically characterised as 'work' – Payment is not taxable in India hence no liability to deduct tax at source. [Ss.9(1)(vii), 194C, 195]

In view of CBDT's Circular No. 715, dated 8-8-1995, services rendered by Non-resident for production of programmes for purpose of broadcasting and telecasting shall be specifically characterised as 'work' for the purpose of section 194C, the income therefrom would be treated as 'business income'. Therefore, payment to a non-resident for production of programmes for the purpose of broadcasting and telecasting shall not be treated as 'Fees for Technical Service'. Payment made to non-resident company is also not chargeable to tax as per the provision of section 9(1)(i) as the services are rendered and utilised outside India and the said company has no PE in India.

Endemol India (P.) Ltd., In re (2013) 40 taxmann.com 340 / (2014) 97 DTR 51 (AAR)

5. S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – When 'make-available' clause is not satisfied the sum paid for technical services shall not be taxable as FTS under Article 12 – DTAA DTAA-India-Netherland. [Article 12]

Consideration paid for various services by non-resident holding company to the applicant, which relates to (a) general management (b) international operations (c) legal advisory (d) tax advisory (e) controlling and accounting and reporting (f) corporate communications (g) human resources and (h) corporate development, mergers and acquisitions constituted fees for technical services, however there is no material to suggest that the technical knowhow, skill knowledge and expertise are transferred to the applicant so as to enable the applicant to apply this technical knowhow etc., independently and therefore requirement of the 'make-available' clause is not satisfied the sum paid for technical services shall not be taxable as FTS under Article 12 of India-Netherland DTAA. In the absence of a PE in India, the project arising from services rendered in space was not taxable in India.

Endemol India (P.) Ltd., In re (2013) 40 taxmann.com 345 / (2014) 97 DTR 33 / (2014) 264 CTR 117 (AAR)

6. S.245R : Advance rulings – Pendency of proceedings – Application – Mere filing of Income tax return does not attract the bar on filing advance ruling application – Application was admitted. [S.139(1), 143(1), 143(2), 245R(2)]

The applicant its return filed on 30-11-2011. Application was filed on 4th August, 2012, notice under section 143(2) was issued on 8th August, 2012. i.e. after the date of application. The Authority held that the questions raised by the applicant cannot be said to be already pending before the Income Tax Authorities and therefore, the application was admitted. Where only income-tax return was filed before date of filing application for advance ruling but notice u/s. 143(2) was issued only after date of filing application, it cannot be said that matter covered by advance ruling application was pending before Income-tax authority so as to attract the bar on filing advance ruling application u/s 245R(2).

Mitsubishi Corporation, Japan, In re (2013) 40 taxmann.com 335 / (2014) 97 DTR 4 (AAR)

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INDIRECT TAXES

Central Excise & Customs

Vipin Kumar Jain

1. Recovery of Confirmed Demands when Stay applications are pending/Appeal not disposed within 180/365 days from the date of the stay order

1) Facts

While deciding the stay application, the Tribunal waived the deposit of duty and penalty as well as recovery subject to deposit of ₹ 5 lakhs *vide* order dated 19-5-2008. Since the appeal could not be heard within the prescribed period of 180 days for no fault on the part of the petitioner, therefore, in terms of Supreme Court decision in Commissioner of *Customs & Central Excise, Ahmedabad v. Kumar Cotton Mills Pvt. Ltd. 2005 (180) ELT 434 = (2005-TIOL-42-SC-CESTAT)*, the Tribunal ordered the interim stay to continue till further orders on 3-3-2009. In spite of such order, the Department initiated the recovery proceedings as the stay is said to have come to an end after the expiry of 180 days.

Also in another instance, Petitioner filed an appeal before the Tribunal along with an application for waiver of pre-deposit which was pending for disposal for no fault of the petitioner. Despite this, the Board in terms of Circular dated 1-1-2013 instructed the Administrative Officers to initiate recovery proceedings in such matters which are pending before the Appellate Authorities after filing of an appeal.

2) Issue

(a) Whether the second proviso in sub-section (2A) of Section 35C is directory and that the Tribunal in appropriate circumstances can extend the period of stay beyond 180 days?

(b) Whether the Revenue was justified in initiating recovery proceedings on the basis of Circular dated 1-1-2013, even when an application for waiver of pre-deposit is pending before the Appellate authorities for the reason that on such application for stay or waiver of pre-deposit, no orders have been passed?

3) Held

(a) It was held that the assessee has no control in respect of matters pending before the Tribunal, in the matter of availability of infrastructure, the members of the Tribunal and the workload. Therefore, for the reason that the Tribunal is not able to decide appeal within 180 days, the vacation of stay is harsh and onerous and unreasonable condition. The condition of vacation of stay for the inability of the Tribunal to decide the appeal is burdening the assessee for no fault of his. Such a condition is onerous and renders the right of appeal as illusory. An order passed by a judicial forum is sought to be annulled for no fault of assessee. Therefore, such condition of automatic vacation of stay on the expiry of 180 days, has to be read down to mean that after 180 days the Revenue has a right to bring to the notice of the Tribunal the conduct of the assessee in delay or avoiding the decision of appeal, so as to warrant an order of vacation

of stay. If the provision is not read down in the manner mentioned above, such condition suffers from illegality rendering the right of appeal as redundant.

(b) The Hon'ble High Court further held that Board Circular is untenable, misconceived, wholly illegal and arbitrary. Right of consideration in an appeal and on an application for waiver of pre-deposit, is a right conferred by the statute and such right cannot be defeated on the basis of the Circular, which contemplates that the recovery can be effected, if stay is not granted within 30 days. Therefore, such condition in the Circular is not legal and therefore set aside with the observation that till such time, the application for waiver of pre-deposit is decided in an appeal filed in terms of the statute, the Revenue shall not proceed to recover the same provided that the assessee does not delay the hearing of the appeal directly or indirectly.

{2013-TIOL-201-HC-P&H-CX, M/s. PML Industries Ltd., v. Commissioner of Central Excise and Another}

2. When the matter has been settled by the Settlement Commission against the main noticees, then the case against the co-noticees is also settled

1. Facts

The appellant is a Clearing Agent who was involved in clearing the impugned goods imported by Shri Sanjay Agarwal (Importer) by misdeclaring the description of goods as organic chemicals instead of pesticides. It is the allegation against the appellant that the appellant is the mastermind and was actively involved in misdeclaring the goods as organic chemicals, as the appellant had cleared more than 400 consignments. Out of the 400 consignments, more than 300 consignments were cleared showing the description as pesticides classifying under Chapter Heading 38 but in the case of Shri Sanjay Agarwal, the appellant misdeclared the goods as organic chemicals classifying under Heading 29. In this background, Show Cause Notice was issued to the appellant and after due adjudication, penalty amount of ₹ 2,50,000/- has been imposed under Section 114AA of the Customs Act, 1962.

2. Issue

Whether the proceeding, under the impugned Show Cause Notice, is also settled against all the other co-noticees, when the matter is settled against the main noticee by the Settlement Commission?

3. Held

Relying upon the case of *Vijay R. Bohra v. CCE, Daman [2010 (260) ELT 290 (Tri. Ahmd.)]*, it was held that when the matter has been settled by the Settlement Commission against the main noticees i.e. the importer then the case against the co-noticees are also got settled and hence, appeal was allowed with consequential relief, if any.

(2013-TIOL-366-CESTAT-Mad Shri K. C Rajesh v. Commissioner of Customs (Seaport-Export), Chennai)

3. No reversal of CENVAT Credit required when inputs are partially written off in the books of account prior to 1-3-2011

1. Facts

The lower authorities asked the appellant to reverse the CENVAT credit availed on

certain inputs, the value of which was partly written off in their books of account during the period from April, 2004 to March, 2009 in view of the relevant rule viz. Rule 3(5B) of the CENVAT Credit Rules, 2004, as it stood during the above period.

2. Issue

Whether there was a requirement for reversal of CENVAT Credit availed on inputs, which are partially written off in the books of account, even prior to the amendment (w.e.f. 1-3-2011) made to Rule 3 (5B) of CENVAT Credit Rules, 2004.

3. Held

In view of the provisions of CCR, it is held that, prior to 1-3-2011, a manufacturer of final product who availed CENVAT credit on inputs was not required to reverse any part of that credit on the ground of a part of the value of the inputs being written off in books of account. Only cases of writing off the full value of the inputs on which CENVAT credit had been availed called for reversal of the credit. The present one is not such a case. It was also held that the Department has no case that the amendment dated. 1-3-2011 has retrospective effect and hence, the impugned order was set aside and the appeal was allowed.

(2013-TIOL-447-Cestat-Bang M/s. Sanghavi Engineering v. CCE, Hyderabad)

4. If Bill of entry provisionally assessed the claim for refund of SAD can be filed within one year from date of finalisation of assessment

1. Facts

The issue in the present appeal relates to refund of SAD paid by the appellant at the time of import of the goods. The said refund claim stands rejected on the ground on limitation by observing that the period of one year as provided in the Notification No.93/08 prescribes the limitation of one year for filing of the SAD refund claim. On the other hand, appellant's contention is that their assessment was provisional and the date of finalisation of assessment was taken as the relevant date for computing the period of limitation of one year. The refund claim was filed within a period of one year from the date of finalisation of the assessment. Appellant had earlier filed similar refund claims within one year from the date of finalisation of assessment, in respect of which, department returned their claims and asked them to file the same after finalisation of assessment.

2. Issue

Whether claim for refund of SAD can be filed within a period of one year from the date of finalisation assessment in relation to a Bill of Entry which was provisionally assessed?

3. Held

It was held that, as appellant acted based on the instructions of the Superintendent, he cannot be blamed for the same. The Board issued a Circular No. 23/2010-Cus dated 29-7-2010 clarifying (w.r.t. Notification No. 98/2008 – Cus dated 1-8-2008) that as the refund is not under section 27 of the Customs Act, 1962, the fact of finalisation of bill of entry assessment cannot be taken as the relevant date. However, without going into the validity and correctness of the Circular issued, since the Revenue itself was under the impression that period of limitation would start from the date of finalisation of assessment, in the peculiar facts and circumstances of the case, refund cannot be rejected on the point of time bar. Thus,

Order was set aside and matter remanded for processing the refund claim after verification of documents.

(2013-TIOL-522-CESTAT-Del M/s. Singla Trading Co. v. Commissioner of Customs, New Delhi)

5. Assessee entitled to claim refund without challenging the assessment

1) Facts

The appellant procured one consignment of Germinated Oil Palm Seed for home consumption falling under heading CTH 12092990 which were exempted under Notification 21/2002 dated 1-3-2002. Appellant, however, did not claim exemption under the said notification at the time of filing the bill of entry which was assessed by the assessing officer. Later, on realising the fact that they are entitled for benefit to exemption notification, they filed a refund claim. The said refund application was however rejected on the premise that the appellant has not challenged the assessment of bill of entry.

2) Issue

Whether the assessee is entitled to claim refund without challenging the assessment?

3) Held

The Hon'ble Tribunal held that it is not disputed that at the time of filing bill of entry, the appellant has complied with all the conditions of the exemption notification. Therefore, it is the duty of the assessing officer to give benefit of exemption notification as the Assessing officer failed to assess the goods properly. The Tribunal followed the decision of Sesa Goa Ltd. (2010-TIOL-1729-CESTAT-Mum) wherein it was held that when the exemption is available, it is the duty of the Assessing Officer to give exemption benefit to the assessee. Thus, the appellants were entitled to refund claim without challenging the assessment and the appeal was allowed with consequential relief.

{2013-TIOL-249-CESTAT-Mum, Ruchi Soya Industries Ltd. v. Commissioner of Customs (ACC & Import), Mumbai}

6. Management Consultancy services utilised by the manufacturer to conduct market research and customers credit rating admissible for input credit

1) Facts

Appellants had requested PWC to conduct market research and customers credit rating in international market to improve their market abroad. They had availed CENVAT credit of service tax paid on the said service. Proceedings were initiated taking a view that CENVAT credit is inadmissible as there is no nexus of services with manufacturing activity.

It was submitted that as market research and credit rating is specifically covered in the definition of input services, credit has been wrongly denied to them.

2) Issue

Whether Management Consultancy services utilised by the manufacturer to conduct market research and customers credit rating admissible for input credit?

3) Held

The Hon'ble Tribunal held that the inclusive portion of input service definition clearly includes market research services on which credit is available.

Also, it further took a view that credit rating of customers is relatable to sales promotion and business of manufacture. Therefore, input credit cannot be denied and consequently allowed the appeal.

{2013-TIOL-509-CESTAT-Ahm, M/s. Gujarat Reclaim & Rubber Products Ltd. v. Commissioner of Central Excise, Surat-II}

7. Proportionate distribution of credit not necessary prior to amendment

1) Facts

The assessee is engaged in the manufacture of water treatment plant/ parts, water treatment chemicals, resins etc. They were availing as well as utilising credit of service tax paid on services such as telephone, security, insurance etc. rendered at its 'other' manufacturing unit for payment of Central Excise duty of the clearances made at their 'main' unit. CCR, 2004 allowed the credit in respect of service tax paid on input services used by manufacturer in relation to manufacture of final product w.e.f. 10-9-2004. The dispute arose as the appellant did not take registration as Input Service Distributor in respect of their Head Office and instead had simply utilised credit in their main unit.

2) Issue

Whether availment and utilisation of credit under such circumstances was legal?

3) Held

The Hon'ble Tribunal relied on the decision of the Hon'ble Karnataka High Court in the case of Ecof Industries Pvt. Ltd. 2011 (23) STR 337 (Kar.)= 2011-TIOL-770-HC-KAR-ST to submit that head office could have passed on the entire CENVAT credit to any of its units and there was no need to pass on proportionate credit for services received or final products manufactured, etc. as per the law that stood at the relevant point of time. There was no restriction for utilisation of such credit without allocating proportionately to various units. The omission to take registration as an ISD can at best be considered as procedural irregularity.

{2013-TIOL-395-CESTAT-Ahm, M/s. Doshion Ltd., Shri Chandresh C Shah, Shri Pankaj N. Mehta, Shri Sanjay Patni v. Commissioner of Central Excise, Ahmedabad}

8. Discretionary powers for provisional release of goods under section 110A of the Customs Act, 1962

1) Facts

The appellant had imported a vessel namely 'M.V. Horseshoe Casino' and filed Bill of Entry date 22-6-2011 classifying the vessel under sub-heading 8901 10 10 of the Ist Schedule to the Customs Tariff Act and claiming the benefit of Notification No.21/2002-Cus. date 1-3-2002 (Sl.No.352). The value declared in the Bill of Entry was USD 3 million. Based on intelligence to the effect that the appellant had misclassified and undervalued the vessel to evade payment of appropriate duty of customs, the Directorate of Revenue Intelligence (DRI) launched investigations into the above import on 8-9-2011. According to the DRI's estimate, the actual cif value of the vessel would be ₹ 35,80,74,723/- much higher than the declared cif value of ₹ 27,96,00,248/-. On the basis of these results of investigations, show cause notice date 8-6-2012 was issued to the appellant by the ADG of the DRI proposing to confiscate the vessel in terms of section 111(m) of the Customs Act *inter alia*. Upon receipt of the show-cause notice,

the appellant by letter date 18-6-2012 requested the Commissioner of Customs, Mangalore for provisional release of the vessel which had been seized on 29-5-2012. Upon this request, the Commissioner ordered provisional release of the vessel subject to two conditions viz. (i) furnishing of a bond for an amount of ₹ 35,80,74,723/- being the value of the seized vessel as determined by the department and (ii) furnishing of security in the form of bank guarantee (with auto renewal clause) for an amount of ₹ 14 crores. This order of the Commissioner, made under section 110A of the Customs Act, was communicated to the appellant by his Assistant Commissioner in a letter date 3-7-2012.

2) Issue

Whether the conditions imposed by the Commissioner for provisional release of the vessel were arbitrary?

3) Held

The Hon'ble High Court has held that an element of discretion is inbuilt in section 110A of the Customs Act. But this discretion cannot be exercised in an arbitrary manner. The adjudicating authority in the context of invoking section 110A of the Act should consider all the relevant factors such as the nature of the goods, the nature of the dispute, the conduct of the party, the balance of convenience, etc. The order passed under section 110A should also disclose that the relevant factors were considered and the conditions stipulated for provisional release of the goods should match the interest of the Revenue as evaluated in a fair manner by the adjudicating authority by taking into account all the relevant factors. The Court held that the discretion under section 110A of the Customs Act was exercised in this manner on different sets of facts and circumstances in the different cases cited before us. Obviously, the conditions stipulated for provisional release of the goods in the cases vary from case to case. In the instant case, almost the entire amount of duty based on the value of the vessel as determined in the show cause notice stands paid by the appellant. Only a small amount of ₹ 2 lakhs remains to be paid towards duty, which the appellant can deposit. The appellant also is said to be willing to deposit interest on duty. Considering the fact that the vessel imported by the appellant is not prohibited goods and that no offence of serious nature has been framed against them in the show cause notice and that the substantive dispute in this case is one of classification of the vessel, the Court held that the adjudicating authority ought not to have imposed such harsh conditions as mentioned in his order. After taking into account all the relevant factors, it was held that the vessel can be provisionally released to the appellant on the following conditions:

(i) a bond for an amount equal to the value of the vessel as determined in the show cause notice be furnished (ii) an amount of ₹ 2 lakhs (Rupees two lakhs only) be paid towards balance of the duty based on the assessable value determined in the show cause notice; (iii) an amount of ₹ 25 lakhs (Rupees twenty five lakhs only) be paid towards interest on duty; and (iv) a bank guarantee for an amount equal to 10% of the value of the vessel determined in the show cause notice be furnished.

(2013-TIOL-301-CESTAT BANG M/s. Victor and Motels Ltd. v. CC, Bengaluru)

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INDIRECT TAXES

Sales Tax

D. H. Joshi

1. Appeal – Dismissed in default for Non-Appearance of Counsel

The writ petitioner Procter & Gamble was assessed *vide* Order date 22-6-2011 for the periods 2008-09 and 2009-10 under the local and CST Act. In the assessments, the petitioners was denied time to file 'F' forms on the ground that u/s 46(8-A) of VAT Act, the appeal was required to be disposed of within a period of one year and since the period was already over, the prayer for restoration of appeal could not be accepted. Before appellate authority, among other things, the counsel of the petitioner could not appear for hearing due to his illness which was supported by affidavits and the medical certificate of the counsel. The MP High Court held : that the impugned order rejecting the restoration application cannot be sustained r/w Rule 61(4) of VAT Rules. The time limit fixed u/s. 46(8-A) would not override or curtail the right of the appellant to invoke provisions of readmission/ rehearing of appeal u/r 61(4). Accordingly, the writ was allowed.

Procter & Gamble Hygiene & Health Care Ltd. v. Dy. Commissioner CT & Ors. (2014) 24 STJ 38 (M.P.)

2. Assessment – Limitation

The Full Bench of the Haryana Tax Tribunal, following its earlier judgments held that u/s. 28(2) of the Haryana GST Act, 1973, no limitation of assessment in the provision was prescribed. Hence, limitation where no period of limitation to frame an assessment is prescribed, maximum 5 years from the close of the financial year is a reasonable period for such an assessment.

Hansaflon Plasto Chem. Ltd. v. State of Haryana & Ors. (2014) 47 PHT 20 (HTT)(FB).

3. Entries in Schedule

(1) The case before the Delhi High Court was 'Slice' mango fruit pulp drink was food or food article? Held : The impugned Order classifying the concerned product i.e. mango pulp based drink, was not classifiable in Entry 47 of the First Schedule and would be taxed under residuary entry at 8% u/s. 4(i)(d). Accordingly, appeal was allowed.

Varun Beverages Ltd. v. Commissioner of VAT (2014) NTN (Vol. 54) P. 44.

(2) The Commissioner of Commercial Tax, M.P., in case No. 35/70/2012/XI decided on 09-12-2013 held that 'Fresh Cream' and 'Fresh Butter' in the absence of specific entry for both the items in any of the schedules of MP VAT Act, would fall in residuary entry II/IV/I and therefore they were liable for VAT @ 13%.

Reliable Dairy Products & Biotech Pvt. Ltd., Jabalpur (2014) 24 STJ (CCT, MP) P. 70.

4. Entry Tax – Value of Goods

In the case before the Allahabad High Court, the question was : "What is the value of goods, which is to be taken into consideration, for levy of entry tax ?" High Court held that the value of goods at the time of entry has to be taken into consideration for charging it for tax and not any other value whether it be wholesale price or retail price of such goods, at a point later than its entry into the State.

The court further held that the provisions of section 2(h)(iv) and section 4(g) are not *ultra virus* of the Act. These are machinery provisions to find out the value of goods at the time of entry of goods in the State.

Binani Cement Ltd. v. State of U.P. & Ors. (2014) NTN (Vol. 54) P. 7

5. Administrative charges

The Haryana Tax Tribunal was dealing with the claim of deduction of 'Administrative Charges' on inter-State sales under the East Punjab Molasses (Control) Act, 1948 as applicable to State of Haryana, which had been added to the turnover by the AO and assessed to tax under the CST Act. The said charges being separately shown in the bills and were paid to the Govt. as per the mandate of section 3 of the Act of 1948 after collecting the same from the customers, it was held that the same were exempt from the payment of tax.

Saraswati Sugar Mills Ltd. v. State of Haryana (2014) 47 PHT 134 HTT

6. Attempt to evade tax

The P & H High Court decided the following important points: —

(a) There was no evasion of tax on account of deficiency in documents noticed with regard to correct name and address of the consignee;

(b) Production of documents voluntarily at the check-post ruled out any evasion of tax;

(c) Not following own judgment by the Member of the Tribunal in the similar issues held was not justified.

LG Electronics India Pvt. Ltd. v. State of Punjab and Anr. (2014) 47 PHT 82 (PH)

(d) Non-registration of the dealer in the State of Punjab was not a ground to levy penalty for an attempt to evade tax u/s. 51(7) of the PVT Act, 2005

Bajaj Electricals Ltd. v. State of Punjab (2014) 47 PHT (PVT)

7. Compounding – Dealer in Gold jewellery

In a case before the High Court of Kerala, the dealer in gold jewellery opened new branch during 2010-11 and permission granted for compounding for the year 2010-11. Later finding that dealer held stock "Exceeding double the quantity held in the previous year".

Held - It was violation of mandatory provisions for eligibility for compounding which was an objective criteria and statutory requirement, failing which permission granted can be cancelled. A corporate body cannot challenge a provision u/s 8(f)(ii), on the ground of violation of freedom under Article 19(1)(g). Therefore, request to read down the provision on the basis of Article 14 was without any basis. Accordingly, the challenge in the writ petition was rejected.

Josco Gold Corp. Ltd. v. CTO. (2014) 22 KTR 58 (Ker.)

8. Concealment of turnover

The J & K Sales Tax Tribunal Srinagar, decided that whenever, the assessing authority notices the concealment of turnover and on contravention, assessee denied the issuance of such bill, burden heavily lay on the Assessing Authority to establish that the said bill was issued by the dealer and for this the AA was required to adhere to the provisions of law and make thorough enquiry before making additions in the turnover of the assessee.

B.A. Rawanda & Bros. v. The AA, Commercial Taxes (2014) 47 PHT 158 (J&K) (STAT)

9. Input tax credit

The issue for decision before the Allahabad High Court was where stock particulars furnished in Form 'A', yet input tax credit denied to assessee dealing in motor parts. Goods sold item-wise in numbers, there was no requirement to fill Col. 3 of Form A, for weight of goods. Against the Order of the Tribunal, Dept. filed Revision Appln. before the High Court. Held – Purchases made by the assessee duly accounted. Therefore, the grant of input tax credit was not illegal. Revision dismissed.

Commissioner, CT v. Bajarang Auto Purdilpur (2014) NTN (Vol. 54) P. 60

10. Penalty – U.P. VAT Act, 2008 – Delayed transportation of goods

In this case, on facts, the findings of the authorities down below including the Tribunal were that delayed transportation of goods had occasioned due to serious defects developed in the vehicle, and, hence, no penalty was levied inasmuch as, Dept. found no evidence otherwise. The Allahabad High Court held : The findings of the Authorities were purely based on facts and in absence of any perversity or illegality therein, or otherwise, no question of law arose therefrom. Hence, revision was dismissed.

CCT v. Kumar Engineering (2014) NTN (Vol. 54) p. 43

11. Pre-deposit for hearing on merits

The High Court of Punjab & Haryana was seized of an important point of pre-deposit of 25% of the additional demand as was fixed by the Haryana Tax Tribunal to enable the appellant to be heard on merit. However, the appellant paid the same after more than a year. Meantime, the Tribunal had dismissed the appeal for non-payment of pre-deposit. The High Court held the appellant may have been negligent in depositing the amount after more than a year but as the Dept. has accepted the deposit, it would be appropriate to allow the appeal, set-aside the impugned order and restore the appeal to the Tribunal for deciding on merit subject however, to deposit of ₹ 10,000/- as costs with the Punjab & Haryana High Court, Legal Services Committee. Ordered accordingly.

Eco Auto Components Ltd. v. State of Haryana & Ors. (2014) 47 PHT 9 (P&H).

12. Pre-deposit of Tax – Whether Writ maintainable

In the writ petition filed by L & T before the Punjab & Haryana High Court, the point was about the maintainability of the writ, where the petitioner was statutorily required to pre-deposit the tax and penalty for hearing the appeal on merits against an AO's Order creating a huge demand of more than ₹ 55 crores. Held: The petitioner's pleas, in essence, were that the impugned orders were erroneous in facts as well as in law. A due consideration of the arguments reveals that the impugned order may, at best, disclosed an erroneous exercise of jurisdiction, but does not disclose an assumption of jurisdiction where there was none. Therefore, there was no ground for entertaining the writ petition as other remedies of appeal were available under the circumstances of the case.

Larsen & Toubro Ltd. v. State of Punjab & Ors. (2014) 47 PHT 10 (P&H)

13. Rebate of tax – U.P. Trade Tax Act, 1958

In this case, the Apex Court was required to consider two questions of law viz.: (i) Notification date 18-6-1997 rescinded by Notification date 27-2-1998 r/w section 5 of the Trade Tax, whether grant of rebate of tax by the State Govt. by issuing a Notification discriminated between the goods imported from neighbouring States and goods manufactured and produced in the State of U.P. and therefore contravened the constitutional provisions viz; Articles 301 and 304(a) of the Constitution ? Held: 'Rebate of tax' granted by the State Government to cement manufacturing units using flyash as raw material in the State alone was violative of the provisions of the Constitution and (ii) whether it restricted free flow of trade, commerce and intercourse amongst States ? Held : the exemption or rebate of tax is within the purview of taxation. In the instant case, if the grant of rebate of tax was of the full amount of tax levied, then for the dealers manufacturing cement using flyash outside the State of U.P. but selling it in the U.P., by charging tax @ 12.5%, then the overall effect was that there is no tax levied on the net turnover after deductions being made from the gross turnover. Therefore, it can be said on the basis of various judgments of the court the treatment so given were discriminatory and violated Article 304(a) of the Constitution.

State of U.P. & Ors. v. Jaiprakash Associates Ltd. & Ors. (2014) NTN (Vol. 54) P. 14

14. Revision

The Haryana Tax Tribunal was seized with the following important point:

"Revision u/s 34 – Branch transfer against Form F – Revisional authority treated the consignment sales of rice to Delhi-based consignee as ingenuine after verification from Delhi Authority who informed that those forms were issued by the consignee agent to other parties and not to the appellant."

Held – Before opening the case, revisional authority was required to establish whether the appellant resorted to fraud, misrepresentation, collusion or suppression of material or furnished false information/particulars or whether the order of the assessing authority u/s 6A(2) of the CST Act, was conclusive in nature in view of the Apex Court judgment in the case of *Ashok Leyland v. State of Tamil Nadu (2004) 23 PHT 81 (SC)(FB).* Accordingly, the case was remanded to the Revisional Authority to examine the facts in the light of the above judgment.

Purshotam Dass Dalipchand v. State of Haryana (2014) 47 PHT 150 (HTT)

15. Revision moved by department

The case before the Allahabad High Court was, whether an educational institution i.e. Banaras Hindu University, was a 'dealer' and doing 'business' under the provisions of the U.P. VAT Act, 2008 ? Held : Following the earlier decision of the same court that the issue has already been decided recently and, thus, it was very surprising and unfortunate that the revisionist i.e. the Dept. was unnecessarily burdening this Court. Revision was thoroughly misconceived and was dismissed.

CCT v. Banaras Hindu University (2014) NTN (Vol. 54) P. 38

16. Schedule Entries

Before the Madras High Court in Writ Petitions under the TNVAT Act, 2006 and TNGST Act, 1959, the point raised with regard to the classification of Turmeric and Turmeric powder and Coriander and Coriander powder, whether the powder form of turmeric and coriander continued to enjoy the benefit of exemption despite their being a specific omission of the powder form ?

Held, Yes. Writ petitions allowed.

Nazareth Foods (P) Ltd. & Anr. v. ACCT & Anr. 2013-14 (19) (10) TNCTJ P 357

17. Submission of Duplicate Portions of Original 'C' Forms

The M.P. High Court following its earlier decision in *Manganese Ore (India) Ltd. (2005) 7 HTJ 412 (M.P.)* which was approved by Apex Court, held that the petitioner is entitled for concessional rate on the basis of duplicate portions of 'C' forms and directed the Revisional Authority to verify duplicate portions of 'C' forms from original 'C' forms submitted in manufacturing division of the petitioner and if it is found that the same are as per originals, then, exemption in the trading division should be granted.

Teblik Drugs Ltd. v. State of M.P. & Anr. (2014) 24 STJ 41 (M.P.)

18. Taxable Event – Discounts – Credit Notes – Writ

The Madras High Court while deciding large number of writ petitions was seized with the above issues.

Input tax credit on purchase against tax invoice. Goods purchased at higher purchase price resulting in higher input tax and were resold at a lesser price, resulting in low output tax thereby accumulated ITC. Trade discount received after payment of VAT on sale in the form of credit notes, taxed as turnover. To curve this trade practice, sub-section 20 of Section 19, introduced retrospectively, which came into force on 19-8-2010 and later prospectively brought into force w.e.f. 1-1-2007 was challenged as violative of Articles 14 and 19 of the Constitution.

Held – Section 19(20) as amended by Amendment Act 22 of 2010 is a valid piece of Legislation and the amendment given retrospective effect w.e.f. 1-1-2007, by amending Act 42 of 2010 could not

be struck down as being either unreasonable, discriminatory or causing any unforeseen or unforeseeable financial burden for the past period nor unduly oppressive or confiscatory.

Jayam & Co. and Ors. v. ACCT and Anr. (2014) NTN (Vol. 54) (Mad.) P 76

19. The Madras High Court while dealing with large number of Writ Petitions, decided the following important points:

(A) Interpretation of fiscal legislation – When vires of a statute is challenged, courts must take every effort to uphold the constitutional validity of the provisions of a statute, courts exercising power of judicial review must be conscious of the limitation of judicial intervention, particularly, in matters relating to the legitimacy of the economy or fiscal legislation. The burden is on the person, who attacks the constitutional validity of a statute, to establish clear transgression of constitutional principle.

(B) Input tax credit – Regulating the claim of input tax credit is within the powers of legislative competence. The Legislature consciously enacted section 19(11) of TN VAT Act, with avowed object of incorporating the time-frame for availing the input tax credit. Prescribing such time-frame for availing input tax credit is well within the legislative competence of the State. Prescription of time limit does not offend Article 14 of the Constitution. Primary obligation of the State is to tax. The concession by way of input tax credit are to be construed very strictly.

(C) Concept of VAT – VAT system is to rationalize the tax burden and bringing down in general the price level and to bring in simplicity and transparency in the tax structure thereby improving the tax compliance and eventually to ensure revenue growth.

(D) Scheme of VAT – Scheme of VAT Act provides for adjustment of excess input tax credit and carried forward to the next year or refunded, necessarily the details furnished by the registered dealer have to be verified. Matching process has to be carried out by verifying various entries.

USA Agencies v. Commercial Tax Officer (2014) 47 PHT 91 (Mad.)

20. Transfer of assessment proceedings

The Haryana Tax Tribunal in a case pertaining to transfer of assessment proceedings from one taxing authority to another u/r 7(5) held that the legal requirement of communication of the Order and the word used was "shall" which makes the requirement mandatory. Thus, the communication of the transfer of the proceedings to the affected party were mandatory provision of law. Thus, the order of the DETC., Ambala, transferring the case from one AA to another was no order in the eye of law as the same was never communicated to the assessee as required u/r 7(5). Hence, the impugned order were set-aside on the ground of lack of jurisdiction.

Jain Vidyut v. State of Haryana (2014) 47 PHT 143 (HTT)

21. Writ Petition against notice which is beyond limitation

The Punjab & Haryana High Court, in a writ petition was seized whether it can be allowed against the notice which is beyond the period of limitation. Held : proper course of action for the noticee was to file objection / reply and to raise all the pleas as had been raised in the writ petitions before it. It further directed that the AO shall decide the same in accordance with law by passing a speaking order before proceeding further in the matter.

M.K. Steel Products v. State of Punjab & Anr. (2014) 47 PHT 16 (PH).

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INDIRECT TAXES

Service Tax

Sunil Moti Lala*

A] Classification of Service

Business Support Services

1 The appellant, a job-worker, manufactured goods for a company A by utilising the raw materials supplied by A for a consideration. Under Notification 214/86-CE 'A' had undertaken to pay the excise duty liability on such goods. The Revenue sought to levy Service Tax on the charges collected by the appellant under the category of Business Support Service. On appeal, the Hon'ble Tribunal held that the activities carried out by the appellant would not be liable for service tax since:

- The appellant would be considered as 'manufacturer of goods' notwithstanding 'A' had undertaken to pay the excise duty in respect of such goods.

- Since the process amounting to manufacture has been specifically kept outside the levy of service tax under the category of business auxiliary services, the same cannot be brought under the service tax levy under the category of business support services.

Jubilant Industries Ltd. v. CCE (2013) 31 STR 181 (Tri.-Del.)

Business Auxiliary Services

2 The Revenue had failed to establish the fact that National Highway Authority of India (NHAI), to whom the assessee had provided toll collection services, was a business or a commercial concern engaged in any business activity. Thus, the Hon'ble Tribunal held that taxing the assessee's services to NHAI under the category of business auxiliary services was inconceivable and accordingly the Revenue's appeal was dismissed.

CST v. Intertoll ICS CE CONS O & M P. Ltd. (2013) 31 STR 477 (Tri.-Del.)

3 The assessee provided modelling services to various clients who paid her agent, M. M paid service tax on the receipts under the category of 'Advertising agency services' on behalf of the assessee and paid the balance to the assessee. The Revenue alleged non-payment of service tax by the assessee under the category of "Business Auxiliary services". The Hon'ble Tribunal held that –

- The Department cannot issue a show cause notice on the assessee for non-payment of service tax since as per section 65(7) an assessee includes his agent and the assessee had discharged her liability through her agent, M

- Mere payment of service tax by M under the wrong head (Advertising agency services instead of Business Auxiliary services) would not mean that no payment was made.

Katrina R. Turcotte v. CST (2013) 31 STR 670 (Tri. -Ahmd.)

4 The Revenue sought to tax services provided in the nature of assistance in visa and passport related work under BAS. The Hon'ble Tribunal held that CBEC Circular No. 137/6/2011-ST dated 20-4-2011 covers the issue in favour of the assessee and impugned services were not covered under any category of services leviable to service tax.

Good Wind Travels Pvt. Ltd. v. CCE (2013) 31 STR 598 (Tri.-Ahmd.)

5 The Hon'ble Tribunal held that the primary activity of issuance of Smart Card with relatable chip was composite contract to build a

* assisted by Sheetal Jain

system and cannot be conceived to be Business Auxiliary Service.

Smart Chip Ltd. v. CCE (2013) 31 STR 727 (Tri.-Del.)

6 The assessee was engaged in sale of Banks products by using infrastructure, staff and expertise to market impugned products. The Hon'ble Tribunal held that Bank products were nothing but bank service and covered within "Promotion or marketing of services provided by client" under Business Auxiliary Services w.e.f. 1-7-2003.

Ace Credit v. CCE (2013) 32 STR 407 (Tri.-Bang.)

7 The Hon'ble Tribunal held that, carriage fee charges for providing desired frequency for broadcasting channels signals was covered under Business Auxiliary Service as the same facilitates better quality view of channels thereby enhancing viewership. The matter was remanded back for examining aspect of invocation of extended period and imposition of penalty.

Indusind Media & Communications Ltd. v. CCE (2013) 32 STR 418 (Tri.-Del.)

8 The Hon'ble High Court held that it does not have jurisdiction to entertain a question that, whether the activity carried on by assessee falls within the Business Auxiliary Service or Business Support Service.

CCE v. Chadha Auto Agencies (2013) 32 STR 265 (Kar.)

9 The Hon'ble Tribunal observed that the order-in-original deviated from the charges made in the show cause notice. It thus held that since there was a complete variation between the grounds alleged in the show cause notice and the grounds on which the demands were confirmed, the impugned order was liable to be set aside on that ground alone. However, the Hon'ble Tribunal also considered the other submissions of the assessee and held that data processing services provided to banks cannot be treated as "business auxiliary service" as it is not customer care, it is excluded from its scope.

TCS e-serve Ltd. v. CST [2013-TIOL-1518-CESTAT-Mum.]

Banking and Financial Services

10 The Hon'ble Tribunal observed that the assessee was in the business of leasing of aircraft parts/equipments for fixed monthly charges and the agreements:

- did not entitle or give an option to the lessee to own the asset at the end of the lease period;
- did not transfer effective ownership of the asset and all the risks and rewards to the customers;
- did not show that they covered more than 75% of the estimated economic life of the asset;

Accordingly, it held that the services of the assessee would not be liable for service tax as "financial leasing including equipment leasing or hire purchase" under the category of "Banking & Financial Services".

CST v. Lufthansa Technik Service P. Ltd. (2013) 31 STR 730 (Tri.-Del.)

Chit Fund Services

11 'Chit funds' are in the nature of cash management services which were brought within the ambit of service tax under the category of banking and other financial services w.e.f. 1-6-2007 in view of the deletion of the exclusion of cash management services from the fund management services which were included within the definition of banking and other financial services.

All Kerala Association of Chit Funds v. UOI (2013) 29 STR 557 (Ker.)

Cargo Handling services

12 The Hon'ble Tribunal observed that M/s. Airport Authority of India ("AAI") the

main contractor, had paid service tax on cargo handling services provided to various airlines. Accordingly, it exonerated the assessee who was a sub-contractor of AAI from payment of tax, interest & penalties.

Jac Air Services Pvt. Ltd. v. CST (2013) 31 STR 155 (Tri.-Del.)

13 The Hon'ble Tribunal held that the activity of moving coal from various quarries to the railway siding (within the mining area) using payloaders would not be liable for service tax under the category of "Cargo Handling Service" since for classifying an activity as Cargo Handling Service it must be proved that it is a service adjunct to the actual transportation of goods i.e. services just before transportation of goods or post transportation services when cargo has been discharged. The movement of goods within a mine from one place to another is not such a service.

Anupama Coal Carriers Pvt. Ltd. v. CCE (2013) 32 STR 41 (Tri.-Del.)

14 The Hon'ble Tribunal held that loading, unloading and handling of coal into tipper trucks and transportation from coal face surface to coal stock yard, was liable to service tax under Cargo Handling Service.

CCE v. Gayatri Carriers Pvt. Ltd. (2013) 32 STR 367 (Tri.-Del.)

15 The assessee entered into an agreement to provide services as a contractor for hiring of machines, equipments, crushing & screening plant and other services for production of low silicon limestone gitties. The Hon'ble Tribunal referring to the definitions of "Cargo Handling Services" and "Business Auxiliary Services" and discussing the rules for clarification laid down in section 65A, concluded that the essential characteristic of the composite service was not Cargo Handling Service. Allowing the appeal, it held that the activity of transportation/loading and unloading was only incidental to the actual activity of processing of goods which formed the essential character and that such activity became taxable only after the amendment in the definition of "Business Auxiliary Services" with effect from 16-6-2005.

M/s. Ujjawal Parivahan Sahakari Samiti Ltd. v. CCE [2013-TIOL-1504-CESTAT-DEL]

Commercial Training and Coaching

16 The Hon'ble Tribunal held that the taxable service of "Commercial training or coaching service" occurs when any institute or establishment is engaged in the activity of imparting skill, knowledge or lessons on any subject or field (excluding sports) irrespective of whether such imparting of skill, knowledge or lessons is in respect of particular discipline or a broad spectrum of discipline/academic areas; irrespective of the nomenclature or description of the institute or establishment, as a coaching or training centre or an educational institution; regardless of whether an institute or establishment is incorporated by a or registered under any law; and irrespective of distinctions on the basis of curriculum, course content, teaching methodology, course duration or otherwise. Activities of imparting skills, knowledge, lessons on any subject or field or when provided by any entity, institution or establishment which is excluded by a specific and legislated exclusionary clause would alone be outside the fold of the taxable activity.

Great Lake Institute of Management Ltd. v. CST (2013) 32 STR 305 (Tri.-LB)

17 The assessee claimed benefit of Exemption Notification No. 12/2003-ST for value of course material supplied to students. The Revenue relying on CBEC Circular No. 59/8/2003-ST dated 20-6-2003 providing for inapplicability of Exemption Notification where goods and materials sold as part of service which material does not answer description of priced standard textbook denied benefit of exemption. The Hon'ble Tribunal held that documentary evidence indicating separate value of course material, therefore entitlement to exemption was

undisputed. The clarification relied upon by the Revenue was misconceived, clearly illegal and contrary to Exemption Notification.

Cerebral Learning Solutions Pvt. Ltd. v. CCE (2013) 32 STR 379 (Tri.-Del.)

18 The assessee constructed a hostel for boys and girls, who were getting education from one of the educational institutions. Demand was confirmed as no evidence was produced to that effect. The Hon'ble Tribunal held that since the building was constructed as hostel for the residence of students studying in medical institute and there being no allegation that, the building was being used for any other purpose and in view of CBEC Circular No. 80/10/2004-ST dated 10-9-2004, assessee was not liable to service tax.

Anand Construction Co. v. CCE (2013) 32 STR 451 (Tri.-Mumbai)

Consulting Engineer Services

19 The assessee was providing technical consultancy services to government bodies in respect of their water projects. As per the contract the services were divided into various stages and each stage was an independent stage and could be terminated independent of the other and the fee was based on the stage completed. The Hon'ble Tribunal held that only services that are technical would fall within the ambit of consulting engineering services and services that are non-technical would not fall under the category of consulting engineering services.

Vashushilpi Projects & Consultants (P) Ltd. v. CCE (2013) 31 STR 712 (Tri.-Del.)

Construction of Residential Complex Services

20 The assessee was engaged in construction of residential complexes on its own land and had entered into agreement for sale of residential units with the customers and also took advances from them but had not paid service tax thereon. The Hon'ble Tribunal relying on the Guwahati High Court decision in *Magus Construction Pvt. Ltd. v. Union of India (2008) 11 STR 225 (Gau.)* held that no service tax was payable by the assessee.

CCE v. Vee Aar Developers Pvt. Ltd. (2013) 30 STR 564 (Tri.-Del.)

21 The Hon'ble Tribunal held that construction activity on own plot of land and sale thereof to prospective buyers is not taxable as there is no service provided.

CCE v. Bee Gee Construction Co. (2013) 31 STR 86 (Tri.-Del.)

22 Under a development agreement with a society, the assessee was 'entitled' to construct a residential building on the society's land using its own finances and thereafter sell the units in the constructed building to the members of the society by executing a sale deed after receiving all payments and completion of construction. The Hon'ble High Court held that the developer was not a contractor who was executing the construction work on behalf of the society but was selling flats and the construction of residential complex till the execution of such sale deed, would be in the nature of "self-service" and consequently would not attract service tax.

CST v. Sujal Developers (2013) 31 STR 523 (Guj.)

Erection, Commissioning and Installation Service

23 The assessee was engaged in job of laying the coated pipes on behalf of their customers for Government of Gujarat for GWRDC and NWRSDSK projects. The Hon'ble Tribunal held that as per paras 13.2 and 13.4 of Board's Circular No. 80/10/2004-ST dated 17-9-2004 and decision in Larsen & Toubro Ltd. 2011 (22) STR 459 (Tri.) service tax was leviable on construction done for commerce or primarily commerce and in the instant case, the supply of water was for the needy citizens of State and therefore, the activity was not chargeable to Service Tax.

CCE v. PSL Ltd. (2013) 31 STR 570 (Tri.-Ahmd.)

Franchisee Services

24 The Hon'ble Tribunal noted that the assessee, (jewellery company) granted a licence to various retail shops (franchises) to sell jewellery of its brand/trademark, and the licence to use was not exclusive (i.e., to the exclusion of the assessee who retained the right to licence others also). It thus held that the consideration/ royalty for transfer of right to use the trademark was not liable for sales tax as a deemed sale under Article 366(29A)(d), but was a service liable for service tax under the category of "franchise services".

Malabar Gold Pvt. Ltd. v. CTO (2013) 32 STR 3 (Ker.)

25 The assessee imported technology from a Chinese company for production of cotton in the form of mother seeds containing "Fusion BT" genes, multiplied the same and gave it to its customers with a sub-licence for further multiplication of the seeds and onward sale of seeds to farmers in consideration for a royalty. The sub-licencees sold the seeds in packages containing the mark "Fusion BT". The Revenue contended that the assessee was liable for service tax on the royalty received from the sub-licencees under the category of "franchise services" since they granted the sub-licencees a representational right to sell their products. On appeal, the Hon'ble Tribunal observed that:

- The assessee did not receive any representational right from the Chinese company and did not grant any such right to the sub-licencees;
- The mark "Fusion BT" only denoted technology and did not identify the product with the assessee. Thus, the royalty would not be liable for service tax under the category of "franchise services".

Global Transgene Ltd. v. CST (2013) 32 STR 86 (Tri.-Mum.)

Goods Transport Operator Services

26 TISCO paid service tax on Goods Transport Operator services availed by it as payer of freight but the Supreme Court subsequently in the case of *Laghu Udyog Bharti v. UOI (2006) 2 STR 276 (SC)* held the levy of service tax on the recipient of Goods Transport Operator services as unconstitutional and ordered refund of the service tax paid to such service recipients. However, the assessee, applied and received refund of service tax paid by TISCO as its agents. Thereafter, the Finance Act, 2000 nullified the ruling of the Supreme Court and pursuant to such validation the department demanded service tax from the assessee. The assessee argued that it is not the person liable to pay the tax and hence tax cannot be demanded from it. On appeal, the Hon'ble High Court observed that since the amounts were returned to the assessee in its capacity as an agent of TISCO (person liable to pay) the refunds could also be demanded from it. Further, it also held that in view of the specific provision of section 117 of the Finance Act, 2000 the assessee was liable to pay interest @ 24% from the expiry of 30 days from the date of enactment of the Finance Act, 2000.

OTS Ltd. v. CCE (2013) 30 STR 577 (Jhar.)

Manpower Supply and Security Service

27 The Hon'ble Tribunal in this case held that reimbursement of expenses in case of manpower and security services are to be included in Assessable value as such expenses are inseparable and integrally connected with performance of taxable service. It further held that mere filing of balance sheet and returns does not amount to disclosure of facts.

CCE v. International Logistics (2013) 31 STR 563 (Tri.-Del.)

28 The Revenue sought to tax supply of manpower for running and maintenance of crushing plant, loading crushed stones in various sizes as required by clients under agreement of

supply of manpower as per rate contract under Manpower supply service. The Hon'ble Tribunal after following decision in Divya Enterprises 2010 (19) STR 370 (Tri.), held that lump sum work given to assessee was not covered under supply of manpower service category.

Seven Hills Construction v. CST (2013) 31 STR 611 (Tri.-Mumbai)

Management and Consultancy Service

29 The assessee's Managing Director employed in same capacity on part time basis with other company paid salary through the assessee. The assessee credited the salary to MD's account without retaining any part thereof. The Hon'ble Tribunal held that if advisory activity has been undertaken by MD, then service tax demand was to be made on MD and not on assessee. There was no evidence showing MD rendering consultancy/advisory services, hence the assessee was not liable to pay service tax.

Bosch Chassis Systems India Ltd. v. CCE (2013) 32 STR 301 (Tri.-Mumbai)

Management, Maintenance or Repair Service

30 The Hon'ble Tribunal held that the definition of 'maintenance and repair' during the period of dispute i.e. July to December, 2003 covered only those activities that were carried under a maintenance contract or agreement or where the assessee was a manufacturer of the goods or a person authorised by such manufacturer. Since the assessee had not entered into any maintenance contract or agreement with its client nor was he a manufacturer or a person authorised by him, their activity was not taxable under the category of "maintenance and repair services".

Jain & Co. v. CCE (2013) 31 STR 85 (Tri.-Del.)

31 The assessee had agreement with HLL for providing cold storage of goods for storing and forwarding frozen products and they had to maintain specific temperature for storage before dispatch. In these circumstances, the Hon'ble Tribunal held that storage of goods in cold storage was indispensable part of Clearing & Forwarding Agent Service and therefore charges thereof had to be added in taxable value of C&F Agent service. Further, the fact of non-payment of duty on cold storage was known to department in 2002, hence extended period of limitation was not invocable.

Monsanto Manufacturers Pvt. Ltd. v. CCE (2013) 32 STR 364 (Tri.-Del.)

Mandap Keeper Services

32 The assessee collected donation while booking halls for social functions. The Revenue included the same in the gross amount received for providing 'Mandap Keeper Services'. The Hon'ble Tribunal held that since a donation was compulsory for the booking of the hall for social functions, it would be considered as part of the gross consideration received for providing 'Mandap Keeper Services' and therefore, liable to service tax.

CCE v. Shri Kutch Kadva Patidar Samaj, Nashik and Others [2013-TIOL-1706-CESTAT-Mum]

Broadcasting Services

33 The Hon'ble Tribunal held that acquisition of channel distribution and ad-sale rights did not amount to import of broadcasting services and were therefore not liable to service tax in light of the following:

- grant of distribution rights was not akin to permitting the right to receive communication signals in any form by transmission through electromagnetic waves
- the transaction would not be liable to service tax under the taxable category of 'Broadcasting Services' under reverse charge mechanism since Indian agent / subsidiary did not receive telecast signals from the foreign entity

- communication signals were received directly by MSO/DTH providers, etc. and not by the Indian agent/subsidiary.

Further, the Tribunal observed that cartoon characters, shown as trademark of cartoon network were covered under the definition of artistic work as defined under section 2(c) of the Copyright Act, 1957, under clause (i) as drawing, engraving or a photograph. Hence, they were excluded from the definition of IPR service and accordingly, not taxable. Also no service tax was payable on expenses reimbursed during the course of marketing TV channels i.e., cartoon network and POGO channel, etc. in terms of Delhi High Court ruling in Intercontinental Consultants and Technocrats Pvt. Ltd. [2012-TIOL-966-HC-Del-ST].

ESPN Software India (P) Ltd. v. CST, New Delhi and *Turner International India Pvt. Ltd. v. CST, New Delhi [Final order Nos. 58020-58022/2013]*

Security Agency Services

34 The Hon'ble Tribunal held that prior to 18-4-2006, only security services provided by commercial concern was liable for service tax. Thus, security services provided by co-operative society for welfare of ex-servicemen, being held to be a non-commercial concern, was not liable for service tax.

Rajputana Ex-Servicemen Co-op. Society v. CCE (2013) 31 STR 248 (Tri.-Del.)

Sponsorship Service

35 The assessee sponsored GMR owned cricket team 'Delhi Daredevils' and claimed immunity from service tax as sponsorship of sports events not liable to service tax. The Revenue sought to demand tax on the same. The Hon'ble Tribunal held that several rights accruing under sponsorship agreement clearly indicates sponsorship of team in relation to participation in IPL T-20 Cricket Tournament. The agreement was for sponsorship of T-20 sport event and not owner of Delhi Daredevils or BCCI-IPL and therefore squarely falls within exclusionary clause and the assessee was immune to service tax charge. It further held that it was settled principle of statutory construction that, phrase 'in relation to' was indicative of expansive intention.

Hero Motocorp Limited v. CST (2013) 32 STR 371 (Tri.-Del.)

Technical Testing and Analysis

36 The Revenue demanded service tax from the assessee in respect of testing and analysis of computer software services provided by the assessee for the period prior to 16-5-2008. The Hon'ble Tribunal referring to the definition of "Technical Testing and Analysis" prior to 16-5-2008 and as amended with effect from 16-5-2008, the budget instructions letter 334/1/2008 - TRU dated 29-2-2008 and relying on the decision of Relq Software Pvt. Ltd. (2011) 23 STR 449 (Kar.) held that testing and analysis of IT software would be effective only from 16-5-2008 when the said activity was specifically included under technical testing and analysis service as IT software services were introduced on the said date.

CCE v. Aztecsoft Ltd. [2013-TIOL-1541-CESTAT-Mum.]

Transmission and distribution of electricity

37 The Hon'ble Tribunal held that the activity of erection, commissioning and installation of meters and also technical testing and analysis is a service related to the transmission and distribution of electricity and hence exempt from service tax under Notification No. 45/2010-ST.

Purvanchal Vidyut Vitran Nigam Ltd. v. CCE (2013) 30 STR 259 (Tri.-Del.)

Outdoor Caterer's Service

38 The Hon'ble High Court held that an outdoor catering service consists of two components – (i) sale of food articles which is liable for sales tax leviable by the State

legislature; and (ii) the service of bringing the food articles to the place designated by the client (including the cost of transporting food articles) which alone would be liable for service tax.

CST v. The Grand Ashok (2013) 31 STR 528 (Kar.)

Works Contract Service

39 The Hon'ble Tribunal, referred the matter to Larger Bench on following issue in view of conflicting decisions; "Whether composite contracts involving transfer of property in goods and services of execution of works contract which become taxable only from 1-6-2007 under Works Contract Service or whether for period prior to 1-6-2007 such contract could be vivisected and service components subjected to tax under pre-existing taxable services such as Commercial or Industrial Construction service, Erection, Installation or Commissioning service or Construction of Residential Complex service?"

Larsen & Toubro Ltd. v. CST (2013) 32 STR 410 (Tri.-Del.)

B] Valuation

40 In the instant case, the issue was whether the materials supplied free of cost (free supplies) by the service recipient to the construction service provider should be considered as part of taxable value, to be eligible to claim the benefit of Notification No. 18/2005-ST ('abatement notification', in terms of which Service tax was payable on 33 per cent of contract value). The Hon'ble Tribunal held that the following essential elements should be present to include the value of the goods and materials supplied/ provided/used by the service provider for determining the taxable value of a service:

- The goods should belong to the service provider;
- The service provider should have been charged towards the value of such goods; and
- The service provider should have accrued some benefit/profit by use of the goods.

Thus, in the absence of the above elements in the given case, the free supplies would not be includible in the gross amount charged within the meaning of section 67 of the Finance Act, 1994 and therefore, were not liable to Service Tax.

Bhayana Builders (P) Ltd. v. CST [AIT-2013-155-CESTAT]

41 The Hon'ble Tribunal held that as the assessee had not collected service tax from recipient of services, entire consideration received was to be treated as cum-tax.

Professional Couriers v. CST (2013) 32 STR 348 (Tri.-Mumbai)

42 The assessee, a trading house held articles manufactured by other companies, whose price list specified that, prices were exclusive of installation charges and they have raised invoices by specifying that prices of goods were ex-showroom and transfer of title in goods happened at place of seller. The Hon'ble High Court held that the sale price of goods at ex-showroom price attracted sales tax and subsequent to transfer of title of goods at place of seller, the assessee had acted as agent of customer for transportation and installation of goods and charges for same did not become part of sale of goods. When transfer of title in goods is a place of buyer, then all charges incidental thereto like transport and installation and other expenditures incurred by seller would become part of amount for which goods are sold by seller to buyer. However, if transfer of title of goods is to be at place of seller then such charges do not form part of amount for which goods are sold. If the sale agreement specifies all obligations on the part of seller to transport goods as incidental to sale, then it becomes part of amount for which goods are sold.

Prakash Retail P. Ltd. v. DCCT (2013) 32 STR 388 (Kar.)

C] CENVAT

43 The Hon'ble Tribunal held that where there was no dispute as regards the receipt of services and payment of service tax thereon, CENVAT credit cannot be denied on the ground that invoices were not in accordance with Rule 9 of CENVAT Credit Rules, 2004 read with Rule 4A of Service Tax Rules, 1994 as it stood during the period under consideration i.e. prior to 1-3-2007.

Electrotherm (India) Ltd. v. CCE (2013) 31 STR 43 (Tri.-Ahmd.)

44 A company 'A' which was a job-worker for company 'B', a manufacturer, was issued a Show Cause Notice for confirming a demand on services provided by A to B invoking the extended period of limitation. During the course of proceedings A paid the service tax and B claimed credit. The Revenue sought to deny credit to B invoking the extended period of limitation. The Hon'ble Tribunal held that since during the relevant period such provision for denying credit was prevalent only for excise duty and not made applicable to service tax, B could entertain a *bona fide* belief that it was entitled to CENVAT Credit and hence the demand against B was barred by limitation.

Electrotherm (India) Ltd. v. CCE (2013) 31 STR 43 (Tri.-Ahmd.)

45 The assessee, a manufacturer of cast iron pipes, at the behest of the buyer, arranged for inspection of the goods manufactured by him and recovered the cost of inspection separately from the buyer and did not include the said charges in the assessable value of the goods. The Hon'ble Tribunal held that CENVAT credit on the said inspection charges cannot be claimed.

Kapilansh Dhatu Udyog Pvt. Ltd. v. CCE (2013) 31 STR 50 (Tri.-Mum.)

46 The Hon'ble Tribunal held that the CENVAT credit on royalty charges paid to owner of the brand name for manufacturing and clearing plywood bearing such brand name was admissible.

Century Plyboards (I) Ltd. v. CCE (2013) 31 STR 58 (Tri.- Kolkata)

47 The Hon'ble Tribunal held that the CENVAT credit on banking services availed by the assessee based on debit advices issued by the bank containing all the particulars required under Rule 4A of the Service Tax Rules, 1994 was admissible and cannot be denied on the ground that debit advices were not issued by the bank within the time limit prescribed under Rule 4A.

MPI Machines Ltd. v. CCE (2013) 31 STR 103 (Tri.-Del.)

48 The Hon'ble Tribunal held that prior to 19-4-2006, payment of service tax in respect of goods transport agency services received by utilising CENVAT credit was permissible in view of the explanation to Rule 2(p) of the CENVAT Credit Rules, 2004 which defined output services.

G. R. Corporation v. CCE (2013)31 STR 204 (Tri.-Del.)

49 The assessee was engaged in production of crude oil at the oilfield of Mumbai offshore on which they paid cess under Oil Industry (Development) Act, 1974 and then transported the same to their Uran plant through a pipeline and used it to manufacture dutiable final products. It had availed CENVAT credit on input services used for manufacture of crude oil to set-off the excise duty payable on products manufactured at the Uran plant. Revenue denied credit on the ground that input services were used in manufacture of "exempted goods". On appeal, the Tribunal upheld the Revenue's contention and held that:

- Crude oil manufactured at Mumbai offshore is an "exempted product" and the fact that they are paying cess leviable under Oil Industry (Development) Act, 1974, was not relevant since the

words "duty of excise" referred to in the definition of "exempted goods" and "excisable goods" refers to only duty of excise as specified in section 3 of the Central Excise Act, 1944.

- The Mumbai offshore unit was not an integral part of Uran plant and the crude oil cannot be said to be an intermediate product so as to allow CENVAT credit of input services used in an exempt intermediate product which in turn was used for manufacture of dutiable final product since the crude oil manufactured at Mumbai offshore unit was a separate saleable commodity and in fact was partly being sold by the appellant at Mumbai offshore.

Oil & Natural Gas Corporation Ltd. v. CCE (2013) 31 STR 214 (Tri.-Mum.)

50 The assessee, extracted oil with associated gases from oil wells and transferred it to offshore "well platforms" (connected to the oil wells through pipelines) and then to offshore "process platforms" (connected to well platforms) for processing. The crude (oil and gas) at this point which was in a semi-stabilised condition was an exempted product which was partly sold to other refineries and partly transferred to its onshore plant (connected to process platforms) to obtain downstream excisable products. The assessee availed CENVAT credit of input services received in its offshore locations (well heads, well platforms, process platforms, etc.) which was denied by the Revenue on the ground that the input services were exclusively used for manufacture of exempt products viz., crude oil and gas in a semi-stabilised condition. On appeal, the Hon'ble High Court relying on *Escorts Ltd. v. CCE (2004) 171 ELT 145* and *CCE v. Solaris Chemtech Ltd. (2007) 214 ELT 481 (SC)* held that:

- Manufacture of dutiable products at the onshore plant was fundamentally premised on the manufacturing process that commenced at the offshore plants;
- The input services used at the off–shore plants was used by the assessee manufacturer "directly or indirectly in or in relation to" manufacture of dutiable products at its onshore plant. Accordingly, the CENVAT credit on input services was allowed but subject to the qualification that it would be required to comply with the discipline and rigour of Rule 6 and would be entitled to take CENVAT Credit only on the quantity of input service which was used in the manufacture of the ultimate dutiable product.

ONGC v. CST (2013) 32 STR 31 (Bom.)

51 Where the assessee had proposed to enter into manufacturing of herbal products, for which they had availed R&D services but due to business exigencies had to abandon the venture it was held that since the definition of "input services" and "final products", both require the "use" of input services to manufacture of final products, the credit of service tax paid on R&D services which did not materialise into manufacture of excisable products would not be available. Further, interest under section 75 would also be payable for wrong availment of CENVAT credit in view of the judgment of the Supreme Court in Ind-Swift Laboratories Ltd. (2011) 265 ELT 3(SC). However, penalty under Rule 15 could not be imposed.

Lyka Labs Ltd. v. CCE, Surat (2013) 32 STR 79

52 The Hon'ble Tribunal held that credit on services of the Mandap Keeper availed to celebrate the 'Annual Day' function of the company which was attended by the employees and their families was an integral part of the business activity and hence admissible.

Endurance Technologies Pvt. Ltd. v. CCE (2013) 32 STR 95 (Tri.-Mum.)

53 The Hon'ble Tribunal held that where the air travel was undertaken by the employees in connection with the business of assessee,

CENVAT credit on air travel agents services was admissible.

Goodluck Steel Tubes Ltd. v. CCE (2013) 32 STR 123 (Tri.-Del.)

54 The Hon'ble Tribunal held that CENVAT credit can be utilised for payment of Service Tax under reverse charge basis under section 66A of the Act.

Kansara Modler Ltd. v. CCE (2013) 32 STR 209 (Tri.-Del.)

55 The Hon'ble Tribunal held that outdoor catering services availed for providing lunch/dinner to customers was a part of business promotion for increasing the sale of manufactured goods. It was an activity relatable to manufacture of goods and hence CENVAT credit thereon was admissible.

Heubach Colour Pvt. Ltd. v. CCE (2013) 32 STR 225 (Tri.-Ahmd.)

56 The Hon'ble Tribunal held that the CENVAT credit of insurance services availed for insurance of plant, machinery and inventories being an activity in relation to manufacture was admissible.

Grasim Industries Ltd. v. CCE (2013) 32 STR 256 (Tri-Del)

57 The assessee claimed CENVAT credit of service tax paid on services such as sales promotion, handling, storage, assembly, logistics, quality services, repacking, warehousing, delivery, etc. provided by agent located outside India. However, the Revenue sought to deny the credit. The Hon'ble Tribunal held that there was no reason to distinguish the services of Commission Agent falling within the ambit of Business Auxiliary Services on different footing as compared to other services falling within the scope of same taxing category for the purpose of allowing CENVAT credit.

CCE & ST (LTU) v. Turbo Energy Ltd. (2013) 31 STR 573 (Tri.-Chennai)

58 The Hon'ble Tribunal allowed CENVAT credit of service tax paid on:

- Transportation of employees from residence to factory and back.
- Hiring of ambulance for treatment of employees in case of accident is required to be kept as per the provisions of the Factories Act.
- Transportation of employee's children from the residential colonies to schools as the factory is located at a remote place, and providing a residential colony for staff is essential and providing of transportation for school children is more essential.

Hindustan Zinc Ltd. v. CCE (2013) 31 STR 575 (Tri.-Del.)

59 The Hon'ble Tribunal after relying on CBEC Circular No. 97/8/2007 dated 23-8-2007 allowed CENVAT credit of service tax paid on Goods Transport Agency services for outward transportation of goods beyond place of removal as the freight was part of the price on which duty has been discharged.

CCE v. Jamuna Auto Industries Ltd. (2013) 31 STR 587 (Tri.-Del.)

60 The Hon'ble Tribunal allowed CENVAT credit of service tax paid on Travel Agent services availed at Head Office by the Company's officers and services of maintenance of Head office.

Jindal Pipes Ltd. v. CCE (2013) 31 STR 588 (Tri.-Del.)

61 The Hon'ble Tribunal allowed CENVAT credit of service tax paid on insurance premium for protection of plant & machinery from risks and hazards as the same though does not contribute to manufacture directly but manufacture was made with such facility having indirect nexus.

Federal Mogul Goetze (India) Ltd. v. CCE (2013) 31 STR 628 (Tri.-Del.)

62 The assessee claimed CENVAT credit of service tax paid on stock brokers service used for disposal of shares held by assessee in another company. The Hon'ble Tribunal held that integral connection between sale of shares and any of the assessee business activities has not been established and affidavit of Director does not bring out clear picture and therefore credit was inadmissible

United Telecom Ltd. v. CCE (2013) 31 STR 636 (Tri-Bang.)

63 The Hon'ble Tribunal allowed CENVAT credit of service tax paid on Clearing house agent, erection and commissioning, inward freight, courier service, credit card service, real estate agent and repair and maintenance service since the same were utilised in relation to business and hence admissible as input service. It further held that CENVAT credit of catering service would be eligible for CENVAT credit only if the assessee was not charging to the employees.

Delta Energy Systems Ltd. v. CCE (2013) 31 STR 684 (Tri-Del.)

64 The Hon'ble Tribunal allowed CENVAT credit of service tax paid on accident insurance policy for workers as insurance for workers even contract workers was required by law and insurance service has to be treated as service in or in relation to manufacture of finished products

J. K. Cement v. CCE (2013) 31 STR 687 (Tri.-Del.)

65 The assessee claimed service tax paid on security services availed by assessee for guarding the inputs which had been sent to the premises of job-worker where the goods were converted into an intermediate product and sent back to the factory of the assessee. The Hon'ble Tribunal held that the definition of input service nowhere specifies that the services have to be received and utilised within the factory and therefore there was no reason to deny CENVAT credit on said security services. It further held that service tax paid on security services availed at the guest house maintained by the assessee near factory was not admissible as the said guest house was used for business process as well as for satisfaction of personal needs.

MRF Ltd. v. CCE&ST (LTU) (2013) 31 STR 689 (Tri.-Chennai)

66 The Hon'ble High Court held that the expression used whether directly or indirectly in the definition of input service has wide import. Service need not be a service which is directly used in manufacture of final product. Use which is indirect and in or in relation to manufacture of final product is sufficient. Further, the expression in or in relation to has widened scope and purview of entitlement. The expression directly or indirectly and in or in relation to the manufacture of final products used in conjunction is indicative of comprehensive sweep and ambit of Rule 2 (l) of CENVAT Credit Rules, 2004.

Oil & Natural Gas Corpn. Ltd. v. CCE (2013) 32 STR 31 (Bom.)

67 The Hon'ble High Court held as under:

- Maintenance of residential colony of employees by the assessee is input service since if accommodation was not provided by the assessee to its employees at remote location, then it would not be feasible for it to carry on its manufacturing activity. The staff colony provided by the assessee was directly and intrinsically linked to its manufacturing activity.
- Plantation activity undertaken by the assessee for ensuring steady supply of raw material (wood) could not be excluded from the definition of input service.

CC&CE v. ITC Limited (2013) 32 STR 288 (AP)

68 The assessee availed CENVAT credit in the month of March, 2005 on the basis of invoices issued by Head Office as Input Service Distributor which was not registered. The

Hon'ble Tribunal held that the legal requirement for getting Head Office registered as ISD came into force in June, 2005, whereas the assessee availed credit in March, 2005. Hence the Revenue's objection was unsustainable. Further, the fact of availing credit has been disclosed in periodical returns filed with the Department and thus the extended period of limitation was not invocable.

CCE v. Plastichemix Industries (2013) 32 STR 383 (Tri.-Ahmd.)

69 The Hon'ble Tribunal allowed CENVAT credit of service tax paid on courier service since same was used for sending documents to head office and customers and therefore definitely relatable to manufacture.

Hindalco Industries Ltd. v. CCE (2013) 32 STR 433 (Tri.-Ahmd.)

70 The Hon'ble Tribunal allowed CENVAT credit of service tax paid on management consultant service used for merger of firms.

Cable Corporation of India Ltd. v. CCE (2013) 32 STR 434 (Tri.-Mumbai)

71 The Hon'ble Tribunal allowed CENVAT credit of Rent-a-cab service utilised to bring workers or executives to factory by observing that, if there is no management by corporate office, a manufacturing organisation cannot survive, finance cannot be procured, raw materials cannot be purchased, and manufactured goods cannot be sold and so on. Further, in the matter of extending CENVAT credit to Rent-a-cab service, contract bus service and telephone service, no distinction can be made between the factory and corporate office going by the provisions of CENVAT Credit Rules, 2004. Also where the expenditure was incurred by the company in books of account there is presumption in favour of assessee that service was availed in relation to their business.

Thiru Arroran Sugars Ltd. v. CCE (2013) 32 STR 435 (Tri-Chennai)

72 In the present case, the Tribunal allowed CENVAT credit of service tax paid on hiring of JCB/cranes used for uprooting trees for use and get charcoal required in manufacture of calcium carbide.

DCM Shriram Consolidated Ltd. v. CCE (2013) 32 STR 440 (Tri.-Del.)

73 The Hon'ble Tribunal allowed CENVAT credit of service tax paid on mobiles/telephones installed at the residence of Director or Senior employees as the same were having nexus with the manufacturing of company.

Golden Tobacco Ltd. v. CCE (2013) 32 STR 474 (Tri.-Mumbai)

74 The Hon'ble Tribunal observed that the RBI guidelines displayed at the branch disclose phone number to which customers can make call proving that the telephones were used for providing output service and therefore CENVAT credit was admissible thereon.

Bank of Rajasthan Ltd. v. CCE (2013) 32 STR 475 (Tri.-Del.)

75 The Hon'ble Tribunal held that the expression "activities relating to business" requires integral connection between activity / service and business of manufacturing of final product. Mere relation with business is not sufficient. The Bombay High Court decision in Coca Cola India Pvt. Ltd. 2009 (15) STR 657 (Bom.) did not analyse scope of this expression, whereas later decision in Ultratech Cement Ltd. 2010 (20) STR 577 (Bom.) did analyse the same and also clarified Coca Cola decision, and hence was required to be followed as precedent.

Telco Construction Equipment Co. Ltd. v. CCE&C (2013) 32 STR 482 (Tri.-Bang.)

76 The assessee adopted EPC model, for laying of oil and gas transmission pipelines and for this purpose they granted several turnkey contracts to various EPC contractors involving fabrication, assembly with equipments and devices, installation and commissioning of

pipeline system for the movement of oil and gas. They claimed CENVAT credit of duty paid on pipe supplied free of cost to contractors. The Hon'ble Tribunal held that the assessee had not used pipes for providing any output service but have supplied them for construction of pipeline to EPC contractors. Being a free supply material, if its value was not included in pipeline system by output service provider, question of availment of credit also could not arise. Thus, the assessee was not eligible for taking credit on pipes either as capital goods or inputs or input service.

Gujarat State Petronet Ltd. v. CC&CE (2013) 32 STR 510 (Tri.- Ahmd.)

77 The Hon'ble Tribunal held that no time limit has been prescribed for taking credit either in CENVAT Credit Ruled, 2004 or Central Excise Act, 1944, therefore the lower authority's observation that, credit to be taken within one year was incorrect and unacceptable.

Central Bank of India v. CCE&ST (2013) 32 STR 525 (Tri.-Chennai)

D] Penalty

78 The Hon'ble Tribunal held that the quantum of penalty to be imposed would be as per the provisions prevailing at the time of occurrence of offence and not at the rates prevailing on the date of review of order by the Commissioner in his review proceedings.

BNP Paribas Equities India P. Ltd. v. CST (2013) 31 STR 22 (Tri.-Mum.)

79 The Hon'ble Tribunal held that prior to 27-2-2010 imposition of penalty under Rule 15(1) and Rule 15(2) of the CENVAT Credit Rules, 2004 for wrong availment of CENVAT credit on input services was not admissible since said rules did not cover wrong availment of input service credit.

Oil & Natural Gas Corporation Ltd. v. CCE (2013) 31 STR 214 (Tri.-Mum.)

80 The Revenue rejected the refund claim as supporting documents submitted after considerable delay as due to delay in issue of certificate by Port Trust Authorities. The Hon'ble Tribunal held that the assessee ought not to be penalised and export benefit ought not to be refused for no fault of theirs. Refund claim filed within the stipulated time though relevant documents submitted later was to be treated filed within time and refund was to be allowed.

Hari & Co. v. CCE(ST) (2013) 31 STR 681 (Tri.-Chennai)

81 The assessee relied upon Punjab and Haryana High Court decision in First Flight Courier Ltd. 2011 (22) STR 622 (P&H) to set aside penalty under section 76, whereas Revenue relied upon Kerala High Court decision in Krishna Poduval 2006 (1) STR 185 (Ker). The Hon'ble Tribunal held that Delhi Benches were covered under P&H High Court jurisdiction and therefore are bound by declaration of law by High Court. Further, the P&H High Court decision is in later point of time and both decisions have been discussed in [Mittal Technopack Pvt. Ltd. 2012-TIOL-1507-CESTAT-Kol] and therefore, order imposing penalty was set aside.

Surya Consultants v. CCE (2013) 32 STR 217 (Tri. -Del.)

82 The Revenue contended that, Section 73(3) providing for waiver of penalty was not applicable to habitual offenders. The Hon'ble Tribunal held that Section 73(3) does not differentiate between habitual and non-habitual defaulters, therefore, the Revenue's contention was liable to be rejected.

CC, CE&ST v. OTS Advertising Pvt. Ltd. (2013) 32 STR 303 (Tri.-Bang.)

E] Others

Appeal

83 The Hon'ble Tribunal held that where the assessee was paying excise duty as well as

service tax and availing CENVAT credit on input services, inputs and capital goods, an appeal relating to any dispute involving CENVAT credit must for administrative convenience be, treated as appeal filed under Central Excise.

Wadpack Pvt. Ltd. v. CCE (2013) 31 STR 24 (Tri.-Bang)

84 The Hon'ble Tribunal held that the dismissal of an appeal by the Tribunal for non-compliance of its stay order where an appeal by the assessee against the stay order was pending before the High Court was incorrect.

Saswad Mill Sugar Factory Ltd. v. CCE (2013) 32 STR 177 (Bom.)

85 The Revenue objected for common appeal against two orders sanctioning refund. The Hon'ble Tribunal observed that two separate numbers were given to two orders and common order not covering both refund claims hence there was no justification for filing common appeal.

CCE v. Asian Plastowares Pvt. Ltd. (2013) 31 STR 594 (Tri.-Ahmd.)

86 The Hon'ble Tribunal held that Commissioner was not empowered to condone delay of 14 months as section 85(3) of Finance Act, 1994 is very clear and provides specific time limit for filing appeal.

Prithvi Hotels (Gujarat) Pvt. Ltd. v. CST (2013) 31 STR 612 (Tri.-Ahmd.)

87 The assessee applied for condonation of delay in filing appeal before Commissioner on the ground that, appeal was filed before wrong forum by mistake. However, the lower authorities observed that there was no entry in the IC register of Service Tax Commissionerate of the receipt of appeal. The Hon'ble High Court held that once the period of limitation has run itself out, the Appellate Authority does not have power to condone the delay in filing the appeal beyond the maximum period prescribed under the Act.

Gopinath & Sharma v. CESTAT (2013) 32 STR 172 (Mad.)

88 The assessee applied for condonation of delay due to ill health of General Manager (Taxation) / Company Secretary on the basis of medical certificate of doctor attending dispensary in premises of the assessee as prescribed by law, diagnosing illness as Hepatitis and advising complete bed rest to him. The Hon'ble High Court held that such medical certificate cannot be rejected on the ground that, doctor who gave it was skin specialist. The CESTAT not being expert in examining medical certificate could not reject it.

Kone Elevator India Pvt. Ltd. v. Secretary, Ministry of Finance (2013) 32 STR 262 (Mad.)

Advance payment of service tax

89 The assessee paid service tax in December 2008 and reflected the same as advance payment of tax in the return for the period October 2008 to March 2009 without intimating the Range superintendent. On receiving the consideration in April 2009, the assessee adjusted the said advance and reflected the same in the return for the period April-September 2009. The Revenue contended that the said payment was not an advance payment but excess payment and thus the assessee could not adjust it *suo motu* in terms of Rule 6(4B) of Service Tax Rules, 1994 and demanded the tax thereon with interest and penalty. The Hon'ble Tribunal observed that the assessee had reflected the payment of advance payment of tax particulars in both the returns. Thus, it was evident that what the assessee made was advance payment of tax and not excess payment of tax. Since the liability to pay tax arose only in April 2009, the payment made prior to such date can be contemplated only as an advance and thus no service tax was liable to be paid.

Varun Shipping Co. Ltd. v. CST [2013-TIOL-1550-CESTAT-Mum]

Export Rebate

90 The Hon'ble High Court held that the rebate of excise duty due to the assessee cannot be adjusted against alleged service tax dues recoverable from him during the pendency of the stay applications before the Tribunal without giving him a reasonable opportunity of being heard.

Arunachala Gounder Textile Mills Pvt. Ltd. v. CCE (2013) 31 STR 6 (Mad.)

91 The Hon'ble Tribunal observed that the expenses incurred by the exporter on services were such that the export could not have been occasioned without them. Accordingly, it allowed the refund of service tax paid on such services even though the services were not mentioned in the registration certificate of the exporter since the legislative intention was not to permit export of taxes.

CCE v. Sigma Vibracoustic (India) Pvt. Ltd. (2013) 31 STR 207 (Tri.-Mum.)

Export

92 In case of in–bound roaming services, the assessee, a telecom company, entered into an agreement with foreign telecom service providers whereby the assessee agreed with them to provide services to their customers while they are in India. For this service, they charged the foreign telecom providers who paid them in convertible foreign exchange. The Hon'ble Tribunal held that:

- the service recipient was the "foreign telecom provider" since it was he who paid for the service rendered and who contracted to avail the service. The In-bound roamer located in India was not the service recipient. Hence the location of the service recipient was outside India.
- Applying circular No. 111/5/2009 – ST dated 24-2-2009 and the decision of the Larger Bench in Paul Merchant's case [(2013) 29 STR 257 (Tri.-LB)] such services would qualify as export of services.

Vodafone Essar Cellular Ltd. v. CCE (2013) 31 STR 738 (Tri.-Mumbai)

93 The assessee sought a ruling on whether the provision of marketing and related support services from India to foreign affiliates located outside India, with respect to goods to be supplied by foreign affiliate entities to its India based customers, would qualify as 'export' under the Service tax law. The Hon'ble Authority for Advance Rulings ruled that Rule 3 of the Place of Provision of Service Rules, 2012 would be relevant to the instant case which states that services would not be taxable if the service receiver was located outside India. Since the recipient of services in the present case (i.e., affiliate entities) was located outside India, the services would not be liable to Service tax.

Tandus Flooring India Private Limited v. CST [AIT-2013-146-AAR]

Exemption

94 Notification No. 41/2007-ST exempted by way of refund services used for export of goods provided the exporter claimed refund within 6 months from the date of export. The said notification was superseded by Notification No. 17/2009-ST dated 7-7-2009 provided for a period of 1 year to claim refund. The Hon'ble Tribunal mainly relying on Trade Notice No. 7/2010 dated 4-3-2010 held that the period of one year under Notification No. 17/2009 – ST would apply even to refund claims made in respect of services received prior to the coming into force of that notification even though they were made beyond 6 months from the date of export.

Sandoz Polymers Pvt. Ltd. v. CST (2013) 30 STR 527 (Tri.-Ahmd.)

95 The Hon'ble Tribunal held that where the exemption under Notification No. 41/2007-ST was available for the whole of Service Tax, the Education Cess also stands to be exempt.

CCE v. Kudremukh Iron Ore Company Ltd. (2013) 31 STR 633(Tri.- Bang.)

96 The Hon'ble Tribunal observed that since service tax was not payable under Notification No. 4, 2004-ST dated 31st March, 2004 but was paid by the assessee, they could claim the benefit of refund of service tax. However, there being no procedure to claim refund under the said Notification, the refund application ought to have been filed under section 118 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. The Hon'ble Tribunal held that refund claim was not filed within 1 year from the relevant date i.e., the date of payment of service tax and accordingly, part refund was held to be time barred. Since there were no provisions to refund service tax paid on services consumed outside SEZ, the Commissioner (Appeals) order upheld the rejection. Service recipient can claim refund of service tax only when incidence of service tax was not passed on. In the present case, there was no evidence to prove absence of unjust enrichment and thus refund was not available to the assessee. Though part period was covered by Notification No. 9/2009-ST dated 4th March, 2009, since the assessee had not filed refund claim under the said Notification No. 9/2009-ST and in absence of evidence on records of fulfilment of conditions prescribed under the notification, refund was not allowed.

Mahindra World City Ltd. v. CCE (2013) 32 STR 93 (Tri.-Del.)

Fee for late filing of return

97 The assessee registered with service tax department have not provided any service and also not filed ST-3 returns on time. The Revenue sought to levy fees for late filing of Nil returns. The Hon'ble Tribunal held that in view of the Circular dated 23-8-2007 and Rule 7C of Service Tax Rules, 1994 this was a fit case to invoke the proviso to Rule 7C and waive the late fees relating to the Nil returns filed.

Amrapali Barter Pvt. Ltd. v. CST (2013) 32 STR 456 (Tri.- Kolkata)

Limitation

98 The Hon'ble Tribunal held that where the issue involved was one of legal interpretations, the assessee cannot be held guilty of suppression or misstatement of facts and the extended period of limitation was not invokable.

CCE v. Bali Industries (2013) 31 STR 105 (Tri.-Chennai)

99 The Hon'ble Tribunal held that where the assessee had through its letter made known to the department about the nature of its contract with its customers and the manner of payment of service tax it has adopted, the extended period of limitation cannot be invoked.

Vashushilpi Projects & Consultants (P) Ltd. v. CCE (2013) 31 STR 712 (Tri.-Del.)

Recovery of Service Tax

100 The Revenue had during the course of a search collected a sum of ₹ 2 crores from the petitioner-company in respect of its service tax liability without assessing the petitioner in accordance with law. The Hon'ble High Court held that the collection of the amount by the department was incorrect, it being a well settled position in law that no tax could be collected from the assessee without an appropriate assessment order being passed by the authority concerned following the procedures established by law and accordingly directed the Revenue to return the amount collected to the petitioner.

Chitra Builders P. Ltd. v. CCE (2013) 31 STR 515 (Mad.)

Interest

101 The CENVAT Credit was taken by Unit–I of the assessee and utilised by Units – I & II and later was reversed by Unit – I pursuant to an audit conducted in Unit – I. The Hon'ble Tribunal held that credit should be considered as not taken at all and hence interest thereon was not payable.

Sharvathy Conductors Pvt. Ltd. v. CCE (2013) 31 STR 47 (Tri.-Bang.)

102 The assessee applied for refund of amount paid after stipulated period of one year under section 11B on the ground that, mere erroneous deposit of service tax not to be treated as tax and therefore Section 11B was not applicable. The Hon'ble Tribunal held that the Commissioner (A) has rejected refund following Hon'ble Supreme Court decision in Doaba Co-operative Sugar Mills 1988 (37) ELT 478 (SC) and powers of Central Excise Officers are confined within statute of Central Excise Act, therefore the rejection of refund was required to be upheld.

Elgi Equipment Ltd. v. CCE (2013) 31 STR 583 (Tri.-Chennai)

Inter-unit services not taxable

103 It was held that the SEZ unit and DTA unit of a company are not separate legal entities in general law (even though invoices have been issued and agreements have been entered) or under the definition of 'person' under section 2(v) of the SEZ Act read with Rule 19(7) of the SEZ Rules, and hence services provided by SEZ unit to DTA unit is not liable for service tax.

L&T Ltd. v. CCE (2013) 32 STR 113

Refund

104 The Revenue had rejected the refund claim of the assessee filed under Notification No. 9/2009, on the ground that the assessee's manufacturing activity in the SEZ was not inter-related or connected with the services received under the category of scientific and technical consultancy services. The Hon'ble Tribunal held that credit on clinical testing services availed prior to commencement of commercial production was allowable in view of the fact that the final product could be manufactured only after obtaining regulatory approval of the clinically tested samples and therefore such services were directly related to the manufacture of the final product. It rejected the Revenue's plea that unless goods reaches commercial production stage CENVAT credit was not admissible. Accordingly, it held that the refund claim was admissible.

Zydus Tech Ltd. v. CST (2013) 30 STR 616 (Tri.-Ahmd.)

105 The Hon'ble Tribunal held that when a notification [41/2007 dated 6-10-2007] exempts "whole of service tax", it implies that Education Cess and Secondary & Higher Secondary Education Cess on the same are also exempted.

Cauvery Coffee Traders v. CCE (2013) 31 STR 126 (Tri.-Bang.)

106 The Hon'ble Tribunal on facts held that the assessee, an agent for overseas supplier, had exported his services under the Export of Services Rules, 2005 and hence was entitled to claim refund of service tax paid on input services under Notification No. 12/2005 ST dated 19-4-2005. It further held that the failure of the assessee to file a declaration envisaged under Notification No. 12/2005 was only a procedural irregularity and thus directed the assessee to file the declaration and the Revenue to process the claims thereafter.

Kothari Infotech Ltd. v. CCE (2013) 31 STR 170 (Tri.-Ahmd.)

107 The Hon'ble Tribunal held that the refund of CENVAT credit can be allowed irrespective of when the credit was taken in case of service providers exporting 100% of their services. Thus, where refund claim of October to December 2010 contained tax paid in respect of input services of earlier period, the refund claim cannot be denied.

Amdocs Business Services v. CCE (2013) 31 STR 249 (Tri.-Mum.)

108 The assessee as SEZ unit claimed exemption under Notification No. 9/2009 – ST dated 3-3-2009 in respect of the following services viz.,

a) services which were received prior to issuance of Notification No. 9/2009-ST

dated 3-3-2009 but the payment for which was made post 3-3-2009; and

b) services received by its registered office which is situated away from SEZ unit.

The Tribunal observed that:

- In terms of para 3 of the Notification, the only requirement for claiming refund is that service tax on services should have been paid on or after 3-3-2009 and that the time of provision of services was irrelevant. Hence in respect of services mentioned in (a) above refund would be admissible.
- The preamble of the notification makes it abundantly clear that irrespective of the place where the services are rendered, whether inside or outside the unit, so long as the services are rendered in relation to authorised operations SEZ unit, the assessee is entitled to claim refund subject to the satisfaction of other conditions stipulated in the notification. In the present case, since services were utilised in relation to authorised operations refund was admissible.

Wardha Power Co. Ltd. v. CCE (2013) 30 STR 520 (Tri.-Mum.)

109 The Hon'ble Tribunal held that the refund of service tax paid on freight charges in respect of transportation of empty containers from export terminal to factory was allowable under Notification No. 17/2009-Service tax dated 7-7-2009 which allows refund of tax paid on input services used for export of goods.

Vippy Industries Ltd. v. CCE (2013) 32 STR 213 (Tri.-Del.)

110 In the instant case, the Courier Agency had failed to specify the import-export number of the exporter on the receipt/invoices issued by them. The Hon'ble Tribunal held that the refund of Service Tax paid on the said input services under Notification No. 17/2009-S.T., was not admissible since there was a non-fulfilment of the conditions mentioned in the said Notification.

Magsons Exports v. CST (2013) 32 STR 222 (Tri. -Del.)

111 The refund claim filed by the assessee under Notification No. 17/2009-ST was rejected as being time barred for failure to file claim within one year from date of export of goods. The Hon'ble Tribunal held that it is settled law that Notification issued by Government to be considered as part of Statute and the said Notification was self contained providing for exemption by way of refund in respect of exports. Filing of claim within one year from date of exports becomes statutory and substantive requirement. It further held that the Tribunal being creature of law not to go beyond provision of law and statute and give relief.

Ultratech Cement Ltd. v. CCE (2013) 31 STR 600 (Tri.-Ahmd.)

112 The Revenue denied refund of service tax paid on documentation charges under Notification No. 17/2009-ST on the ground that same were not taxable service. The Hon'ble Tribunal held that suppliers invoice reveal discharge of service tax under "Clearing and Forwarding Agency Service" and denial of refund of service tax on documentation charges was not sustainable in law. It further held that officer in-charge of factory receiver input service has no jurisdiction to deny service tax paid by service provider.

Jollyboard Ltd. v. CC&CE (2013) 32 STR 337 (Tri.-Mumbai)

113 The Hon'ble Tribunal held that the refund of unutilised CENVAT credit used for export of exempt service was admissible as Rule 6(3) of CENVAT Credit Rules, 2004 was not applicable and there was no bar on availing full credit for such services during relevant period. The Exim policy of Government of India was to promote

export of goods and not to place tax burden on such exports to render them uncompetitive.

KPIT Cummins Infosystems Ltd. v. CCE (2013) 32 STR 356 (Tri.-Mumbai)

114 The assessee deposited service tax on billing basis instead of actual collection. The adjudicating officer found that, on one hand assessee had paid excess service tax and on other hand short paid matching amount in following quarter and on that basis raised demand of short paid service tax. The Hon'ble High Court held that the assessee was entitled to refund of excess paid service tax as the adjudicating authority on artificial basis could not have held that he ought to have deposited same amount once all over again in following quarter. Otherwise also it would amount to collecting tax from assessee twice which is not permissible in law. Further, before raising demand, the adjudicating authority should have granted adjustment of service tax already paid by assessee towards their liability and limitation and doctrine of unjust enrichment was not applicable.

C. C. Patel & Associates Pvt. Ltd. v. UOI (2013) 32 STR 392 (Guj.)

Revision of Order

115 The CCE(A) allowed the assessee's claim for benefit of deduction of value of materials by a reasoned order but remanded the case to the adjudicating authority for re-quantification of demand and no appeal was filed against the order of the CCE(A). The Hon'ble Tribunal held that since the Revenue had not appealed against the order of CCE(A), the order of the adjudicating authority re-quantifying the demand by allowing the benefit of deduction cannot be interfered with by the CCE by issuing a Show Cause Notice for revision of the order passed by the adjudicating authority.

Pentagon Intex Pvt. Ltd. v. CCE (2013) 30 STR 685 (Tri.-Bang.)

Stay Order of Tribunal

116 The Hon'ble High Court held that where the appeal before the Tribunal is not decided on the expiry of 180 days from the date of the order of the Tribunal dispensing with the pre-deposit of duty demanded and penalty levied, there is no automatic vacation of stay on expiry of 180 days since the assessee has no control in respect of matters pending before the Tribunal due to unavailability of infrastructure; the members of the Tribunal and the workload. However, the Revenue can seek vacation of stay after the expiry, if it is proved that it was the assessee who has defaulted and taken steps to delay the ultimate decision.

PML Industries Limited v. CCE (2013) 30 STR 113 (P&H)

Others

117 The Hon'ble High Court observed that service tax is imposed upon the person to whom service is being provided and the same service provider is merely a collecting agency. Thus, where the agreement did not contain terms for payment of service tax by the service recipient and the service provider was made to pay service tax by the Revenue, it held that the service provider was eligible to be reimbursed by the service recipient.

Bhagwati Security Services (Regd.) v. UOI (2013) 31 STR 537 (All.)

118 The company, a steel project owner, supplied machinery to its contractors for executing various jobs for the project for which it received hire charges from the contractors. The Hon'ble Supreme Court held that there was no 'transfer of right to use goods' and accordingly no sales tax under section 5E of the Andhra Pradesh General Sales Tax Act, 1957 would be leviable since –

- The effective control of the machinery even while the machinery was in use of the contractor was that of the company;

- The contractor was not free to make use of the machinery for the works other than the project work of the company or move it out during the period the machinery was in his use;
- The condition that the contractor would be responsible for the custody of the machinery while it was on the site did not militate against company's possession and control of the machinery.

State of Andhra Pradesh v. Rashtriya Ispat Nigam Ltd. (2013) 31 STR 513 (SC)

119 The assessee was engaged in provision of manpower supply services to Reliance Petroleum Ltd., Jamnagar, a unit situated in a Special Economic Zone ("SEZ"). The service tax authorities alleged that the taxpayer was required to discharge service tax and follow the refund procedure as prescribed under Notification No.09/2009-ST, dated 3rd March, 2009. The assessee among other things contested that the provisions of the SEZ Act have overriding effect over provisions which are inconsistent in any other law and therefore, the taxpayer was not required to discharge service tax and follow refund procedure. The Hon'ble Tribunal held that the Notification issued under service tax laws have been issued only to operationalise the exemption/immunity available to a SEZ unit under the SEZ Act. Accordingly, service tax is not required to be paid.

Reliance Port & Terminals Limited v. CCE [2013-TIOL-1473- CESTAT-Ahm]

120 The Hon'ble High Court held that if the agreement stipulating that service tax was to be paid separately and it was not included in fee for professional / technical fees then expression any sum paid appearing in Section 194J of the Income-tax Act, 1961 relates to fees for professional or technical services and therefore service tax amount paid separately was not subjected to TDS.

CIT (TDS) v. Rajasthan Urban Infrastructure (2013) 31 STR 642 (Raj.)

121 Pursuant to audit, the Show Cause Notice dated 18-4-2012 was issued for the financial years 2007-08 to 2010-11 alleging that if Audit team had not visited the assessee's premises the fact that they were engaged in providing taxable service of Renting of Immovable Property would not have been known to the Revenue and they had wilfully suppressed the facts with the intention to evade service tax. However, the Hon'ble High Court observed that records indicate that in response to notice dated 13th April, 2009 by jurisdictional authorities copies of lease agreements, etc., were submitted. It thus held that the allegations against the assessee about suppression were vague and the payment of service tax on premium for long term lease was question of interpretation of law.

Infinity Infotech Parks Ltd. v. UOI (2013) 31 STR 653 (Cal.)

122 The Hon'ble Tribunal held that the benefit of Rule 6(3) of Service Tax Rules, 1994 is also available to service receiver as the assessee is defined in section 65(7) as person liable to pay service tax and recipient of service is a person liable to pay service tax.

Inox Air Products Ltd. v. CCE (2013) 32 STR 336 (Tri.-Chennai)

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ALLIED LAWS

Ajay R. Singh

1. Acquisition – Steps towards acquisition mean active steps leading to publication of declaration u/s.6 of Land Acquisition Act

Mere passing of a resolution by the Planning Authority or sending of a letter to the Collector or even the State Government cannot be treated as commencement of the proceedings for the acquisition of land under 1966 Act or the Land Acquisition Act. Steps towards the acquisition would really commence when the State Government takes active steps for the acquisition of the particular piece of Land which leads to publication of the declaration under section 6 of the land Acquisition Act. Any other interpretation of the Scheme of Sections 126 and 127 of the 1966 Act will make the provisions wholly unworkable and leave the landowner at the mercy of the planning Authority and the State Government. If mere passing of resolution or sending of letter to Collector or State Govt. to acquire land is considered to be step for acquisition, it would lead to absurd results and the landowners will be deprived of their right to use the property for an indefinite period without being paid compensation. That would tantamount to depriving the citizens of their property without the sanction of law and would result in violation of Article 300A of the Constitution of India.

Shrirampur Municipal Council, Shrirampur v. S. Bhimaji Dawkher AIR 2013 SC 3757

2. Evidence – Execution of will – Attesting witness had put their signature over will deed – Evidence Act sec. 68

Nowhere does the provision mandate that the Will should contain a statement to the effect that it has been signed in the presence of the witnesses who have then signed in the presence of the testator. The model specimen at the end of the bare Act cannot be taken to be a part of the statute. That apart, notwithstanding a statement made to the above effect in a Will, it would be really a matter of evidence whether the Testator signed the Will in the presence of the witnesses and each of them signed it in his presence and in the presence of each other. In *Smt. Punni v. Sumer Chand: AIR 1995 HP 74*, the Court while interpreting Section 63(c) clarified that it is not necessary that both witnesses should be present simultaneously at the same time while affixing their signatures. The requirement only is that each of them should have seen the testator sign or affix his mark to the Will.

Deepika Hingorani v. State & Anr. AIR 2013 Delhi 220

3. Execution of Sale Deed – Proof – Evidence Act sec. 59

Scribe informed by executants about execution of sale deed and had not seen execution of deed himself. Sole attesting witness not examined. Thus, no direct evidence regarding execution. In absence of direct / circumstantial evidence, sale deed could not be said to have been duly executed merely depending on expert opinion of Hand writing expert. Facts contradictory as on one hand sale deed had been described as act in pursuance of family agreement without payment of consideration and on other hand, specific

stand taken regarding payment of consideration. Execution of sale deed could not be said to have been proved.

Duti Ram Kalita v. Nidhi Ram Kalita, AIR 2013 Gauhati 200

4. Resjudicata – Judgement in personam – Binds both parties to suit

The court observed that estoppels by Judgement is traceable to sec. 115 of the Indian Evidence Act, 1872 applies to be parties to the Judgement and not to a third party unless the Judgment is in rem. The Petitioner was a party to the Judgments in the suit and the appeal hence being a party to the said judgement, he is stopped from pleading that the said judgment does not bind it.

The Judgment being a Judgement in personam binds both the parties to the suit.

Mir Hussain Ali Khan v. State of Andhra Pradesh & Ors. AIR 2013 Andhra Pradesh 187

5. Succession – Execution of Will – Requirement – Succession Act sec. 63(c)

Execution of Will Attesting witness in his deposition stated of will deed executed in his presence. Will earlier read over by document writer to testator. After finding it proper testator signed will in his presence. Thereafter both attesting witnesses had put their signature over will deed. Also he had deposed that at time of execution of will, testator was mentally and physically fit and was of sound disposing state of mind. Execution of will duly proved.

Defendants no where stated anything about signature of testator to be forged and fabricated. Widow of testator had also supported case of plaintiffs and execution of will by her husband in their favour. Will being in possession of grandmother of plaintiff, same not shown to him when property was mutated in name of his father and grandmother. Non disclosure of will by plaintiff, thus explained, especially since he was minor at relevant time. Witness nowhere stated that testator was not in fit condition at time of execution of will. Will not shrouded with suspicious circumstances. Execution of will, proved.

Kuntibai v. Umeshan kar Kuswaha and Ors. AIR 2013 Chhattisgarh 187

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