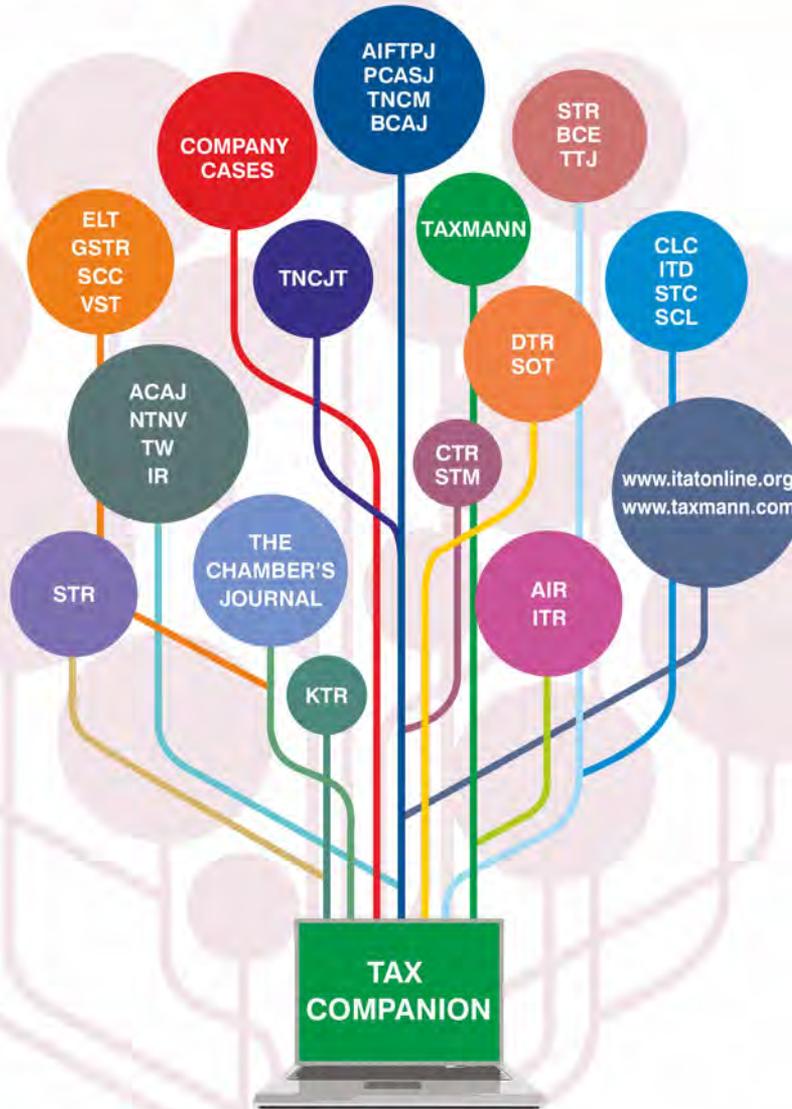


# ALL INDIA FEDERATION OF TAX PRACTITIONERS JOURNAL

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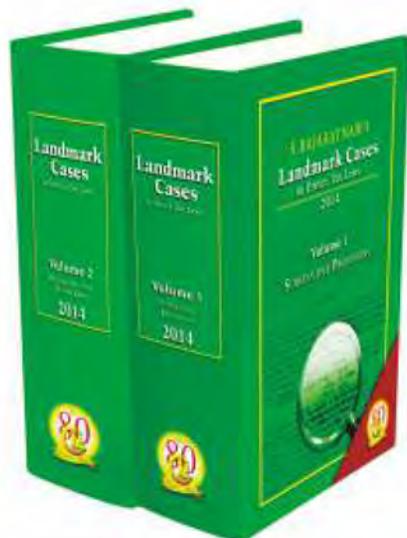


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## From the Editor-in-Chief

### **Whether prosecution is justified for technical failure in performing honorary task on behalf of the Government? Failure to pay tax deducted at source within specified time.**

Collection of taxes through tax deductions by taxpayers is one of the most effortless avenues of tax collections for the exchequer. Starting with only three sources of incomes (i.e. salaries, interest and dividend) for which this mode was initially used by the Government, owing to its utility, these modes are, currently prescribed under more than 28 sections as an effective tax collection tool.

Today, of all direct tax collections which go into the treasury of the exchequer, tax deducted at source and advance tax payments account for 40% each, while 10% are by way of self-assessment tax; this means nearly about 90% of direct taxes are paid by way of voluntary compliance by the assesseees across the country.

While the levy and collection of taxes from assesseees in accordance with law is the responsibility of the Administration, the Legislature has also cast this responsibility on assesseees. It would only be clichéd to suggest that by so deducting and depositing taxes, assesseees are performing an honorary task which the Executive is statutorily obligated to perform.

What rewards or compliments do the assesseees get for performing this duty voluntarily for the society in general?

While even *bona fide* non-deduction attracts interest and penalty (and even disallowance of expenditure in many cases), delay in depositing deducted tax attracts interest. To add to the taxpayer's woes, the Department has also started initiating prosecution for delay in depositing such tax. Unfortunately, even the compounding fee prescribed by the Board for compounding this "offence" of delay is quite onerous. In view of this legal

scenario, will CBDT kindly clarify as to why they are using this iron stick against the hapless assesseees and for what purpose?

Where an assessee performs an honorary task for the Government in collecting taxes, is it fair to saddle them with the prospect of facing prosecution for a default (not even worthy of being called offence) as minor as delay in depositing the tax so deducted by few days especially when these proceedings can go on for years, before being finally decided by the various judicial forums. For instance, to quote sadly, in Mumbai, cases involving prosecution launched more than 15 years ago have not yet come for final hearing.

All in all, it is for the CBDT and the Finance Ministry to consider this burning issue with proper perspective to find out a workable solution wherein only cases of gross delinquency attract prosecution proceedings, and especially, when minor defaults can be adequately dealt with by existing penal consequences under the Act viz. interest, disallowance and penalties, as the case may be, which are in any case appealable. In devising a practicable strategy for dealing with such defaults, the foremost thing that needs to be kept in mind is whether a default is *mala fide*. It cannot *ipso facto* be assumed by the Department and then leave it to the courts to give a final verdict.

To remedy the above genuine grievances, may I suggest the following:

1. A reasonable but short time limit may be prescribed for the assessment of TDS returns;
2. Where an assessee misuses the tax collected for his own purpose, he can be penalised by charging interest and severe penalty, which would serve the ends of justice;
3. Neither should penalty be levied nor prosecution launched for technical defaults on the face of the fact situation and last,
4. Compounding fee ideally to be levied for technical defaults must be rationalised to enable assesseees to *suo motu* come forward and opt for it.

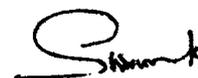
Furthermore, the following other measures may help in minimising the number of defaults as regards the tax deduction provisions:

1. Having a uniform rate for tax deduction for various sources of income;
2. There can be a provision for advance payment of tax to be deducted at source during the year and any excess payment may be allowed to be adjusted in the next year. This can save substantial time otherwise spent by assesseees on complying with TDS provisions.
3. When there is a dispute about the rate of tax deduction, there can be provision for advance ruling even for deduction at source in respect of payment to resident.
4. A pass book system or ledger may be introduced on the website wherein deductions of tax at source under all the provisions be exhibited for the benefit of all concerned.
5. A concept of single return may also be introduced for reducing compliance requirements.

Recently, in the case of *Rashmikant Kundalia v. UoI*, the Bombay High Court has *vide* ad interim order dated 28-4-2014 stayed the operation of notices issued to the Petitioner under section 234E of the Act for levy of fees for default in not timely furnishing of TDS statements. One of the grounds raised by the Petitioner was, there were already numerous penalties prescribed for the said default.

All stakeholder professionals are requested to send in and/or support the above constructive suggestions to the Federation which will enable us proper representation in the matter.

Regards,



Dr. K. Shivaram  
Editor-in-Chief



## President's Message

### DANCE WITH DEMOCRACY GAVE BJP ABSOLUTE MAJORITY TO GOVERN THE COUNTRY

My beloved members,

While I am writing this monthly message on 16-5-2014 in the afternoon, am profusely jubilant that the country's electorate, particularly youths, exercised their right to vote wisely and the results are more than our expectations mandating absolute power for the governance of the country in the able hands of Shri Narendra Modi, PM designate of BJP, who became the darling of the nation. While delivering elections speeches, he depicted his vision of governance of the country. Obviously, today, being the red letter day in the history of the country, the nation is celebrating with bang and sweets the victory of the BJP and its PM designate Shri Narendra Modi, who will be installed in this week in the chair of Hon'ble Prime Minister of India. So, the dance with democracy is now over and we should get to our business as usual. We, as an Apex body of Tax Practitioners, obviously have expectations, *inter alia*, from the new government which are thus: (i) improving the ease of doing business in India, (ii) sorting out the confrontations between the Tax Dept. and assesseees (particularly, foreign companies who bring hard foreign exchange which we badly need) on retrospective amendments and transfer pricing and to provide fiscal stimuli to kick start industrial growth in India, (iii) to recast tax policies both in the field of direct and indirect taxes as well as its administration, to achieve simplicity and transparency, (iv) to arrest significantly corruption in all walks of life as well as skyrocketing inflation in the economy and (v) to look sincerely at the general well being of a common man and, in particular, the agriculturalist.

As per our policy to impart and update our knowledge in our respective specialisation of the subjects viz. direct and indirect taxes and simultaneously relax and rejuvenate, we have arranged seminars at (i) Agra on 24-5-2014, (ii) National Tax Conference at Chennai, on 28th to 29th June, 2014 and (iii) National Tax Conference at Nagpur on 23rd to 24th August, 2014. I, therefore, earnestly appeal to you to attend the said seminars in large numbers to promote our activity and main objective of learning. In this context, I may remind you that it is our duty to enroll new members for the AIFTP's family and strengthen it.

As per recent press news, the CJI wants Courts open for 365 days to radically improve the court management system to fight the monstrous backlog of over 2 crore cases. At present, the SC has 193 working days, HCs 210 days and trial courts 245 days a year. According to him, in terms of productivity the proposal makes huge sense as a tool to clear a backlog. He further said : "*Judiciary over the years has become an essential service provider like hospitals and electricity or water dept. These dept. function 365 days a year. Then why not the judiciary?*" Indeed, this proposal of CJI is worth considering by all the concerned parties. Therefore, we should take forward this suggestion and have dialogue over it with the authorities concerned for its implementation.

Having had summer vacation for sometime, we should start working afresh with zeal and mission that we have in our minds.

With best wishes and regards,

**J. D. Nankani**  
National President

# DIRECT TAXES

Supreme Court  
Research Team

**1. S.13 : Denial of exemption – Trusts or institutions – Investment restrictions A charitable and religious trust which does not benefit any specific religious community is not hit by s. 13(1)(b) and is eligible to claim exemption u/s. 11. [S. 2(15), 11, 12A, 12AA]**

On facts, the objects of the assessee are not indicative of a wholly religious purpose but are collectively indicative of both charitable and religious purposes. The fact that the said objects trace their source to the Holy Quran and resolve to abide by the path of godliness shown by Allah would not be sufficient to conclude that the entire purpose and activities of the trust would be purely religious in colour. The objects reflect the intent of the trust as observance of the tenets of Islam, but do not restrict the activities of the trust to religious obligations only and for the benefit of the members of the community. In judging whether a certain purpose is of public benefit or not, the Courts must in general apply the standards of customary law and common opinion amongst the community to which the parties interested belong to. Customary law does not restrict the charitable disposition of the intended activities in the objects. Neither the religious tenets nor the objects as expressed limit the service of food on religious occasions only to the members of the specific community. The activity of Nyaz performed by the assessee does not delineate a separate class but extends the benefit of free service of

food to public at large irrespective of their religion, caste or sect and thereby qualifies as a charitable purpose which would entail general public utility. Even the establishment of Madarasa or institutions to impart religious education to the masses would qualify as a charitable purpose qualifying under the head of education u/s. 2(15). The institutions established to spread religious awareness by means of education though established to promote and further religious thought could not be restricted to religious purposes. The assessee is consequently a public charitable and religious trust eligible for claiming exemption u/s. 11;

On facts, though the objects of the assessee-trust are based on religious tenets under Quran according to religious faith of Islam, the perusal of the objects and purposes of the assessee would clearly demonstrate that the activities of the trust are both charitable and religious and are not exclusively meant for a particular religious community. The objects do not channel the benefits to any community if not the Dawoodi Bohra Community and thus, would not fall under the provisions of s. 13(1)(b). (Civil Appeal No. 2492 of 2014. order dated 20th February, 2014.)

*CIT v. Dawoodi Bohara Jamat. (SC), [www.itatonline.org](http://www.itatonline.org)*

**2. S.158BD : Block assessment – Undisclosed income of any other person – Satisfaction can be (a) at the time of or along with the initiation of**

**proceedings against the searched person u/s. 158BC of the Act; (b) along with the assessment proceedings u/s. 158BC of the Act; and (c) immediately after the assessment proceedings are completed u/s. 158BC of the Act of the searched person. [S. 158BC, 158BE]**

The result is that for the purpose of s. 158BD a satisfaction note is *sine qua non* and must be prepared by the AO before he transmits the records to the other AO who has jurisdiction over such other person. The satisfaction note could be prepared at either of the following stages: (a) at the time of or along with the initiation of proceedings against the searched person u/s. 158BC of the Act; (b) along with the assessment proceedings u/s. 158BC of the Act; and (c) immediately after the assessment proceedings are completed u/s. 158BC of the Act of the searched person. (Civil Appeal No. 3958 of 2014, dated 12th March, 2014)

*CIT v. Calcutta Knitweaves (2014) 362 ITR 673/101/DTR 217 (SC)*

**3. S.244A : Refunds – Interest – Deduction at source – Deductor entitled to interest on refund of excess TDS from date of payment. [S. 156, 195, 240, 244]**

The assessee made an application u/s. 195(2) for permission to remit technical service charges and reimbursement of expenses to a foreign company without deduction of tax at source. The AO passed an order directing the assessee to deduct TDS at the rate of 20% before making remittance. The assessee effected the deduction and filed an

appeal before the CIT(A) in which it claimed that the said remittance was not subject to TDS. The CIT(A) upheld the claim with regard to the reimbursement of expenses with the result that the TDS thereon was refunded to the assessee. However, the AO declined to grant interest u/s. 244A on the said interest by relying on Circular Nos. 769 dated 6-8-1998 and 790 dated 20-4-2000 issued by the CBDT. The CIT(A) upheld the AO's stand though the Tribunal and High Court upheld the assessee's stand. On appeal by the department to the Supreme Court HELD dismissing the appeal:

- (i) A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorisedly by the Department. When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest in as much as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a deductor who has deducted tax at source and deposited the same before remitting the amount

payable to a non-resident/ foreign company;

- (ii) Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. There being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, the Government, cannot shrug off its apparent obligation to reimburse the deductors' lawful monies with the accrued interest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which *ex ae quo et bono* ought to be refunded, the right to interest follows, as a matter of course;

- (iii) The said interest has to be calculated from the date of payment of such tax.

*UOI v. Tata Chemicals Ltd. (2014) 267 CTR 89(SC)*

*DIT v. Reliance Infocom Ltd. (2014) 267 CTR 89(SC)*

*DIT v. Set Satellite (Singapore)Pte Ltd. (2014) 267 CTR 89(SC)*

**4. S.276CC : Offences and prosecutions – Failure to furnish return of income – Firm – Partner – Prosecution for failure to file ROI can be initiated during the pendency of assessment proceedings. The statement in the individual returns of the partners that the firm has not filed a ROI as its accounts are not finalized does not absolve the firm of prosecution for non-filing of ROI. [S. 144, 278E]**

The offence u/s. 276CC is attracted on failure to comply with the provisions of s. 139(1) or failure to respond to the notice issued u/s. 142 or s. 148 within the time limit specified therein. The contention that pendency of the appellate proceedings is a relevant factor for not initiating prosecution proceedings u/s. 276CC is not acceptable. S. 276CC contemplates that an offence is committed on the non-filing of the return and it is totally unrelated to the pendency of assessment proceedings except for second part of the offence for determination of the sentence of the offence, the department may resort to best judgment assessment or otherwise to past years to determine the extent of the breach. (AYs. 1991-92 to 1993-94)

*Sasi Enterprises v. ACIT (2014) 98 DTR 329 (SC)*

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# DIRECT TAXES

High Court  
Research Team

## 1. S.2(22)(e) : Deemed dividend – Assessee was not beneficial owner – Deletion of addition was held to be justified

During the search operation carried out by the department, it was noticed that the said company had given loans to various members including the assessee having shareholding & voting powers exceeding 10%. The assessee during the search operation, confronted with such shareholding pattern and the loans advanced. Assessee accepted certain sum u/s. 2(22)(e) of the act. During the course of assessment proceedings, it was contended by family members that they had settled on aggregate of 5.12 lakhs of equity shares of the said company held by them. It was the case of the assessee that he did not hold any beneficial voting power. AO rejected the contention of the assessee. CIT (A) dismissed the appeal. Tribunal allowed the appeal and held that trust deed was created nearly four years prior to the date of search and notarised. Tribunal also held that the Companies' act would not permit transfer of shares in the name of trust and that there was no dividend declared by the company and that the trust did not receive any income so as either to open a bank account or to file a return. On appeal in HC, HC held that Tribunal having found as a fact that shares in question stood settled on genuinely created trust and assessee was no more beneficial owner of the shares, no interference was called for with the order of Tribunal holding that deemed dividend u/s. 2(22)(e) was not chargeable in the hands of the assessee. (A.Y. 2006-07)

*CIT v. Krupeshbhai N. Patel (2014) 99 DTR 209 (Guj.) (HC)*

## 2. S.2(22)(e) : Deemed dividend – Accumulated profits –

## Depreciation to be considered as per Income-tax Act and not as Companies Act

While assessing income, the assessing authority is required to take into consideration the depreciation as provided under the Income-tax Act and not as provided under the Companies Act.

*CIT v. Pushparthy Packs (P.) Ltd. (2014) 98 DTR 65 (Bom.)(HC)*

## 3. S.2(22)(e) : Deemed dividend – Not a share holder – Loans or advances from another company cannot be treated as deemed dividend merely on the ground that there was common shareholder in both the companies

The assessee company had received loan from another company. The assessee was not a shareholder of the other company. However, there was a common shareholder (individual) who held more than 50% in both the companies. In view of the above facts the AO held that the amount received by the assessee from another company was a deemed dividend u/s. 2(22)(e) of the Act. The CIT(A) upheld the AO's order. On further appeal, the Tribunal deleted the addition made by AO following the decision of the jurisdictional High Court in *CIT v. Ankitech (P.) Ltd. 340 ITR 14 (Delhi)* where it has been held that deemed dividend provisions cannot be invoked merely because there are common shareholders between the two companies. The High Court followed the aforesaid judgment and dismissed revenue's appeal. (A.Y. 2006-07)

*CIT v. AR Magnetics (P.) Ltd. (2014) 220 Taxman 209 (Delhi) (HC)*

**4. S.2(22)(e) : Deemed dividend – Not a share holder – Inter-corporate deposit – Where assessee had received a deposit from a company but did not own any share of that company it could not be treated as a deemed dividend**

The Assessee received a deposit of ₹ 25 lakhs from Amigo Brushes Pvt. Ltd. During the assessment, the Assessing Officer treated the deposits as a loan and consequently deemed to be a deemed dividend under Section 2(22)(e) of the Act from Amigo Brushes Pvt. Ltd. The assessee contended that it did not hold a share in other company from which it had received deposit and, accordingly, it could not be treated to be a deemed dividend under Section 2(22)(e) of the Act. The CIT(A) upheld the order of the AO. On appeal, the Tribunal reversed the order of CIT(A). The High Court decided the issue in favour of the assessee, relying on the decision of the Division Bench of the High Court in *CIT v. Ankitech (P.) Ltd. (2012) 340 ITR 14 (Del)* wherein it was held that if the assessee-company does not hold a share in other company from which it had received deposit then it cannot be treated to be a deemed dividend under Section 2(22)(e) of the Act. (A.Y. 2000-01).

*CIT v. Daisy Packers (P.) Ltd. (2014) 220 Taxmann 331 (Guj.) (HC)*

**5. S.2(22)(e) : Deemed dividend – Not a registered share holder – Where assessee-company received share application money from another company, the amount in question could not be taxed as deemed dividend in its hands as the assessee was not a registered shareholder of said company**

The assessee had derived income from trading in shares. During the course of assessment proceedings, it was revealed that the assessee

had received a sum of ₹ 23.00 lakhs from M/s. Japanwala Jewellers (P.) Ltd., Jaipur as share application money. The assessing authority, after taking note of Section 2(22)(e) and available records, observed that the share application money received by the assessee company was in the nature of an unsecured loan and further treated it to be deemed dividend in the hands of the assessee company under the provisions of Section 2(22)(e). The High Court upholding the order of the CIT(A) and Tribunal held that liability of tax as deemed dividend would be attracted in the hands of the individuals who were shareholders of the said company and not in the hands of the company.

*CIT v. Suram Holding (P.) Ltd. (2014) 220 Taxmann 327 (Raj.)(HC)*

**6. S.2(31)(v) : Association of persons – Linde and Samsung were independent of each other and were responsible for their own deliverables under the contract, without reference to each other. Consequently, no AOP is formed**

Before an association can be considered as a separate taxable entity (i.e. an Association of Persons), the same must exhibit the following essential features: (i) must be constituted by two or more persons; (ii) the constituent members must have come together for a common purpose; (iii) the association must move by common action and there must be some scheme of common management; (iv) the cooperation and association amongst the constituent members must not be perfunctory and/or merely in form. The association amongst members must be real and substantial which is sufficient to treat the association as a separate homogeneous taxable entity. (b) On facts, as per the terms of the Contract, the scope of work to be executed by Linde and Samsung was separate and was accordingly specified in the annexures to the Contract. The payments to be made for separate items of work were also specified. The currency

in which the payments were to be made was also separately indicated.

Linde and Samsung had joined together to (i) bid for the contract; (ii) present a façade of a consortium to OPAL for execution of the contract and accept joint and several liability towards OPAL for due performance of the contract and completion of the project; and (iii) put in place a management structure for *inter se* coordination and execution of the project. However, in all other respects, both Linde and Samsung were independent of each other and were responsible for their own deliverables under the Contract, without reference to each other. Consequently, no AOP is formed.

*Linde A. G. v. DDIT (Delhi)(HC).www.itatonline.org*

**7. S.2(47)(v) : Transfer – Capital gains – Mere execution of a development agreement is not a “transfer” if possession as per s. 53A of the Transfer of Property Act is not given. [S.45, Transfer of Property Act, 53A]]**

Though the development agreement was executed in AY 2003-04, the possession as contemplated in Section 53A of the Transfer of Property Act was in fact not handed over by the assessee to the developer. The agreement only permitted the development to be carried out by the said developer. The entire control over the property was in fact with the assessee inasmuch as the licence to construct the property was also in the name of the assessee and the occupancy certificate was also given to the assessee. Therefore, the execution of the agreement could not amount to transfer as contemplated under Section 53A of the Transfer of Property Act. The agreement was subsequently specifically modified and the assessee was liable to pay the capital gain as per the last agreement i.e. for assessment year 2008-09.(A.Y. 2008-09) (Tax Appeal Nos. 11 & 12 of 2013, dt. 2-12-2013.)

*CIT v. Sadia Shaikh (Bom.)(HC), www.itatonline.org*

**8. S.4 : Income – Accrues or arises – Retention money received, after TDS, but subject to bank guarantee, is not chargeable to tax as income till all conditions are satisfied**

(i) Mere receipt of income is not the sole test of chargeability.

(ii) On facts, the right to receive the sum was uncertain and contingent upon satisfactory completion of several factors. Same uncertainly and unpredictability prevailed. The assessee had no absolute right to receive the amount. SSNNL had no obligation to release the same before completion of warranty period and even thereafter would release the amount only after making permissible adjustments. Mere fact that in the present case no recoveries were made from the bank guarantee or security deposit is of no consequence. The fact that tax was deducted at source on said amount also would be of no consequence. The assessee had no control over such deduction. Merely whether tax was deductible or not would not decide the taxability of certain receipts. The manner in which the assessee accounted for such receipt in its books of account can also not determine its tax liability.

*Amarshivo Construction Pvt. Ltd. v. DCIT; (Guj)(HC) www.itatonline.org*

**9. S.4 : Income – Capital or revenue – Subvention assistance from holding company – Capital receipt. [S.2(24)]**

Subvention assistance from holding company to recoup anticipated losses of the assessee constituted capital receipt not chargeable to tax.

*CIT v. Deutsche Post Bank Home Finance Ltd. (2014) 98 DTR 144 (Delhi)(HC)*

**10. S.4 : Income – Capital or revenue – Subvention payment received from parent company – Revenue receipt chargeable to tax. [S.2(24)]**

Subvention payment received by the assessee from parent company to make good the loss and to see that company is run more profitably constituted revenue receipt. (A.Y. 1999-2000 to 2001-02)

*CIT v. Siemens Public Communication Networks Ltd. (2014) 98 DTR 151 (Karn.)(HC)*

**11. S.9(1)(i) : Income deemed to accrue or arise in India – AOP Business connection – Fees for technical services off-shore supply & services. [S.2(31)(v),9(1)(vii)]**

Merely because a project is a turnkey project would not necessarily imply that for the purposes of taxability, the entire contract be considered as an integrated one. Where the equipment and material is manufactured and procured outside India, the income attributable to the supply thereof could only be brought to tax if it is found that the said income therefrom arises through or from a business connection in India. It cannot be concluded that the Contract provides a “business connection” in India and accordingly, the Offshore Supplies cannot be brought to tax under the Act.

In order to fall outside the scope of Section 9(1)(vii) of the Act, the link between the supply of equipment and services must be so strong and interlinked that the services in question are not capable of being considered as services on a standalone basis and are therefore subsumed as a part of the supplies. In view of the Explanation to Section 9(2) as substituted by Finance Act 2010 with retrospective effect from 1-6-1976, the decision of the Supreme Court in *Ishikawajima-Harima Heavy Industries*, in so far as it holds that in order to tax fees for technical services under the Act the services must be rendered in

India, is no longer applicable. Therefore, in the event the services in question are not considered as an integral and inextricable part of equipment and material supplied, it would be necessary to examine whether any relief in respect of such income would be available to the assessee by virtue of the DTAA between Germany and India;

(f) The AAR exercises judicial power and necessarily has to follow the principle of law already accepted by it. This is also a necessary facet of Article 14 of the Constitution of India. The equal protection clause in the Constitution would necessarily imply that the judicial authorities interpreting the law must also follow a consistent view. Thus, in the event the Authority was of the opinion that the earlier view was erroneous, it was incumbent upon the Authority to refer the matter to a larger bench. In the present case, the Authority has sought to distinguish its earlier decision in the case of *Hyundai Rotem*, without pointing out any material dissimilarity in facts which would render the earlier decision inapplicable. We are also unable to find any material dissimilarity in facts that would warrant such a conclusion.

*Linde A. G. v. DDIT (Delhi)(HC). www.itatonline.org*

**12. S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Permanent Establishment – DTAA-India-USA. [S.90, Article 5]**

Re. Whether a subsidiary can be a Permanent Establishment: While under Article 5(6), a holding or a subsidiary company by themselves would not become PE of each other, a subsidiary can become a PE of the holding company if it satisfies the requirements of Article 5. Accordingly, any premises belonging to the subsidiary that is at the disposal of the parent (the “right-to-use test”) and that constitutes a fixed place of business (the “location test” and the “duration test”) through which the

parent carries on its own business (the “business activity test”), gives rise to a PE of the parent under Article 5(1).

Re. Location or fixed place PE under Articles 5(1) and (2) of DTAA: The word “permanent” refers to some degree of permanency and not a mere transitory nature of the business in the other State. The expression “fixed place of business” refers not only to physical location in the form of immovable property or premises but in certain instances can mean machinery and equipment. The word “fixed” refers to a distinct place with some or certain degree of permanence. The carrying on of “business” should be “through” the fixed place of business.

Re. What constitutes a “Service PE” under Article 5(2)(l) of the DTAA: Articles 5(2)(l) and (k) defines what can be called service PE. Sub-clause (l) requires furnishing of services within the second contracting State by a foreign enterprise through its employees or other personnel. But a PE is created only if activities of that nature continue for a period or periods aggregating more than 90 days in 12 months period or under clause (ii) services are performed within that State for a related enterprise as defined in Article 9 paragraph 1.

Re. Impact of Article 5(3) and its over-riding effect and consequences: Article 5(3) contains a list of negative activities which are deemed not to create PE. First and foremost, Article 5(1)/(2) should be applicable but then if the activities fall within parameters of paragraph 3, PE is not created for imposing tax in the second state. It does not follow that if activities are not covered in the negative or exclusions set out in paragraph 3, a PE is established or deemed to be established under paragraph 1 or 2 of Article 5.

Re. What is “Agency PE” under Articles 5(4) and (5) of DTAA: A dependent agency is one which is bound to follow instructions and is personally dependent on the enterprise he represents. Such dependency must not be isolated or once in a while transaction but should be of comprehensive nature.

The MAP procedure and agreement is no doubt relevant but cannot be determinative or the primary basis to decide whether the assessee had PE in India.

*CIT v. eFunds It Solution (2014) 99 DTR 257 (Delhi)(HC)*

*DIT(IT) v. eFunds Corporation & Ors. (2014) 99 DTR 257 (Delhi)(HC).*

**13. S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Amount received by assessee, a non-resident company, for granting license to use its copyrighted software for licensee’s own business purpose only, could not be brought to tax as 'royalty' under article 12(3) of India-US DTAA – In absence of any amendment in DTAA, there was no need to examine effect of subsequent amendment to section 9(1)(vi) – DTAA-India-USA. [S.90, Articles 5, 12]**

The assessee, an international software marketing and development company developed customized software which was licensed to an Indian customer and the branch office of the assessee in India. In the course of assessment, the AO taxed the receipts on licensing the software as 'royalty' as per article 12 of Indo-US DTAA. The CIT (A) upheld the order of AO. The Tribunal, however, held that the amount received by the assessee under the licence agreement for allowing the use of the software was not royalty either under the Act or under the DTAA. On revenue’s appeal, the High Court observed that in order to qualify as royalty payment, it is necessary to establish that there is transfer of all or any rights (including the granting of any licence) in respect of copyright of a literary, artistic or scientific work. In order to treat the

consideration paid by the Licensee as royalty, it is to be established that the licensee, by making such payment, obtains all or any of the copyright rights of such literary work. Distinction has to be made between the acquisition of a "copyright right" and a "copyrighted article". Copyright is distinct from the material object, copyrighted. Just because one has the copyrighted article, it does not follow that one has also the copyright in it. Viewed from this angle, a non-exclusive and non-transferable license 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. 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 Act or under the DTAA. Further the High Court observed that it was not necessary to examine the effect of subsequent amendment to section 9(1)(vi) and also whether amount received for use of software would be royalty in terms thereof for the reason that the assessee was covered by the DTAA, the provisions of which are more beneficial. In view of the above the appeal was dismissed.

*DIT v. Infrasoft Ltd. (2014) 220 Taxmann 273 (Delhi)(HC)*

**14. S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Design & Engineering drawings are in the nature of “plant” and consideration thereof is not assessable as “fees for technical services” if delivered outside India.**

The assessee company provided design and engineering services, manufacture, delivery, technical assistance through supervision of erection and commissioning etc., to establish

compressor house-I for RINL. The payments were made by RINL separately for each of the services/equipments provided/supplied by the assessee. It, *inter alia*, included payment made towards supply of design and engineering drawings. The assessee company claimed the said payment is not taxable under the Income tax Act as it was a transaction of sale of goods that has taken place outside India. In our view the decision of Delhi ITAT Bench in the case of *Mannesman Demag Sack AG v. Add. CIT* reported in (2008), 119 TTJ 543 (Del), on which reliance was placed by learned DR, is not applicable to the facts of the instant case. In the case of *Mannesman Demag Sack*, supra, the decision was rendered on the basis of the terms of the contract which provided that technical services shall include supply of design and drawings. Hence on the facts of the case, the Tribunal held that design and drawing charges are in the nature of fee for technical services. However, it may be pertinent to note that the Tribunal in that case, accepted the alternative contention of the assessee that the said fee cannot be assessed in India, unless it is shown that some part of work has emanated from Indian territories. Hence on a conspectus of the matter, we are of the view that the amount received by the assessee for supply of design and engineering drawings is in the nature of plant and since the preparation and delivery has taken place outside Indian territories, the same cannot be subjected to tax in India. (ITA No. 612 of 2013, dt. 4-2-2014.)

*DIT v. Nisso Lwai Corporation, Japan (AP)(HC), www.itatonline.org*

**15. S.10(38) : Long-term capital gains – Securities – Shares sold after two years from their conversion (stock in trade to investment) did not mean the conversion was illegal and done with an intention to claim exemption u/s. 10(38) – Income is taxable under the head**

**‘Capital gain’ and eligible for exemption u/s. 10(38). [S. 45]**

The assessee filed its return of income declaring long-term capital gains arising from sale of shares which was claimed as exempt income u/s. 10(38). The AO took a view that the business of the assessee was not to invest in shares but to deal them as a stockbroker and trader and, consequently, held the income to be business income and not capital gains. Further, he observed that conversion of stock-in-trade into investment was done with the intention not to pay tax. The Tribunal, after considering the facts, held the income to be taxable under the head “Capital gains”. The High Court observed that the assessee had converted and transferred the shares in question under the head “investment” on 1 April, 2004 and sold them after two years from the date of conversion, and this was disclosed in the financials. The AO never disputed when the conversion took place. Mere fact that the income is now exempt from tax after the introduction of Section 10(38) w.e.f. April 1, 2005, does not mean that the conversion was illegal. Further, the shares had been sold a considerable amount of time after the conversion. The High Court finally, accepted the assessee’s position of treating the income from sale of shares, taxable as “Capital gain”. (A.Y. 2006-07)

*CIT v. Express Securities (P.) Ltd. (2014) 220 taxmann 365 (Delhi)(HC)*

**16. S.10A : Free Trade Zone – Export Oriented Undertaking – Interest income out of surplus funds in Banks and sister concerns & EEFC account is eligible for exemption. [S. 10B]**

The question is whether the interest received and the consideration received by sale of import entitlement is to be construed as income of the business of the undertaking. There is a direct nexus between this income and the income of

the business of the undertaking. Though it does not partake the character of a profit and gains from the sale of an article, it is the income which is derived from the consideration realised by export of articles. In view of the definition of ‘Income from Profits and Gains’ incorporated in subsection (4), the assessee is entitled to the benefit of exemption of the said amount as contemplated under Section 10B of the Act. (A.Ys. 1998-99 & 2001-02)

*CIT v. Motorola India Electronics (P) Ltd. (2014) 98 DTR 81 (Karn.)(HC)*

**17. S.11 : Property held for charitable or religious purposes – Notice for accumulation – Exemption must be allowed. [Form No. 10]**

A request by letter complying with the requirement and furnishing all the information as required in Form 10 was made and there was sufficient proof before the AO that the amount was not only kept apart but was also spent in the next year, the adherence to the form and not substance, was not valid. The AO should allow exemption. (A.Y. 2008-09)

*CIT v. Moti Ram Gopi Chand Charitable Trust (2014) 98 DTR 68 (All.)(HC)*

**18. S.11 : Property held for charitable or religious purposes – Application of income – Set-off of expenses in subsequent year is allowed**

Expenditure incurred in the earlier year, repaid out of income of the current year amounts to application of income. (A.Y. 2005-06)

*CIT v. Punjab Mandi Board (2014) 98 DTR 267 (P&H)(HC)*

**19. S.12A : Registration – Trusts or institutions – Cancellation of registration was held to be not**

**justified – Direction to grant registration and 80G exemption was held to be valid. [S. 12AA, 80G(5)]**

The respondent was granted registration u/s. 12A/12AA. Application for approval of renewal of exemption u/s 80G was filed by the petitioner. CIT cancelled the order for registration already granted to the respondent u/s. 12AAA (1b) *vide* its order dated 19-5-2010 by exercising powers u/s. 12AA (3) by observing that para 5.10 of the trust deed of the assessee states that the Board of Trustee can do all such works, as deemed fit by them and they have a discretion to do all such works which may or may not be in accordance with the object of the trust. On appeal in Tribunal, Tribunal passed common order wherein Tribunal granted registration and set aside the order passed by CIT. On further appeal in HC, the court held that CIT having not pointed out that any part of the income of the assessee trust was open or any activity other than objects of the trust was carried out, he was not justified in cancelling the registration u/s 12A already granted to the assessee merely on the ground that a clause in the Trust deed of the assessee empowers the board of trustee to do all such works as deemed fit by them and they have discretion to do all such works which may not be in accordance with the object of the trust. (A.Y. 2006-07)

*CIT v. Krishna Chandra Gandhi Janshika (2014) 99 DTR 433 (Jharkhand)(HC)*

**20. S.12AA : Procedure for registration – Trusts or institutions – Benefits for a particular community – Denial of registration was held to be valid. [S.2(15)]**

Assessee society governed by a scheme decree framed by District Court with the object of providing accommodation and facilities for the purpose of marriages and other auspicious functions of the members of a particular

community was rightly declined registration u/s. 12AA.

*Gowri Ashram v. DIT(E) (2014) 98 DTR 294 (Mad.) (HC)*

**21. S.12AA : Procedure for registration – Trusts or institutions – Genuineness of activities was not doubted – Cancellation of registration was not valid. [S.2(15), 11]**

For the cancellation of registration u/s. 12AA(3), it has to be satisfied that the activities of the trust are not genuine and the activities are not carried on in accordance with the object of the trust. If a particular activity appears to be commercial in character and it is not dominant, then AO has to consider the effect of s. 11 in the matter of granting exemption on particular head of receipt and the mere fact that the said income does not fit in with s. 11 would not, by itself, lead to the conclusion that the registration granted u/s. 12AA is bad and hence has to be cancelled. The Court observed that for invoking section 12AA read with section 2(15) revenue has to show that the activities are not falling within the objects of the Association and that the dominant activities are in the nature of trade, commerce and business. By the volume of receipt one cannot draw the inference that the activity is commercial. Cancellation of Registration was not valid.

*Tamil Nadu Cricket Association v. DIT(E) (2014) 98 DTR 299 (Mad.)(HC)*

**22. S.12AA : Procedure for registration – Trusts or institutions – Statutory authorities – No motive to earn profit – Eligible to exemption. [S.2(15), 11]**

A trust carrying on its activities for fulfilment of its aims and objectives which are charitable in nature with no motive to earn profit, and

in the process earns some profit would not be hit by the proviso to s. 2(15). Assessee was a statutory authority established with the objective to provide shelter to homeless people. Its aims and objects are charitable in nature. For the applicability of proviso to s. 2(15), the activities of the trust should be carried on commercial lines with the intention to make profit. No such material / evidence was on record. Therefore, the assessee was entitled to exemption u/s. 11. (A.Ys. 2003-04 to 2006-07)

*CIT v. Lucknow Development Authority (2014) 98 DTR 183 (All.) (HC)*

*CIT v. U.P. Housing & Development Board (2014) 98 DTR 183 (All.) (HC)*

*CIT v. Ayodhya Faizabad Development Authority (2014) 98 DTR 183 (All.) (HC)*

**23. S.14A : Disallowance of expenditure – Exempt income – Book profit – Disallowance has to be applied while computing book profits under clause (f) of Explanation to s.115JA. [S.115JA]**

The assessee's contention that in view of the Proviso to s. 14A, the said provision could not have been invoked for A.Y. 2000-01 in a revision u/s. 263 is not acceptable because the assessment order was passed after section 14A was enacted (Honda Siel Power Products 340 ITR 53 (Del.) (approved by SC) followed). The failure of the AO to invoke s. 14A had resulted in the order being erroneous and prejudicial to the interests of the Revenue. (A.Y. 2000-01)

*CIT v. Goetze (India) Ltd. (2014) 361 ITR 505 (Delhi) (HC)*

**24. S.14A : Disallowance of expenditure – Exempt income – Rule 8D disallowance cannot be made without showing how**

**assessee's claim/ computation is wrong. [R.8D]**

In A.Y. 2009-10 the assessee earned dividend income of ₹ 1.65 lakhs which was claimed exempt u/s. 10(34) of the Act. The assessee claimed that no disallowance u/s. 14A could be made because no expenditure had been incurred to earn the said dividend. It was claimed that no new investment was made during the year. It was also claimed that no loans were taken for making the investments for earning the dividend income. The AO was not convinced with the reply of the assessee and computed the disallowance at ₹ 32.43 lakhs u/s. 14A by making calculation under Rule 8D. This was deleted by the CIT(A). The department filed an appeal before the Tribunal which was dismissed. The Tribunal relied on J. K. Investors (Bombay) Ltd. (ITAT Mum.) and noted that the AO had not examined the accounts of the assessee and had not recorded satisfaction about the correctness of the claim of the assessee before invoking Rule 8D. It held that while rejecting the claim of the assessee with regard to expenditure or no expenditure, as the case may be, in relation to exempted income, the AO had to indicate cogent reasons for the same and was not entitled to disregard the assessee's claim and straightaway embark upon computing disallowance under Rule 8D. On appeal by the department to the High Court HELD dismissing the appeal.

The AO disallowed the expenditure u/s.14A without first recording that he was not satisfied with the correctness of the claim as regards the claim that "no expenditure" was made by the assessee. The disallowance u/s 14A of the Income-tax Act, 1961 is plainly contrary to the provisions of the statute. The CIT allowed the appeal of the assessee and the Tribunal did not interfere. Challenging the order of the tribunal, the present appeal has been filed. We are of the opinion that no point of law has been raised. Therefore, this appeal is dismissed. (ITA No. 161 of 2013, dt. 23-12-2013.) (A.Y. 2009-10)

*CIT v. REI Agro Ltd. (Cal.)(HC), www.itatonline.org*

**25. S.28(i) : Business income – Dealer in securities – Even a solitary transaction of redemption of (non-tradeable) mutual fund units amounts to a business activity for an assessee dealing in securities**

Merely because deposits in mutual funds are not traded in the nature of sale and purchase of equity shares and such transactions are different in effect and consequences is no ground to treat those differently. Frequency of dealings in deposits of mutual funds with the strategy of firstly investing in tenurial plans and then getting redemption within the same year of deposit and at times resulting in huge profits while at other times in loss, was the usual business activity of the assessee. Such before term redemption, is done in the usual course of business by the assessee clearly to increase its actual cash inflow to tide over its commitments made in the market and at times to earn higher interest in other lucrative investment plans contemporaneously emerging in the market. In this case, in the name of consistency the assessee had tried to hoodwink the authorities. Rather previous conduct of the assessee reveals that the accounts had been manipulated by the assessee to treat the investment as a capital asset only as a camouflage and smoke screen. It is a case where intention as also principle of consistency sought to be used by the assessee in its favour rather goes against it as year after year the same manipulation strategy and maneuverability had been adopted to hoodwink the revenue.

*CIT v. Pooja Investment Pvt. Ltd. (P&H)(HC) www.itatonline.org*

**26. S.28(i) : Business income – Investment in shares – Not keeping separate books together with frequent transactions means that gains from shares have to**

**be assessed as business profits instead of as STCG. [S.45]**

It was observed that separate books were not used. Amounts were freely transferred from the profits gained to business and vice-versa. Since very frequent purchase and sale of shares have been done it indicates that the main intention of the assessee was to earn income out of these shares which have been claimed to be under the head of short term capital gains. Having regard to the short duration of holding of the shares, and the lack of clarity in the account books, this Tribunal was wrong in assessing the gains as STCG instead of as business profits.

*CIT v. D & M Components Ltd.(Delhi) (HC). www.itatonline.org*

**27. S.28(i) : Business income – Income from house property – Rental income from temporary letting out of shops flats in commercial complex. [S.22, 36(1)(iii)]**

Assessee was engaged in the business of construction and sale of properties. Income from temporary letting out a few units in a complex constituted business income and not income from house property. Deduction under section 36(1)(iii) is available. (A.Ys. 1995-96 to 2000-01)

*Nirmala Sahu (Late) (Smt.) v. CIT (2014) 98 DTR 55 (All.) (HC)*

**28. S.28(va) : Business income – Cash or kind – Capital asset – Income from sale of shares – Under an agreement wherein all pervasive control being entrusted to purchaser and absolute exclusion of the seller whether as a shareholder or for its management and control would be business income and not capital gain. [2(14), 45]**

The Assessee disclosed income from short-term and long-term capital gains on account of sale

of shares vide a share purchase agreement. The AO referred to various clauses of the agreement, including the clause on non-compete fees, and concluded that the transfer was of business from assessee to the purchaser with all passive control and thus treated the income from it as business income u/s. 28(va). The Tribunal upheld the view of the AO. On an appeal by the Assessee, the High Court held that transfer was not an innocent transfer of sale of shares that would take place within section 2(14) but a transfer of business with all pervasive control being entrusted to purchaser to complete and absolute exclusion of the seller, whether as a shareholder or for its management and control, and hence it would be taxable as business income. (A.Y. 2006-07)

*Sumeet Taneja v. CIT (2014) 220 taxman 368 (P&H) (HC)*

**29. S.32 : Depreciation – Rate – Leased assets – Assessee was entitled to get higher depreciation on trucks at 40 per cent instead of normal rate of 25 per cent**

The assessee had leased out 19 trucks to M/s. Damodar Mangalji & Co. Ltd. for period of 5 years who in turn leased out trucks to drivers with a condition that they would transport the ore of the assessee. The assessee claimed 40 per cent depreciation at enhanced rate and the same was rejected by Assessing Officer and granted normal depreciation of 25 per cent. On appeal, the Commissioner (Appeals) and Tribunal observed that in case of leasing of vehicle the entire expenditure on maintenance and running was borne by the lessee whereas in case of hiring of trucks the entire expenditure was borne by hirer and, thus, higher depreciation would be allowable only to the hirer of a vehicle and not to a lessor. On appeal, the High Court relied on law laid down by Hon'ble Supreme Court in *I.C.D.S. Ltd. v. CIT* [2013] 350 ITR 527/29 taxmann.com 129/212 Taxman 550 and held that what has been postulated is that the assessee must use the asset for the purpose of business.

The section does not postulate the use of the asset by the assessee himself and therefore the question was answered in favour of the assessee. (A.Y. 1997-98).

*Damodar Mangalji Mining Co. v. JCIT (2014) 220 Taxmann 344 (Bom.)(HC)*

**30. S.32 : Depreciation – Rates – Parts of assets – A tanker or a gas cylinder attached to body of a truck continues to be a gas cylinder and is, accordingly, entitled to depreciation as applicable to gas cylinder, i.e., 100 per cent depreciation**

The Assessee claimed depreciation @ 100% on gas cylinder attached to the part of truck considering it to be separate part for the purpose of claiming depreciation. The AO denied the Assessee's contention for claiming 100% depreciation on gas cylinder. Lower authorities reversed the order of the AO. On an appeal, the High Court relied on the decision of *CIT v. Goyal MG Gases Ltd.* [2008] 296 ITR 72 (Delhi) wherein a similar controversy had arisen and it was held that a tanker or a gas cylinder attached to the body of a truck continues to be a gas cylinder and is accordingly entitled to depreciation as applicable to gas cylinder as per Appendix I to the Income-tax Rules i.e. @ 100%. (A.Y. 1986-87).

*CIT v. H.B. Leasing & Finance Ltd. (2014) 220 Taxmann 215 (Delhi)(HC)*

**31. S.32 : Depreciation – Rate – Leased assets – Where assessee engaged in business of leasing and financing of leased vehicles to third parties, assessee would be entitled to depreciation at higher rate of depreciation i.e. 40 percent**

The High Court relied on the Supreme Court's decision in *I.C.D.S. Ltd. v. CIT* [2013] 350 ITR

527 and held that the assessee engaged in the business of leasing and financing leased vehicles to third parties, it would be entitled to depreciation at higher rate of 40 per cent. (A.Y. 1986-87)

*CIT v. H.B. Leasing & Finance Ltd. (2014) 220 Taxmann 215 (Delhi)(HC)*

### **32. S.32 : Depreciation – Interest – Distinction between “hire purchase transactions” and “loan transactions” explained**

The vehicles were registered in the name of the respective customers. However, in the registration certificate a remark in terms of agreement was to be recorded to the effect that vehicle is held by the registered owner under a hire purchase agreement with the assessee. A “Sale Letter” was executed, reciting that the customer had on the date of the application for loan sold to the financier the motor vehicles. The sale of vehicles have not been shown by the assessee in its profit and loss account and no sales tax return has been filed by it. In its audited account, filed with the income tax returns, the assessee has shown the finance charges as revenue receipts. The auditor has certified that the assessee is not a trading company. The auditor has also certified that the assessee has followed the norms issued by the Reserve Bank of India for non-banking financial companies (NBFC). This shows that the assessee is a finance company engaged in financing of vehicles. There is no evidence that assessee is a trader dealing in purchase and sale of vehicles. Thus the hirer is the real purchaser of vehicles from the dealer. He selects the vehicle for purchase and also the dealer from whom it was to be purchased. At this stage the assessee does not come into picture. After the hirer identified the vehicle and the dealer i.e. the seller then he approached the assessee for finance due to his inability to purchase out of his own funds. At this stage the assessee extended the facility of finance to hirer on willingness of

the hirer to pay a price for this facility. The total amount of hire that hirer pays to the assessee exceeds the price at which the vehicle was purchased from the dealer. This is more than that part of the purchase consideration which was paid by the assessee to the dealer as finance to the hirer. The excess amount so paid by the hirer to the assessee is nothing but interest on loan. The amount so invested by the assessee in the purchase of vehicles is the amount of loan advanced by it to the hirer. When tested on the principles of law laid down by Supreme Court in Sundaram Finance Ltd. the only conclusion that can be reached is that the transactions entered by the assessee with the customer/hirer is a loan transaction and the finance charges were nothing but interest. (ITA No. 367 of 2012, dated 13-12-2013.)

*CIT v. Commercial Motors Finance Ltd. (All.)(HC), www.itatonline.org*

### **33. S.37(1) : Business expenditure – Foreign education – Son of director-Expenditure on foreign education of employee (son of director) is deductible if there is business nexus.**

- (i) The question is whether these twin requirements are said to have been satisfied in the circumstances of this case. The first is what are the materials on record? The assessee furnished its resolution authorizing disbursement of the expenses to fund Dushyant Poddar’s MBA. It secured a bond from him, by which he undertook to work for five years after return within a salary bond and he had in fact worked after graduating from the University for about a year before starting his MBA course. In *Natco Exports P. Ltd. v. CIT* (2012) 345 ITR 188 (Del), the student had applied directly when she was pursuing her graduation. There was a seamless transition as it were between the chosen subject of her

undergraduate course and that which she chose to pursue abroad. In the present case, the facts are different. Dushyant Poddar was a commerce graduate. The assessee's business is in investments and securities. He wished to pursue an MBA after serving for an year with the company and committed himself to work for a further five years after finishing his MBA. There is nothing on record to suggest that such a transaction is not honest. Furthermore, the observation in Natco Exports with respect to a policy appears to have been made in the given context of the facts. The Court was considerably swayed by the fact that the Director's daughter pursued higher studies in respect of a course completely unconnected with the business of the assessee. Such is not the case here. Dushyant Poddar not only worked but – as stated earlier – his chosen subject of study would aid and assist the company and is aimed at adding value to its business;

- (ii) Whilst there may be some grain of truth that there might be a tendency in business concerns to claim deductions under Section 37, and foist personal expenditure, such a tendency itself cannot result in an unspoken bias against claims for funding higher education abroad of the employees of the concern. As to whether the assessee would have similarly assisted another employee unrelated to its management is not a question which this Court has to consider. But that it has chosen to fund the higher education of one of its Director's sons in a field intimately connected with its business is a crucial factor that the Court cannot ignore. It would be unwise for the Court to require all assesseees and business concerns to frame a policy with respect to how educational funding of its employees generally and a class thereof, i.e. children of its management or Directors would be done. Nor would it

be wise to universalise or rationalise that in the absence of such a policy, funding of employees of one class – unrelated to the management – would qualify for deduction under Section 37(1). We do not see any such intent in the statute which prescribes that only expenditure strictly for business can be considered for deduction. Necessarily, the decision to deduct is to be case-dependent. (ITA No. 10/2014, dated 25-2-2014)

*Kostub Investment v. CIT(Delhi)(HC), www.itatonline.org*

**34. S.40(a)(ia) : Amounts not deductible – Deduction at source – Payment of tax before filing return – No disallowance can be made**

Amendment to the provisions of s. 40(a)(ia) by the Finance Act, 2010 is retrospective from 1-4-2005. As TDS was paid before the due date of filing return, disallowance u/s. 40(a)(ia) was not sustainable. (A.Y. 2007-08)

*CIT v. Jawahar Lal Agrawal (2014) 98 DTR 289 (MP)(HC)*

**35. S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – There is a difference between “crossed cheque” and “account payee cheque”. Payment by crossed cheque attracts S. 40A(3) disallowance**

The expression earlier used in s. 40A(3)(a) was a “crossed cheque or a crossed bank draft”. This was amended by the legislature to be replaced by the expression “an account payee cheque or account payee bank draft”. This was done in the background of the experience that even crossed cheques were being endorsed in favour of a person other than the drawee making it

difficult to trace the constituent of the money. To plug this possible loophole the requirement of section 40A(3) was made more stringent. If we accept the contention of counsel for the assessee that there was no distinction between a crossed cheque and an account payee cheque, we would be obliterating this amendment brought in the statute with specific purpose in mind. Accordingly, payment by a crossed cheque is subject to disallowance u/s. 40A(3).

*Rajmoti Industries v. ACIT (Guj.)(HC) www.itatonline.org*

**36. S.40A(3) : Expenses or payments not deductible – Cash payments exceeding prescribed limits – No disallowance for cash payments even if Rule 6DD(j) exception does not apply if there is no dispute as to genuineness of payment and business compulsion. [R. 6DD]**

Though there was no dispute regarding the genuineness of the payments made, the AO made a disallowance u/s. 40A(3) on the ground that the exception in Rule 6DD did not apply.

On facts, though the case of the assessee did not fall within the exclusion clause in Rule 6DD (j), s. 40A(3) will not apply because (a) there is no doubt as to the genuineness of the payment nor the identity of the payee, (b) the assessee was compelled to pay cash owing to the insistence of its principal and if it had not abided by the direction, the business would have suffered and (c) the exceptions in Rule 6DD are not exhaustive and the rule must be interpreted liberally. (Tax Appeal No. 556 of 2013 dated 22-1-2014.)

*Anupam Tele Services v. ITO (Guj.)(HC), www.itatonline.org*

**37. S.41(1) : Profits chargeable tax – Remission or cessation of trading**

**liability – Waiver of loan by bank was held to be not liable to tax**

Bank waived the principal amount of loan and interest. AO assessed the waiver of loan also as income of assessee. Tribunal held that as the assessee never claimed the principal amount of loan as deduction, AO was not justified assessing the said amount as income. On appeal by revenue the Court affirmed the view of Tribunal. (A.Y. 2007-08)

*CIT v. Dholgiri Industries (P) Ltd. (2014) 99 DTR 359 (MP)(HC)*

**38. S.41(1) : Profits chargeable to tax – Remission or cessation of trading liability – Unclaimed liabilities (of earlier years), which are shown as payable in the accounts, are not taxable as income even if creditors untraceable & liabilities are non-genuine**

In A.Y. 2007-08 the assessee showed an amount of ₹ 37.52 lakhs as being due to various creditors. The AO issued summons to the creditors. Some of the creditors were not found at the given address and some stated that they had no concern with the assessee. The AO took the view that there was a “cessation” of the liabilities and assessed the said liabilities to tax u/s. 41(1). The CIT(A) confirmed the addition though the Tribunal deleted it on the basis that as the liabilities had not been written back in the accounts, s. 41(1) did not apply. On appeal by the department to the High Court HELD dismissing the appeal:

S. 41(1) would apply in a case where there has been remission or cessation of liability during the year under consideration. In the present case, there was nothing on record to suggest there was remission or cessation of liability in the AY 2007-08. It is undoubtedly a curious case. Even the liability itself seems under serious doubt. The AO undertook the exercise to verify the records

of the so-called creditors. Many of them were not found at all in the given address. Some of them stated that they had no dealing with the assessee. In one or two cases, the response was that they had no dealing with the assessee nor did they know him. Of course, these inquiries were made ex parte and in that view of the matter, the assessee would be allowed to contest such findings. Nevertheless, even if such facts were established through bi-parte inquiries, the liability as it stands perhaps holds that there was no cessation or remission of liability and that therefore, the amount in question cannot be added back as a deemed income u/s 41(1) of the Act. This is one of the strange cases where even if the debt itself is found to be non-genuine from the very inception, at least in terms of s. 41(1) of the Act there is no cure for it (Tax Appeal No. 588 of 2013, dated 4-2-2014.)

*CIT v. Bhogilal Ramjibhai Atara (Guj.)(HC), www.itatonline.org*

**39. S.43(5) : Speculative transaction – Jobbing – Share broker – Loss is not speculative allowable as business loss. [S. 70, 73]**

The assessee is a member of the U.P. Stock Exchange, Kanpur. Assessee claimed the loss on jobbing as business loss. AO treated the said loss as speculative loss which was confirmed by CIT (A). On appeal the Tribunal held that the assessee was entitled to the exception covered by the proviso, cl.(c) to sub-S.(5) of S. 43 of the Act, even if it is accepted that the loss suffered by the assessee was on account of self trading, the loss was normal business loss and not speculative. On appeal by revenue the Court affirmed the finding of the Tribunal by holding that the transactions carried on by assessee for sale and purchase of the shares were fully covered by the term 'jobbing' and assessee was entitled for the extension of the benefit of proviso (c) to section 43(5). (A.Y. 1998-99)

*CIT v. Shri Ram Kishan Gupta (2014) 100 DTR 1 (All.)(HC)*

**40. S.43B : Deductions on actual payment – Employers'/Employees' contribution towards PF and ESI – Paid prior to filing of return – No disallowance can be made. [S. 2(24)(x), 36(1)(va), 39(1)].**

Assessee deposited employer's and employees' contributions to the PF and ESI prior to the filing of the return u/s. 139(1) though beyond due dates. Deductions could not be disallowed u/s. 43B. (A.Y. 2003-04)

*CIT v. Hemla Embroidery Mills (P.) Ltd. (2104) 98 DTR107 (P&H)(HC)*

*CIT v. UT Star Com. Inc. (2104) 98 DTR 107 (P&H)(HC)*

**41. S.43B : Deductions on actual payment – Employees contribution – Provident fund – Eligible for deduction which was paid before due date of filing of return. [S. 2(24)(x), 36(1)(va), 139(1)]**

Amendment of section 43B applies to employees's as well as employer's contribution towards Provident Fund and assessee was eligible to deduction for employees' contribution which was paid before due date prescribed under section 139(1) of the Act. (A.Y. 2006-07)

*CIT v. Spectrum Consultants India (P) Ltd. (2014) 100 DTR 129 (Karn.)(HC)*

**42. S.43B : Deductions on actual payment – Employees' PF/ ESI Contribution is also covered by s. 43B & allowable as a deduction if paid by "due date" of filing ROI. [S. 2(24)(x) 36(1)(va), 139(1)]**

The assessee collected ESI and PF from its employees but did not pay the sum to the respective funds within the due date prescribed in relevant legislation. The amount was,

however, paid before the due date u/s 139(1) for filing the ROI. The AO & CIT(A) disallowed the payment u/s. 36(1)(va) read with s. 2(24)(x). Before the Tribunal, the department justified the disallowance by relying on *Dy. CIT v. Ashika Stock Broking Ltd. (2011) 139 TTJ 192 (Kol.)* (which in turn relied on *Jt. CIT v. ITC Ltd. (2008) 112 ITD 57 (Kol.) (SB)* where it was held that s. 43B does not apply to employees' contribution). However, the Tribunal declined to follow that law and allowed the appeal by relying on *CIT v. Sabari Enterprises (2008) 298 ITR 141 (Kar)* and *CIT v. P.M. Electronics Ltd. (2008) 220 CTR 635 (Del)* where it was held that s. 43B applied also to employees' contribution to ESI and PF and that if a payment was made within the due date u/s 139(1) of filing the ROI, the disallowance cannot be made. On appeal by the department to the High Court HELD dismissing the appeal:

The only issue involved in this appeal is as to whether the deletion of the addition by the AO on account of employees' contribution to ESI and PF by invoking the provision of s. 36(1)(va) read with s. 2(24)(x) of the Act was correct or not. In *CIT v. Alom Extrusion Ltd. (2009) 319 ITR 306* the Supreme Court has held that the amendment to the second proviso to s. 43B as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988. Such being the position, the deletion of the amount paid by the Assessee as Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of s.43B of the Act. We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal. (ITA No. 245 of 2011, dated 6-9-2011)

*CIT v. Vijay Shree Ltd. (Cal.)(HC), www.itatonline.org*

**43. S.44AD : Civil Construction – Computation – Net profit of 5% of contract receipt was held to be**

**valid instead of 8% estimated by Tribunal**

The assessee was a civil contractor. In the absence of proper books of account maintained, the Assessing Officer estimated the assessee's income at 8 per cent of the gross contract receipts by invoking the provisions of Section 44AD. The CIT(A) held that net profit of assessee was to be assessed at 5 per cent of contractual receipts considering the margin of previous years. The Tribunal gave findings that the assessee had not filed profit and loss account or balance sheet for the relevant years and that the returns and the vouchers produced were defective in nature, and it accordingly confirmed the order of the Assessing Officer, thereby taking 8 per cent of the gross turnover as the income of the assessee. On appeal to the High Court, it was held that, since the assessee's gross contract receipts were in excess of ₹ 40 lakhs for the assessment years 2006-07 and 2007-08, Section 44AD had no relevance and thus assessee's income should not have been assessed at the high rate of 8 per cent. The CIT(A) was right in considering margin of 5 per cent of contractual receipts. (A.Ys. 2006-07, 2007-08)

*K. Kannan v. ACIT (2014) 220 Taxmann 250 (Mad.)(HC)*

**44. S.45 : Capital gains – Capital loss – Capital asset – Transfer-Write-off of irrecoverable advances is not a “transfer” and the loss cannot be claimed as a capital loss u/s. 45 – Not allowed to be carried forward to subsequent year. [S.2(14), 2(47)]**

Having regard to the definitions of terms “capital asset” and “transfer” in sections 2(14) and 2(47), in order to be eligible for carry forward of capital loss, the capital asset should be of the nature defined in s. 2(14) and should be transferred in the manner defined in s. 2(47). Equally, it should be subjected to tax as per s. 45(1) of the Income-tax Act. The advances given

to the said two parties and written off are not the capital assets nor there is any transfer. Therefore, they were not allowed to be carried forward to subsequent years. It is a capital loss and should be ignored. (ITA No. 1110 of 2012. dated 25-3-2014.)

*Crompton greaves Limited v. DCIT (Bom.)(HC); www.itatonline.org*

**45. S.54F : Capital gains – Construction of new residential house – Construction need not begin after sale of the original asset – Eligible for exemption u/s. 54F**

S. 54F does not stipulate that to claim exemption the construction of house should commence before the date of sale of shares. Exemption could not be denied on the ground that the construction of house had commenced before the date of sale of shares. (A.Y. 2009-10)

*CIT v. Bharti Mishra (2014) 98 DTR 1 (Delhi) (HC)*

**46. S.55 : Capital gains – Cost of acquisition – FMV as on 1.4.1981 – Reference to DVO – Amendment of s. 55A(a) by the Finance Act, 2012 is effective from 1.7.2012 and is not retrospective in nature. [S.55A(a)]**

Assessee adopted the value of the property at ₹ 35.99 lakhs as on 1-4-1981, which was much more than FMV of ₹ 6.68 lakhs as determined by the DVO. Therefore, s. 55A(a) could not be invoked. Amendment of s. 55A(a) by the Finance Act, 2012 is effective from 1-7-2012 and is not retrospective in nature. Decision in *CIT v. Daulat Mohta (HUF)* ITA no 1031 of 2008 dated 22-9-2008 was followed. Order of Tribunal was affirmed. (A.Y. 2006-07)

*CIT v. Puja Prints (2014) 98 DTR 177 (Bom.)(HC)*

**47. S.68 : Cash credits – Sundry creditors – Merely because some creditors had not confirmed receipts, additions could not be made to assessee's income when creditworthiness had been proved beyond doubt**

The assessee was a manufacturer of fabrics. The Assessing Officer doubted the genuineness of the sundry creditors in the return of income. Accordingly, notices were sent by the Assessing Officer to those creditors, but the notices were received back unserved. In view of the above, the Assessing Officer made an addition to the assessee's income on account of cash credit u/s 68 of the Act. The CIT(A) deleted the addition. However, the Tribunal confirmed the same. On further appeal, the High Court held that the identity, creditworthiness and genuineness of the creditors had been proved beyond doubt, as had been observed by the First appellate authority and hence the addition was deleted. (A.Y. 2004-2005)

*CIT v. Jagdish Prasad Tewari (2014) 220 Taxmann 141 (All.)(HC)*

**48. S.68 : Cash credits – Unsecured loan-No additions on account of unsecured loan when identity and creditworthiness of the party is proved, more so amount received through proven banking channels**

The A.O. made an addition of ₹ 10 lakhs pertaining to the loan received from M/s. L.N. Seth, HUF. This was upheld by the first appellate authority. However, the Second Appellate Authority deleted the addition. Being aggrieved, the department filed an appeal. The High Court dismissed the appeal by stating that money had come at all levels through banking channels and the creditworthiness and identity of the donors/creditors had been proved. All the three conditions (proven identity,

proven creditworthiness, and proven banking transactions) had been satisfied in the instant case and accordingly upheld the order of the Tribunal. (A.Y. 2005-06)

*CIT v. Shalimar Buildwell Pvt. Ltd. (2014) 220 Taxmann 138 (All.)(HC)*

**49. S.68 : Cash credit – Loan – Additions deleted as there was sufficient evidence available to prove the source. [R.46A]**

The assessee, in the return of income filed, had shown several loan credits for different amounts. The Assessing Officer treated the loan credits of ₹ 11.91 lakhs as unproved cash credits in absence of any evidence filed in these respects. The CIT(A), after considering the explanation given by the assessee, deleted the addition made by the AO. The Tribunal upheld the CIT(A) order. On an appeal by the Department, the High Court held that the issue was considered by the fact finding authorities in detail and does not require any reconsideration. (A.Y. 1995-96)

*CIT v. E.S. Jose (2014) 220 Taxmann 32 (Ker.)(HC)*

**50. S.80HHC : Export business – Receipt of premium on special import license, insurance claim on vehicles and service charges were not linked with export business and thus would be treated as charges within meaning of Explanation (baa) to section 80HHC, thus would not be entitled to deduction**

During the year assessee received premium on special import licences, insurance claim on vehicles and was in receipt of certain service charges. The assessee claimed deduction on these receipts under section 80HHC on the ground that these receipt were linked with export business and thus could not be treated

as charges within the meaning of Explanation (baa) to section 80HHC. The Tribunal disallowed the claim. On appeal, the High Court relied on the law laid down by Hon'ble Supreme Court in *CIT v. K. Ravindranathan Nair* [2007] 295 ITR 228 and held that the view which has been taken by the Tribunal is, therefore, consistent with the law which has been laid down by the Supreme Court and the question was answered in favour of revenue. (A.Y. 1997-1998).

*Damodar Mangalji Mining Co. v. JCIT (2014) 220 Taxman 344 (Bom.)(HC)*

**51. S.80HHE : Export business – Free trade zone – total turnover – Turnover of eligible units does not form part of the profits of the business for the purpose of deduction. [S.10A]**

When assessee is held to be eligible exemption section 10A, neither the profits and gains of that business nor the turnover of that business could be added to find out the profits from export of computer software under section 80HHE. (A.Y. 2001-02)

*CIT v. Sasken Communication Technologies Ltd. (2014) 98 DTR 194 (Karn.)(HC)*

**52. S.80HHE : Export business – Computer software – Service Income – Would not be susceptible to a reduction of 90 per cent**

Income emanating from services rendered would not be susceptible to a reduction of 90 per cent as it does not constitute a receipt of nature similar to brokerage, commission, interest, rent or charges. Such receipt could not be subject to deduction of 90 percent under sub-cl (1) of c. (d) of the Explanation and therefore, not liable to be reduced to the extent of 90 percent. (A.Ys. 1999-2000 to 3)

*CIT v. Robert Bosch (India) Ltd. (2014) 98 DTR18 (Karn.)(HC)*

**53. S. 80IA : Industrial undertakings – The effect of s. 80-IA(9) is that s. 80-IA deduction has to be reduced for s.80HHC deduction in all cases and not only when the combined deduction exceeds the profits. [S. 80HHC, 80 IA(9)]**

The Gujarat High Court had to consider the controversy whether the assessee can claim deduction u/s. 80HHC of the Act, ignoring the deduction already claimed and allowed u/s. 80 IA of the Act, unless and until the combined effect of the deductions flowing from both the sections is to exceed the profit and gain of the eligible business of the undertaking or enterprise. HELD by the High Court deciding in favour of the department:

Sub-section (9) of s. 80 IA is aimed at restricting the successive claims of deduction of the same profit or gain under different provisions contained in sub-chapter C of Chapter VI of the Act. This provision, therefore, necessarily impacts other deduction provisions including s. 80HHC of the Act. Nothing contained in s. 80HHC suggests that the deduction provided therein was immune from any outside influence or that the provision was impregnable by any other statute or enactment. Accepting any such theory would lead to incongruous results. Even the assessee concedes that sub-section (9) of s. 80IA would operate as to limiting the combined deductions to a maximum of the profits and gains from an eligible business of the undertaking or enterprise. If s. 80HHC contained a protective shell making it immune from any outside influence, even this effect of sub-section (9) of s. 80 IA could not be applied. This would completely render the provisions of sub-section (9) of s. 80 IA redundant and meaningless. (Tax Appeal No. 508 of 2007 dated 25-3-2014.)

*CIT v. Atul Intermediates (Guj.)(HC); www.itatonline.org*

**54. S.80IB : Industrial undertaking – Manufacture-explained. Non-claiming of s. 80-IB deduction in return is no bar for claiming it before CIT(A)**

The word “manufacture” implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinct name, character or use. The assessee would put the imported material to series of manual and mechanical processes and through such exercise so undertaken, bring into existence entirely new, distinct and different commodities which are marketable. Thus, the Tribunal, in our opinion, correctly came to the conclusion that this process amounted to manufacturing.

*CIT v. Mitesh Impex (Guj.)(HC). www.itatonline.org*

**55. S.80IB(10) : Housing projects – If developer does not (without just cause) develop to full extent of FSI, a part of the sale proceeds has to treated as being for sale of FSI and denied S. 80-IB(10) deduction**

The assessee, engaged in development of housing projects, constructed a residential project. Though total FSI of 15/312 sq. metres was available for construction, the assessee utilised only 3573 sq. metres. The residential units were constructed only on the ground floor. The said residential units were sold and the entire surplus was claimed u/s. 80-IB(10) as profits derived from activity of developing housing project. The AO and CIT(A) held that a part of the consideration received by the developer was relatable to the unutilised FSI and had to be excluded from the profits eligible for s. 80-IB(10) deduction. However, the Tribunal upheld the assessee’s claim on the basis that the assessee was not compelled to construct up to the maximum FSI and that it had satisfied all the other conditions of s. 80-IB(10). On appeal by the

department to the High Court HELD reversing the Tribunal:

- (i) For any commercial activity of construction, be it residential or commercial complex maximum utilisation of FSI is of great importance to the developer. Ordinarily, therefore, it would be imprudent for a developer to underutilise available FSI. Sale price of constructed properties is decided on the built up area. It can thus be seen that given the rate of constructed area remaining same, non-utilization of available FSI would reduce the profit margin of the developer. When a developer therefore utilises only say 25% of FSI and sells the unit leaving 75% FSI still available for construction, he obviously works out the sale price bearing in mind this special feature. Thus, therefore, when a developer constructs residential unit occupying a fourth or half of usable FSI and sells it, his profits from the activity of development and construction of residential units and from sale of unused FSI are distinct and separate and rightly segregated by the AO;
- (ii) It is true that s. 80 IB(10) does not provide that for deduction, the undertaking must utilise 100% of the FSI available. The question however is, can an undertaking utilize only a small portion of the available area for construction, sell the property leaving ample scope for the purchaser to carry on further construction on his own and claim full deduction u/s 80 IB(10) on the profit earned on sale of the property? If this concept is accepted, in a given case, an assessee may put up construction of only 100 sq. ft. on the entire area of one acre of plot and sell the same to a single purchaser and claim full deduction on the profit arising out of such sale u/s 80 IB(10) of the Act. Surely, this cannot be stated

to be development of a housing project qualifying for deduction u/s 80 IB(10);

- (iii) This is not to suggest that for claiming deduction u/s. 80 IB (10), invariably in all cases, the assessee must utilise the full FSI and any shortage in such utilisation would invite wrath of the claim u/s 80 IB(10), being rejected. The issue has to be seen from case to case basis. Marginal under-utilization of FSI certainly cannot be a ground for rejecting the claim u/s 80 IB(10). Even if there has been considerable under-utilisation, if the assessee can point out any special grounds why the FSI could not be fully utilised, such as, height restriction because of special zone, passing of high tension electric wires overhead, or any such similar grounds to justify under utilization, the case may stand on a different footing. However, in cases where the utilisation of FSI is way short of the permissible area of construction, looking to the scheme of s. 80 IB(10) and the purpose of granting deduction on the income from development of housing projects envisaged there under, bifurcation of such profits arising out of such activity and that arising out of the net sell of FSI must be resorted to. On facts, none of the assesseees have made any special ground for non-utilisation of the FSI. (Tax Appeal No. 549/2008, dt. 8-4-2014.)

*CIT v. Moon Star Developers (Guj.)(HC); www.itatonline.org*

**56. S.80IB(10) : Housing projects – Approval of the project – Completion certificate – Non granting of completion certificate exemption cannot be denied where the approval was obtained on 16th March, 2005**

Assessee had obtained the approval of the project on 16th March, 2005 from the

development Authority and also applied to the Authority on 5th November, 2008 for issue of completion certificate. The AO denied the exemption on the ground that completion certificate in terms of Explanation (ii) which was inserted w.e.f. 1st April 2005 had not been granted so as to enable to avail the benefit under section 80IB(10). Tribunal allowed the claim of assessee. On appeal by revenue the Court held that approval related to the period prior to 2005, i.e. before the amendment of section 80IB which insisted on issuance of completion certificate by the end of the 4 year period was brought in to force. Application of such stringent conditions which are left to an independent body such as the local authority who has to issue the completion certificate, would have led to not only hardship but absurdity. The Court held that since the approval was granted to the assessee on 1st April, 2005, therefore, the assessee is not expected to fulfil the conditions which were not in the statute when such approval was granted to the assessee. (A.Y. 2007-08)

*CIT v. CHD Developments Ltd. (2014) 99 DTR 401 (Delhi)(HC)*

**57. S.80P : Co-operative societies – Exclusion in s. 80P(4) applies only to credit co-operative banks but not to credit co-operative societies**

From CBDT circular No.133 of 2007 dated 9-5-2007 it can be gathered that sub-section (4) of section 80P will not apply to an assessee which is not a co-operative bank. In the case clarified by CBDT, Delhi Co-op Urban Thrift & Credit Society Ltd. was under consideration. Circular clarified that the said entity not being a co-operative bank, section 80P(4) of the Act would not apply to it. In view of such clarification, we cannot entertain the Revenue's contention that section 80P(4) would exclude not only the co-operative banks other than those fulfilling the description contained therein but also credit societies, which are not cooperative banks. In the present case,

respondent assessee is admittedly not a credit co-operative bank but a credit co-operative society. Exclusion clause of sub-section (4) of section 80P, therefore, would not apply. (Tax Appeal No. 442 of 2013, 15-1-2014.)

*CIT v. Jafari Momin Vikas Co-op Credit Society Ltd. (Guj.)(HC), www.itatonline.org*

**58. S.115JA : Book profit – Minimum alternate tax – Adjustment, refund of admitted tax – No provision under the Act to refund the amount which had been admitted and which had been paid by the assessee as MAT. [S. 115JB, 226]**

The petitioner company had admitted certain tax liability in the return of income under Section 115JB which was to be paid on or before October 2007. Admitted tax was not deposited. An intimation order under Section 143(1) was passed creating tax liability on the assessee and thereafter an order was passed under Section 226(3) attaching bank account of assessee. According to the assessee, as profits were worked out on the basis of book profits under Sections 115JAA and 115JB, it was entitled to a credit of tax to be paid for up to the next seven years. Therefore it filed a writ, praying for the notice under Section 226(3) to be quashed, for a refund of the unadjusted balance (since the liability of tax as a MAT company was much lower than the normal tax paid by the assessee in the subsequent year and thus there was no question of adjustment of tax in those year of the amount to be paid for the current A.Y.) and permission to make payments of demanded tax in 4 quarterly installments.

The High Court held that since liability was admitted, there was no question of giving time to pay tax by giving installments for which there was no provision under the Act or Rules. The Court also held that there was no provision under the Act to refund the amount which had been admitted and which had been

paid by the assessee as MAT and therefore no relief could be granted to the assessee. (A.Y. 2007-08)

*B.R.K. Finance & Inv. Company Ltd. v. ITO (2014) 220 Taxmann 145 (All.)(HC)*

**59. S.115JB : Book profit – Minimum Alternate Tax – Provision for diminution in value of assets which has been debited to profit and loss account is not required to be increased as per clause (i) of Explanation 1 to section 115JB to compute book profit under section 115JB – Similarly, provision for doubtful debts debited to profit and loss account is not required to be increased as per clause (c) of Explanation 1 to section 115JB to compute book profit under section 115JB**

The issue of provision for diminution in the value of assets and provision for doubtful debt, the High Court dismissed the appeal of the revenue after relying on the decision of *CIT v. Yokogawa India Ltd.* (204 taxmann 305) wherein it was held that if the adjustments of provision for bad and doubtful debts is reduced from the loans and advances or the debtors from the assets side of the balance sheet, the Explanation to Section 115JA and 115JB is not at all attracted. (A.Y. 2002-03).

*CIT v. Kirloskar Systems Ltd. (2014) 220 Taxmann 1 (Karn.)(HC)*

**60. S.142(2A) : Special audit – Enquiry before assessment – AO need not examine books of account before directing special audit. Q whether accounts are “complex” has to**

**decided by AO and Court can interfere sparingly**

- (i) The contention that the books of account were not called for and examined by the A.O. and therefore the direction for special audit is bad in law is without merit. Sub-section (2A) of Section 142 does not require the “books of account” to be examined by the A.O. It empowers the A.O., with the previous approval of the Chief Commissioner or Commissioner of Income Tax, to direct the assessee to get the accounts audited if he is of the opinion that it is necessary to do so “having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue.....”. It has been held by a Division Bench of this Court in *Rajesh Kumar, Prop. Surya Trading v. Dy. CIT (2005) 275 ITR 641 (Del.)* that the expression “accounts” used in the section does not refer merely to “books of account” of the assessee; it could include the books of account, balance sheets and all other records which are available to the A.O. during the assessment proceedings. It refers to the other records available with the A.O. not only in the course of the assessment proceedings but also at any stage subsequent thereto. It was held that the expression “accounts” cannot be confined to books of account as submitted by the assessee, as it would amount to giving an interpretation which completely defeats the very object of the section. It was further held that the fact that the accounts of the assessee are subject to audit under some other statute is also no ground to hold that in such a case the A.O. cannot direct a special audit. It was observed that in addition to the books of account, the A.O. may also take into consideration such other documents related thereto and which would be part of the assessment proceedings. This judgment was followed by another

Division Bench of this court in Central Warehousing Corporation. In the light of these authorities, it is not possible to accept the contention that the A.O. cannot direct a special audit unless he examines the books of account.

*AT & T Communication Service India (P) Ltd. v. CIT (Delhi)(HC), www.itatonline.org*

**61. S.145 : Method of accounting – Rejection – Estimate of income – Tribunal has to be pass reasoned order after dealing with arguments of both the parties. [S.254(1)]**

Court observed that arguments advanced / points urged deserve to be dealt with, reasons from affirmation have to be indicated though in appropriate cases they may be briefly stated. Recording of reasons is part of fair procedure and reasons are harbinger between the mind of the maker of the decision in the controversy and the decision or conclusion arrived at and they always substitute subjectivity with objectivity. Court set aside 81 matters to Tribunal by observing that the judgments of Tribunal being stereo typed, non speaking, unreasoned, arbitrary and whimsical. The court also observed that the authorities should make an honest and fair estimate of the income even in a best judgment assessment and should not act arbitrarily. Reduction by Tribunal of estimated addition by AO without any facts or comparable cases or past history was not sustainable; Matter is remanded for reconsideration. (A.Y. 1995-96)

*CIT v. Ram Singh and others (2014) 266 CTR 122 / 99 DTR (Raj.)(HC)*

**62. S.147 : Reassessment – Full and true disclosure – Quantum of receipt was disclosed – Change of opinion – Reassessment was not valid**

Assessee had made full and true disclosure at the time of original proceedings about the

method of accounting adopted by him and the quantum of receipts disclosed. There was change of opinion. Therefore, reopening was not sustainable. (A.Y. 2006-07)

*Select Vacations (P) Ltd. v. ITO & Anr. (2014) 98 DTR 137 (Delhi)(HC)*

**63. S.147 : Reassessment – Settlement of cases – Maintainability of application – Pendency of assessment before AO No assessment proceedings were pending – Abatement of proceedings before Settlement Commission – Rejection of application – Reassessment notice was valid. [S.148, 153, 245A(b), 245C & 245D]**

Time-limit to make assessment order in regular proceedings for A.Y. 2007-08 to 2009-10 had already expired before the date on which the application for settlement was made. On the date of filing of the application before the Commission no assessment proceedings was pending with AO. Therefore, the application was not maintainable.

The decision of the Settlement Commission rejecting the application for A.Y. 2007-08 to 2009-10 was upheld. In view of s. 245A, proceedings before the Commission abated in respect of those years. AO was entitled to issue notices u/s.148. (A.Ys. 2007-08 to 2009-10)

*Shrinivas Machine Craft (P) Ltd. v. ITSC & Ors. (2014) 98 DTR 161 (Bom.)(HC)*

**64. S.147 : Reassessment – Business expenditure – R&D expenses – Notice – Reassessment based on internal audit objection not valid. [S.35AB, 37(1), 148]**

The AO allowed R&D expenses incurred by the assessee in respect of in-house research as

revenue expenditure. Subsequently, the audit party raised the objection that the assessee should only be allowed to claim 1/3rd of the R&D expenses in the year as per Section 35AB. The High Court held that reassessment proceedings were initiated solely at the instance of the audit party; the same was a colourable exercise of jurisdiction by the Assessing Officer and therefore, could not be sustained. (A.Y. 2004-05)

*CIT v. Shilp Gravures Ltd. (2014) 220 Taxman 382 (Guj.)(HC)*

**65. S.147 : Reassessment – Direction of CIT(A) – Direction in another assessment year – Reopening was held to be bad in law.[S.148]**

The court held that notice for reassessment was issued only on the account of the directions contained in the order passed by the CIT(A) in the appeal filed by the assessee pertaining to another year cannot be sustained. (A.Y. 2007-08)

*Pramod Kumari Singal v. ITO (2014) 99 DTR 386 (MP)(HC)*

**66. S.147 : Reassessment – Non filing of return – Reassessment was held to be valid. [S. 90]**

Assessee had not filed returns of income and were not subjected to regular assessment under section 143(3). Assessee adopted MAP procedure and income of the two assessments has been partly taxed in India, therefore the reassessment was held to be valid. (A.Ys. 2000-01 to 2006-07)

*CIT v. eFunds IT Solution (2014) 99 DTR 257 (Delhi)(HC),*

*DIT(IT) v. eFunds Corporation & Ors (2014) 99 DTR 257 (Delhi)(HC)*

**67. S.147 : Reassessment – Tax evasion petition – Abuse of law to settle personal vendetta between**

**top-level IRS officers cannot be the reason for reopening of assessment. [S.148]**

Surprisingly one month after the first respondent wrote to the petitioner conceding that there was no basis for the tax evasion petition, he invited the petitioner to cross-examine the complainant, if so advised. Such a procedure is unknown to the Act. Instead of terminating the proceedings initiated under Section 148 of the Act by dropping them the first respondent chose inexplicably to keep those proceedings alive. This is illegal and impermissible in law. This amounts to nothing but harassment of the petitioner. There appears to be some vested interest in keeping the proceedings against the petitioner pursuant to the notice dated 31.03.2011 alive. The tax evasion petition and the present proceedings seem to be the result of a personal vendetta between two officers of the Indian Revenue Service (IRS) (the complainant being one of them). This unfortunately has resulted in multiple proceedings before this Court. The respondents have to act in accordance with law and not under any pressure. The AO, being a responsible officer should not be party or pressurised by someone to personal vendetta. Being statutory officers they have to act independently and in accordance with law. (W.P.(C) 7977/2011, dated 17-2-2014.)

*Pradyok K. Misra v. ACIT (Delhi)(HC), www.itatonline.org*

**68. S.147 : Reassessment – Objection not raised before the AO – New issues raised first time before the Court – Assessee is not entitled to challenge validity of reopening on a ground not stated in objections to AO**

Just as the revenue cannot improve upon its case for reopening before the Court but must stand or fall by the reasons recorded for reopening the assessment, the same test would be applicable

in case of an assessee i.e. it must stand or fall by its objection to the grounds for reopening of assessment. It is not open to the assessee to urge fresh objections before the Court which the AO had no occasion to deal with, unless of course the notice to reopen is ex-facie without jurisdiction not requiring consideration of any argument such as beyond limitation. (WP No. 2595 of 2013, dated 14-2-2014.)

*Crown Consultants Pvt. Ltd. v. CIT (Bom.)(HC), www.itatonline.org*

**69. S.147 : Reassessment – Proceedings of original records were not found – High Court alarmed at shoddy record-keeping by dept. and allegations of tampering – Reopening was quashed**

- (i) We have examined the original record but did not find the proceedings or order sheets relating to original proceedings on record. This is a serious lapse, and it is apparent that the proceeding sheets in the respondents custody and charge, have been removed. The record belongs to the respondents and was in their custody and charge. It was/is their duty and obligation to maintain the records properly and as per law and to ensure their sanctity and accuracy. The records cannot and should not be interpolated or changed. This High Court has in some cases earlier adversely commented about record maintenance by the Revenue as it is unacceptable and faulters on the principle of good governance. Facts mentioned above do not disclose a commendable situation and in fact the situation appears to be alarming and perilous. This requires urgent effective remedial steps. Failure to maintain records has resulted in serious allegations being made that the papers/documents have been tempered or removed, etc.

The papers/documents on record are not serially numbered and indexed. We also note that it is not a practice of the department to give acknowledgement of papers submitted during the course of assessment proceedings;

- (ii) In the present case reassessment proceedings have been initiated after four years from the end of the relevant assessment year and as per the first proviso to Section 147 of the Act, it has to be shown that there was failure on the part of the assessee to disclose fully and truly all facts necessary for the assessment. In the “reasons to believe” it is mentioned that absence of “crucial information” relating to income and expenditure on account of activities of the petitioner in India had resulted in improper computation of income for the assessment year 2003-04. Thus, as per the reasons to believe itself, in case the petitioner had furnished statement showing income and expenditure from Indian activities in the course of the original assessment proceedings, there was no lapse or failure on the part of the assessee i.e. the petitioner. Once it is held that the said details were furnished *vide* letter/reply dated 22nd March, 2006, the reassessment notice, would fail and falter. Letter/reply dated 22nd March, 2006 enclosing the details would go to the very root and falsify the averments made in the reasons to believe. The said reasons would be factually incorrect and reassessment notice bad and contrary to the first proviso to Section 147 of the Act. (A.Y. 2003-04)( WP(CIVIL) NO. 9064/2011, dated 21-2-2014.)

*BBC World News Limited v. ADIT (Delhi)(HC), www.itatonline.org*

**70. S.147 : Reassessment – Intimation – Even S.143(1), Intimation cannot**

**be reopened in the absence of new information. [S.143(1)]**

The reassessment is not on the basis of new information or facts that have come to the fore now, but rather, a re-appreciation or review of the facts that were provided along with the original return filed by the assessee. The record does not show any tangible material that created the reason to believe that income had escaped assessment. Rather, the reassessment proceedings amount to a review or change of opinion carried out in the earlier A.Y. 2005-06, which amounts to an abuse of power and is impermissible. In response, it is argued that since the return was processed under Section 143(1) for the A.Y. 2005-06, which involves a mere intimation, rather than an application of mind or true assessment of the return, a less stringent threshold must be taken in terms of 'reasons to believe' that income has escaped assessment or not. This precise argument, however, has been considered and rejected by this Court in *CIT v. Orient Craft Ltd.* [2013] 354 ITR 536 (Delhi)(A.Y. 2005-06) (WP)(C) 7660/2012, dated 28-1-2014.)

*Mohan Gupta (SUF) v. CIT (Delhi)(HC), www.itatonline.org*

**71. S.192 : Deduction of tax at source – Salary – Fringe benefit tax – Not liable to deduct tax at source on payment of allowance and subsidy to employees to the extent of amount expended. [S.17(1)(iv), 201, R.3]**

The assessee paid conveyance maintenance reimbursement expenditure (CMRE) allowance to its employees for running & maintenance expenditure of their personal vehicles for official work. It treated the same as non-taxable in the hands of the employees and accordingly no tax was deducted on this amount u/s. 192 of the Act. The AO treated it as additional salary within the meaning of 17(1)(iv) and held that the provisions of section 192 were

attracted and since the assessee has not deducted the tax it treated it as assessee in default u/s. 201(1)/201(1A) of the Act.

The High Court held that the payment in question if not utilised actually, the same can be held to be taxable salary of the employees. Moreso, in this appeal, what one is considered is the taxable receipt and not the payment of tax by the employer. Moreover till the FBT regime was in existence, the assessee had already paid the FBT u/s. 115WB. Therefore there was no default of the assessee u/s. 201. (A.Y. 2006-07 to 2009-10)

*CIT (TDS) v. Oil & Natural Gas Corporation (India) Ltd. (2014) 220 Taxmann 187 (Guj.)(HC)*

**72. S.194H : Deduction at source – Commission or brokerage – TDS does not apply to all sales promotional expenditure. It applies only if relationship between payer & payee is that of principal & agent**

The assessee had undertaken sales promotional scheme viz. Product discount scheme and Product campaign under which it offered an incentive on case to case basis to its stockists/dealers/agents. An amount of ₹ 70 lakhs was claimed as a deduction towards expenditure incurred under the said sales promotional scheme. The relationship between the assessee and the distributor/stockists was that of principal to principal and in fact the distributors were the customers of the assessee to whom the sales were effected either directly or through the consignment agent. As the distributor/stockists were the persons to whom the product was sold, no services were offered by the assessee and what was offered by the distributor was a discount under the product distribution scheme or product campaign scheme to buy the assessee's product. The distributors/stockists were not acting on behalf of the assessee and that most of the credit was by way of goods on meeting of sales target, and hence, it could

not be said to be a commission payment within the meaning of Explanation (i) to Section 194H of the Income-tax Act, 1961. The contention of the Revenue in regard to the application of Explanation (i) below Section 194H being applicable to all categories of sales expenditure cannot be accepted. Such reading of Explanation (i) below Section 194H would amount to reading the said provision in abstract. The application of the provision is required to be considered to the relevant facts of every case. (ITA No. 1616 of 2011 dated 1-4-2014.)

*CIT v. Intervet India Pvt. Ltd. (Bom.)(HC); www.itatonline.org*

**73. S.194-I : Deduction at source – Rent – Composite contract for loading and unloading and transportation of granites – Provision of section 194 I is applicable and provisions of section 194C. [S. 40(a)(ia), 194C]**

The assessee deducted the tax at source under section 194C instead of section 194 I. A.O. held that the payments are hit by provision of section 40(a)(ia) hence disallowed the expenditure. On appeal the court held that in case of a composite contract for loading and unloading and transport of granites where the assessee makes use of vehicles and equipment, S. 194 I will be applicable and not s. 194C; contention that for attracting s. 194 I there must be a lease or other arrangement relating to immovable property is not sustainable. Section 194 I intends liability to deduct tax in respect of “any machinery or plant or equipment”. The machinery need not be the machinery annexed to immovable property otherwise under the Transfer of Property Act. Applicability of section 40(a)(ia) the matter was remitted to Tribunal to decide a fresh. (A.Y. 2007-08)

*Three Star Granites (P) Ltd. v. ACIT (2014) 98 DTR 9 (Ker.)(HC)*

**74. S.197 : Deduction at source – Refunds – Certificate for lower rate – An application for certificate of deduction at lower rate can be made even before the commencement of financial year**

The assessee was entitled to file an application for a certificate of deduction at a lower rate even before the commencement of the financial year in which that tax is to be deducted.

*Indus Towers Ltd. v. ACIT (TDS) (2014) 220 Taxmann 402 (Delhi)(HC)*

**75. S.201 : Deduction at source – Failure to deduct or pay – If no income arose to the recipient then notices to payer for TDS default u/s. 201 & disallowance under section 40(a)(ia) are bad. [S. 148, 195, 40(a)(ia)]**

(a) The key to the decision is the answer to the question whether any income arose or accrued to Samsung Electronics Ltd., Korea (“SEC”) through its PE in India in respect of the sales made in India. If the answer is in the affirmative, both the notices would be good notices; if the answer is in the negative, both the notices would be bad. The answer in our opinion should be in the negative, because even as per the revenue, as reflected in the order passed by the DRP in the reassessment proceedings of SEC, no income accrued to SEC in India. In this regard, the DRP rejected the specific request made by that Assessing officer in his remand report that the petitioner be treated as the permanent establishment (PE) of SEC and the income of SEC be computed on that basis. The DRP however held that as regards attribution of income to the “fixed place PE”, a rough and ready basis would be to 10% of the

salary paid to the expat-employees of the petitioner as the mark-up, as was done by the assessing officer in the draft assessment order. The remuneration cost in respect of such employees seconded to the petitioner amounted to ₹ 10,72,24,310; this was taken as the base and a mark-up of 10% had been applied by the assessing officer and the income was taken as ₹ 1,07,22,431/-. This was approved by the DRP in its order dated 29-9-2012; the other claims made by the Assessing Officer in the remand report were rejected;

- (b) Thus the basis of both the notices (sections 148 and 201) has been knocked out of existence by the DRP's order in the reassessment proceedings of SEC for the same assessment year. On the date on which notices were issued to the petitioner under sections 148 and 201(1)/(1A), there was an uncontested finding by the revenue authorities (i.e., the DRP) in the case of SEC that SEC cannot be taxed in respect of the sales made in India through the petitioner on the footing that the petitioner is its PE. If no income arose to SEC on account of sales in India since the petitioner cannot be held to be its PE in India, two consequences follow: (i) the payments made by the petitioner to SEC for the goods are not tax deductible under section 195(2) and hence they were rightly allowed as deduction in the original assessment of the petitioner and (ii) the assessee cannot be treated as one in default under section 201(1) and no interest can be charged under section 201(1A). It needs mention here that the notice under section 201 is a verbatim reproduction of the remand report of the assessing officer in SEC's case filed before the DRP.

*Samsung India Electronics Pvt. Ltd. v. DDIT (Delhi) (HC).* [www.itatonline.org](http://www.itatonline.org)

**76. S.220 : Collection and recovery – Assessee deemed in default – Stay – Without speaking order – Rejection of application is bad in law. [S.220(6)]**

Application for stay was rejected mechanically without adverting to the facts and without considering the true impact of the Instruction No. 1914 issued by the CBDT. Writ Petition was filed challenging the recovering proceedings. High Court allowed writ petition & held that it appeared from the impugned order that the assessee was not afforded the opportunity of hearing. Therefore the impugned order was set aside and the first respondent was directed to pass a reasoned order on the application filed u/s. 220(6) after giving assessee an opportunity of hearing. Till decision on the assessee's application, the respondent was directed not to take coercive steps against the assessee for recovery of the demand raised against it and also court held that because the assessee has filed a stay application along with memo of appeal, the respondents cannot contend that the application u/s. 220(6) was not maintainable and the assessee was directed to seek the remedy of stay from the higher authority.

*Madhya Pradesh Paschim Kshetra Vidyut Vitaram Company Ltd. v. DCIT (2014) 99 DTR 7 (MP)(HC)*

**77. S.220 : Collection and recovery – Assessee deemed in default – Stay – Power of stay to be exercised by the AO, when assessee preferred an appeal. [S.220(6)]**

DCIT passed assessment order against which Petitioner preferred an appeal before CIT (A). After filing an appeal, Petitioner moved a stay application u/s. 220(6) of the act before AO/DCIT making a prayer not to treat as being in default in respect of amount in dispute in the appeal which was rejected by the AO. On writ the court held that, it is only when assessee has presented an appeal; the power in respect u/s.

220(6) can be exercised by the AO. Therefore impugned order was quashed with a direction to the AO to reconsider the assessee's application & pass a fresh reasoned order, after giving an opportunity of hearing to the assessee.

*Kanchanbag v. UOI (2014) 99 DTR 10 (MP)(HC)*

**78. S.220 : Collection and recovery – Assessee deemed in default – Stay – Pendency of rectification application before AO – Appeal before Tribunal – During Pendency of appeal – Stay was granted. [S.220(6)]**

Writ Petition was filed for staying recovery of tax demand till the pendency of the appeal before the Tribunal during pendency of rectification application before AO. HC allowed Writ Petition and held that apart from the rectification application filed by the assessee before seeking depreciation as already granted by the CIT, appeal filed by the assessee before the Tribunal against withdrawal of exemption/ cancellation of registration was also pending for adjudication. AO was directed to decide the rectification application filed by the assessee within 1 month after it with the copy of this order. Further the court directed assessee to file application for interim relief before the ITO who may pass appropriate order on the said application subject to verification of the fact that the order passed by the IT allowing benefit of depreciation was not been stayed by any interim order. Further the court directed that recovery made in the addition to the above, if any, shall remain subject to final outcome of the appeal pending before the Tribunal. (A.Ys. 2008-09 & 2009-10)

*Rajasthan Cricket Association v. ITO (2014) 99 DTR 5 (Raj)(HC)*

**79. S.220 : Collection and recovery – Assessee deemed in default – After rejecting stay application**

**AO must give reasonable time before taking steps for coercive recovery. [S.226(3)]**

Assessee filed an application for stay on payment of tax demand under section 220(3) - Assessing Officer rejected said application and on same day, he issued garnishee order under section 226 to bank and recovered tax demand. Assessee filed stay application on said demand before Tribunal and he filed present application on ground that Assessing Officer was not justified in recovering tax demand - Whether though technically no fault could be found with Assessing Officer, still there was an element of impropriety in his action in issuing garnishee order on same date when stay application was rejected and, therefore, it would be appropriate to direct Assessing Officer to deposit said sum in assessee's account till Tribunal would decide said application.

*Sony India Pvt. Ltd. v. ACIT (2014) 266 CTR 225 (Delhi)(HC), www.itatonline.org*

**80. S.220 : Collection and recovery – Assessee deemed to be in default – AO must pass an speaking order and extend a opportunity of personal hearing while disposing of the stay application filed by the Assessee.**

The Assessee filed a stay application praying for stay of demand before the AO. This was rejected by him without giving any sufficient opportunity. On a writ filed by the Assessee, the High Court held that while examining an application for stay of demand under section 220(6), the AO had to pass a speaking order and extend an opportunity of personal hearing, if one was sought by the assessee. The matter was remitted for fresh adjudication. (A.Y. 2009-10)

*Joshna Rajendra (Smt.) v. CIT(A) (2014) 220 taxmann 360 (Karn.)(HC)*

**81. S.220 : Collection and recovery – Assessee deemed in default – AO is required to pass a speaking order for rejecting stay application. [S.226]**

The assessee filed an application u/s. 220(6) before the AO requesting a stay of demand since it had disputed the AO's demand in appeal. The AO rejected the application by passing a non-speaking order and attached bank accounts. On a writ filed by the assessee, the High Court held that where an appeal was pending against the assessment order, the assessee was not to be treated as an assessee in default in respect of the amount in dispute in appeal, in the discretion of the AO on such conditions as he thinks fit to impose. The AO is, thus, required to pass a reasoned speaking order. The High Court quashed the order of the AO for attaching the assessee's bank accounts of the assessee and gave the AO the liberty to pass a fresh speaking order in accordance with law. (A.Y. 2009-10)

*Lalita Wadhwa v. CIT (2014) 220 Taxmann 420 (P&H)(HC)*

**82. S.220 : Collection and recovery – Stay – Power of Tribunal – Recovery of money before expiry of time limit for filing an appeal was held to be not justified – Tribunal has inherent powers to direct the revenue to refund the amount collected without following due process of law. [S. 156, 220(6), 254(2A)]**

The assessee is a statutory corporation engaged in the activity of constructing and providing accommodation to economic weaker sections of society. The AO denied exemption under section 11 read with section 2(15) of the Act. The Appeal of the assessee was dismissed by CIT(A). Assessee preferred an appeal and stay before the Tribunal. In the meantime AO recovered the tax

by attaching the bank account. Tribunal directed the revenue to refund the amount recovered by attaching the bank account. Revenue filed the writ petition against the order of Tribunal. Dismissing the petition the court held that Recovery of money before expiry of time limit for filing an appeal was held to be not justified. Tribunal has inherent powers to direct the revenue to refund the amount collected without following due process of law. (WP(L) No. 3174 of 2013 dated 4-2-2014) (A.Y. 2010-11).

*DIT(Exemption) v. ITAT (2014) 361 ITR 469/99 DTR 73 (Bom.)(HC)*

**83. S.220 : Collection and recovery – Not to take any coercive steps for recovery against the petitioner, till the appeal time is exhausted- Assessee deemed in default – AO cannot exercise coercive measures to recover tax during the period available for filing an appeal. [S.253]**

Against the assessment order, further appeal lies to the Income Tax Appellate Tribunal u/s 253 of the Act and the time for moving the Tribunal is 60 days from the date of receipt of a copy of the order. As the appellate remedy is available to the petitioner, it could be accepted and the authority may thereafter proceed with the matter. However, in the absence of any legal impediment, the respondents have initiated recovery proceedings against the petitioner, when there is reasonable time for him to prefer an appeal. In view of the above, respondents are directed to not to take any coercive steps for recovery against the petitioner, till the appeal time is exhausted. Thereafter, the respondents are at liberty to act in accordance with law for recovery of the amount as per the order of the appellate authority. (WP No. 373 of 2014, dated 7-1-2014.)

*Dishnet Wireless Limited v. ACIT (Mad.)(HC), www.itatonline.org*

**84. S.226 : Collection and recovery – Modes of recovery – AO warned of contempt action for seeking to overreach ITAT's stay order**

The assessee filed a stay application before the Tribunal and informed the AO about the same. Thereafter, the Tribunal heard the matter on 14-2-2014 and granted stay of the demand. Despite this, the AO attached the assessee's bank account on 19-2-2014 and withdrew the proceeds. The assessee filed a Writ Petition to challenge the attachment. The AO defended his action on the ground that he was not present during the hearing of the stay application and was not intimated of the stay granted by the Tribunal. HELD by the High Court allowing the Petition:

The income tax authorities were represented by the CIT-DR, before the Tribunal. The order on the stay application was also pronounced in open Court on that date. In these circumstances, the submission of the revenue that the concerned AO was not intimated cannot be accepted. If such an argument was made before this Court, where orders are pronounced in Court in the presence of counsel, it would certainly not be accepted, and in fact would be seriously viewed. In the facts of this case, it clearly amounts to overreach of the interim order of the Tribunal; in a similar situation, this Court itself would possibly be initiating contempt proceedings. In these circumstances, the Court is of the opinion that the respondent should lift the attachment and ensure that the amounts recovered are deposited back in the petitioner's account within a week from today. A copy of the present order shall be marked to the Central Board of Direct Taxes separately and communicated. (W.P. (C) 1937 of 2014 dated 28-3-2014.)

*A.T. Kearney India Pvt. Ltd. v. ITO (Delhi)(HC); www.itatonline.org*

**85. S.226 : Collection and recovery – Modes of recovery – Rcovery**

**of excess payments made to government employees could be recovered from them and mere fact that said payment was not due to any fraud or misrepresentation on part of employee would make no difference – Principle of natural justice**

The assessee's filed writ petition against the impugned recovery, whereby a certain amount paid to them as a salary was sought to be recovered from them. The allegation being that they had been paid the amount in excess of their entitlement. The assessee's case was that they had not been paid any amount in excess, inasmuch as whatever was actually due and payable had been paid; therefore the proposed recovery was improper. Further, the impugned recovery had been initiated without issuing any show-cause notice or giving the assessee's any opportunity to be heard. The High Court held that the excess money received by the assessee's had come from the public exchequer; it was public money contributed by the taxpayers. The administration, whether executive or judiciary, held public funds in trust and with the responsibility of spending it strictly in the proper manner, without wasting it or distributing it wrongly or illegally. If an amount was paid to an employee in excess of what he was entitled, it could be recovered from him and the mere fact that the said payment was not due to any fraud or misrepresentation on the part of employee would make no difference. Since no opportunity was granted in this case it violated the principles of natural justice, and, accordingly, the writ petition was allowed. The impugned orders insofar as they related to the assessee's were quashed. However, the respondents were at liberty to pass a fresh order after giving an opportunity for hearing to the assessee.

*Janardan Yadav v. State of U.P. (2014) 220 Taxmann 218 (All.)(HC)*

**86. S.226 : Collection and recovery – Modes of recovery – During the pendency of the Mutual Agreement Procedure with the competent authorities demand cannot be recovered – DTAA-India-USA. [S.90]**

The assessee was a subsidiary of Motorola Solutions Inc. USA and had filed a return declaring certain taxable income. The Assessing Officer, having made certain additions to this income, raised a tax demand. The assessee filed an appeal before CIT (Appeal) and a further demand was raised through a rectification order. The assessee, however, invoked the Mutual Agreement Procedure (MAP) between India and USA by filing an application before the competent authority in the USA. The invocation of MAP was brought to the notice of the competent authority in India, i.e. the Joint Secretary (FT & TR-1), CBDT. Simultaneously, the assessee also filed an application for stay before the Assistant Commissioner. For the purposes of stay, the assessee was directed to furnish a certain amount of bank guarantee. Subsequently, the Revenue, took a view that MAP proceedings were not pending and, moreover, that the assessee had failed to renew its bank guarantee, appropriated a certain amount from the assessee's bank account towards the alleged demand of tax. The assessee filed a writ petition challenging the validity of this appropriation. It was noted that controversy with respect to admission or pendency of MAP stood conceded in favour of the assessee by an affidavit filed by the Joint Secretary (Foreign Tax and Tax Research Division), Department of Revenue, Ministry of Finance, Central Board of Direct Taxes wherein it was clarified that MAP Proceedings were pending and discussions were held between the competent authorities in Indian and the USA. With regard to the bank guarantee, the concerned bank had not sent any communication to the Revenue that

the assessee had not renewed its guarantee, and, therefore, the bank guarantee stood automatically renewed for a further period of three years. The High Court allowed the assessee's petition, holding that where in respect of the tax liability of assessee, Mutual Agreement Procedure (MAP) proceedings were pending and, moreover, the assessee had also furnished a bank guarantee in terms of stay of demand, during the pendency of those proceedings; therefore the Revenue was not justified in appropriating funds from the assessee's bank account towards their demand of tax. In view of this, the writ petition was allowed, demand notices were quashed and the respondents were directed to refund the tax appropriated to the petitioner. (A.Y. 2005-06)

*Motorola Solutions India (P.) (Ltd.) v. CIT (2014) 220 Taxmann 164 (P&H)(HC)*

**87. S.234B : Interest – Interest – Advance Tax – Interest under sections 234B and 234C cannot be levied for default in payment of advance tax in case where tax is paid under MAT [S. 115JB, 234C]**

The High Court relied on one of its own decisions in the matter of *CIT v. Jupiter Bio-Science Ltd.* [2013] 352 ITR 113/[2011] 202 Taxman 80/13 taxmann.com 161 (Kar.) wherein it was held that the assessee was liable to pay advance tax under the amended provisions of Section 115JB of the Act for the relevant period, however he was not liable to pay interest on the amount due under the amended provisions, since there was no default of the assessee. (A.Y. 2002-03)

*CIT v. Kirloskar Systems Ltd. (2014) 220 Taxmann 1 (Karn.)(HC)*

**88. S.234E : Fee – Default in furnishing the statements – High Court grants ad-interim**

**stay against operation of notices levying fee for failure to file TDS statement**

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). A Writ Petition to challenge the validity of s. 234E has been filed in the Bombay High Court. The Petition claims that assesseees who are deducting tax at source are discharging an administrative function of the department and that they are a "honorary agent" of the department. It is stated that this obligation is onerous in nature and that there are already numerous penalties prescribed for a default. It is stated that the fee now levied by s. 234E is "exponentially harsh and burdensome" and also "deceitful, atrocious and obnoxious". It is also claimed that Parliament does not have the jurisdiction or competence to impose such a levy on tax-payers.

The Bombay High Court has, *vide* order dated 28-4-2014, granted ad-interim stay in terms of prayer clause (d) i.e. stayed the operation of the impugned notices levying the fee.

*Rashmikant Jundalia v. UOI (Bom.)(HC) www.itatonline.org*

**89. S.234E : Fee – Default in furnishing the statements – High Court issues notice on challenge to notices for levy of fee for failure to file TDS statement. Recovery of fee is subject to outcome of Petition**

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). A Writ Petition to challenge the validity of s. 234E has been filed in the Jodhpur Bench of the Rajasthan High Court. *Vide* an order dated 15/04/2014 the High Court

has directed that notice should be issued to the CBDT and the UOI as to why the Petition should not be accepted. It has also been held that in the meanwhile, if any recovery is made from the Petitioner, that shall be subject to the final decision of the Writ Petition. (WP No.1981 of 2014 dt. 15-4-2014)

*Om Prakash Dhoot v. UOI (Raj)(HC); www.itatonline.org*

**90. S.234E : Fee – Default in furnishing the statements – High Court grants interim stay on enforcement of notices for levy of fee for failure to file TDS statement**

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 Karnataka High Court. *Vide* an interim order dated 19-2-2014 the High Court held as follows:

Petitioners have questioned the constitutional validity of the provision of Section 234E of the income tax Act and a notice to the petitioner levying fee *vide* Annexure A1 to A21 and Annexure – B. Pending consideration of the grounds in the writ petition, it is desirable that enforcement of notices referred to above issued by the 4th respondent are stayed until further orders. (WP 6918-6938/2014 (T-IT) dated 19-2-2014)

*Adithaya Bizorp Solutions India Pvt. Ltd. v. UOI (Kar.)(HC), www.itatonline.org*

**91. S.244 : Refund – Interest – Interest on interest is not payable. [S.244A]**

Interest on interest is not payable u/s. 244. (A.Y. 1991-92)

*CIT v. Brakes India Ltd. (2014) 98 DTR 285 (Mad.)(HC)*

**92. S.244A : Refunds – Interest – Taxability – Interest u/s 244A is not taxable in the year of grant of refund but has to be spread over the respective A.Y.s to which it relates**

The stand of the department that interest u/s 244(1A) accrues to the assessee only when it is granted to the assessee along with refund order issued u/s. 240 is not correct. Interest accrues on a day to day basis on the excess amount paid by the assessee. The entitlement of interest is a right conferred by the statute and it does not depend on the order for the refund being made. Accordingly, the interest has to be spread over and taxed in the respective years. (R.C. No. 127 of 1997 dated 19-12-2013.)

*M. Jaffer Saheb (Decd) v. CIT (AP)(HC), www.itatonline.org*

**93. S.249(4) : Appeal – CIT(A) – Condition precedent – Adjustment against amount seized – Appeal was held to be maintainable. [S.249(4)(a)]**

Assessee sought adjustment of the amount lying with the Revenue towards tax payable on the returned income. He could not be denied a hearing on the ground of non-payment of tax due on the returned income. Tribunal correctly held that the requirements of s. 249(4)(a) were duly complied with. (A.Y. 1996-97)

*CIT v. Pramod Kumar Dang (2014) 98 DTR 33 (Delhi)(HC)*

**94. S.246 : Appeal – Commissioner (Appeals) – Claim not made in the return – Return – Assessment – Deduction was not claimed in the return – Claim first time before**

**CIT(A) was held to be valid. [S. 80HHC, 80 IB, 139]**

Though the assessee did not raise a claim in the return for deduction u/s. 80IB & 80HHC, it was entitled to raise the claim before the CIT(A) for the first time. If a claim though available in law is not made either inadvertently or on account of erroneous belief of complex legal position, such claim cannot be shut out for all times to come, merely because it is raised for the first time before the Appellate Authority without resorting to revising the return before the AO. Courts have taken a pragmatic view and not a technical one as to what is required to be determined in taxable income. In that sense assessment proceedings are not adversarial in nature. The decision in *Goetze (India) Ltd. v. CIT (SC)* is confined to the powers of the AO and accepting a claim without revised return and does not affect the power of the CIT(A) or the Tribunal to entertain a new ground or a legal contention.

*CIT v. Mitesh Impex (Guj.)(HC), www.itatonline.org*

**95. S.254(1) : Appellate Tribunal – Duty – Reasoned order-Tribunal has to be pass reasoned order after dealing with arguments of both the parties**

Court observed that arguments advanced / points urged deserves to be dealt with, reasons from affirmation have to be indicated though in appropriate cases they may be briefly stated. Recording of reasons is part of fair procedure and reasons are harbinger between the mind of the maker of the decision in the controversy and the decision or conclusion arrived at and they always substitute subjectivity with objectivity. Court set aside 81 matters to Tribunal by observing that the judgments of Tribunal being stereo typed, non speaking, unreasoned, arbitrary and whimsical. Court also noted the observation of the Karnataka High Court in *CIT v. Gauthamchand Bhandari (2012) 347 ITR*

491(Karn)(HC)(491) "We feel sorry that the confidence posed by the legislature is not being justified by passing orders that are outcome from the Tribunal now-a-days. It is high time the method of recruitment of Tribunal Members is also reviewed by the authority concerned and at least hence forth it is ensured that the members of some standing integrity and competence are put in place as members of the Tribunal and not all sundry." The copy of the order was sent to Law Commission of India, Department of Revenue, Ministry of Law and Parliamentary Affairs and CBDT. (A.Y. 1995-96)

*CIT v. Ram Singh and Others (2014) 266 CTR 122/99 DTR 217 (Raj.)(HC)*

**96. S.254(1) : Appellate Tribunal – Order – Undue delay in passing order causes prejudice and results in loss of confidence in the judicial body. Such a delayed order has to be set aside**

It is very clear that the authorities under the Act are obliged to dispose of proceedings before them as expeditiously as possible after the conclusion of the hearing. This alone would ensure that all the submissions made by a party are considered in the order passed and ensure that the litigant also has a satisfaction of noting that all his submissions have been considered and an appropriate order has been passed. It is most important that the litigant must have complete confidence in the process of litigation and that this confidence would be shaken if there is excessive delay between the conclusion of the hearing and delivery of judgment. (WP. No. 12124 of 2013, dated 11-2-2014.)

*Emco Ltd. v. UOI (Bom.)(HC), www.itatonline.org*

**97. S.254(1) : Appellate Tribunal – Powers – Stay – Collection and recovery – Financial position – Rejection of stay application by**

**ITAT on the ground that "the Financial position of the assessee is very sound" and "government also needs liquid funds to manage its day-to-day affairs" & without discussing *prima facie* case is in disregard of law laid down in *KEC International Ltd. v. B.R. Balakrishnan (2001) 251 ITR 158 (Bom.)(HC). [S. 220(6)]***

The assessee filed a revised return in which it withdrew a claim for deduction of ₹ 5.86 crore paid to its AE. The assessee claimed s. 10A deduction on the enhanced income. The AO held that the revised return was filed to get over s. 92-C(4) and the proviso thereto which provides that no deduction u/s. 10-A would be allowed in respect of income enhanced having regard to the Arms Length Price (ALP). The AO's stand was upheld by the Tribunal. The AO levied penalty of ₹ 2.05 crore and refused to grant stay. The assessee filed a Writ Petition. The High Court held that that the assessee held a *prima facie* case on merits and granted partial stay of the demand till the decision of the CIT(A). Subsequently, the CIT(A) dismissed the penalty appeal and the assessee filed a stay application before the Tribunal. The Tribunal rejected the stay application on the ground that "the financial position of the assessee is very sound" and "government also needs liquid funds to manage its day-to-day affairs". The assessee filed a Writ Petition to challenge the said order of the Tribunal. HELD by the High Court:

The impugned order of the Tribunal has been passed in total disregard of the principles laid down in *KEC International Ltd. v. B.R. Balkrishanan & Ors. (2001) 251 ITR 158 (Bom)* wherein a Division Bench of this Court laid down parameters to be observed by the Authorities while considering the stay application. The Tribunal has not even given short *prima facie* reasons recording the Petitioner's case. The Petitioner does have strong

*prima facie* case on merits before the Tribunal. Thus, having regard to the fact that the Petitioner has already paid the full tax amount and also 25% of the penalty amount earlier, the Tribunal ought not to have required the Petitioner to deposit a further sum of ₹ 50.00 lakhs. In fact, the Tribunal while passing the impugned order has not only ignored the directions in KEC but also the observations made by this Court in the Petitioner's own case (WP (L) No. 235 of 2014, dated 12-2-2014.)

*Deloitte Consulting India Pvt. Ltd. v. ACIT (Bom.) (HC), www.itatonline.org*

**98. S.254(1) : Appellate Tribunal – Powers – Stay – Collection and recovery – Assessee deemed in default – AO's action of coercive recovery is illegal and shocks the conscience. The Tribunal cannot remain a silent spectator to such illegal action. [S 220(6)].**

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). The Tribunal accepted the submissions of the assessee and held that 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. It directed the Revenue to refund the entire amount of ₹ 159.84 crore to the assessee within 10 days from the receipt of this order. The department filed a Writ Petition to challenge the said order of the Tribunal. HELD by the High Court dismissing the Petition:

- (i) The action of the AO is in defiance of the directions laid down in *UTI Mutual Funds v. ITO and others* (2012) 345 ITR 71(Bom) that no recovery of tax should be made before the expiry of the time limit for filing an appeal before the higher forum has expired. The Court also has directed that when the bank account has been attached the revenue would not withdraw the amount unless it has furnished a reasonable prior notice to the assessee to enable the assessee to seek recourse to a remedy in law. The action of the AO in not only attaching the bank account but withdrawing the money from the bank was before the expiry of the time limit for filing appeal was only with a view to foreclose the option of the assessee of obtaining a stay from the Tribunal. The assessee received the order of the CIT(A) only on 16-11-2013 and had 60 days time to prefer an appeal there from. However, the AO attached the bank account of the assessee on 18-11-2013 itself i.e. within two days of communication of the order of the CIT(A). Further, not only the bank account was attached but the amounts were forcibly withdrawn on that date itself from the bank so as to completely foreclose the remedy available to the assessee under the Act;
- (ii) The above action of the AO was against the elementary principles of rule of law. The State is expected to act fairly. The undue haste on the part of the AO in recovering a sum of ₹ 159.84 crores

was not only contrary to the binding decisions of this Court but also shocking to the judicial conscience. The entire action appears to have been directed to make the Tribunal and the assessee helpless so that no relief can be granted in favour of the assessee. Leaving aside the case laws in favour of the assessee, on first principles itself, no Appellate Authority and much less the Tribunal can be a silent spectator to the arbitrary and illegal actions on the part of the Assessing Officer so as to frustrate the legal process provided under the Act;

- (iii) The grant of refund was in the exercise of Tribunal's inherent powers to ensure that the assessee is not left high and dry only on account of illegal and high-handed actions on the part of the AO;
- (iv) The revenue would do well to remember that we live in State which is governed by Rule of law. It is primary obligation of the officers of the State that it follows the law laid down by the Courts in letter and spirit before taking any coercive action. (WP (L) No. 3174 of 2013. dated 4-2-2014)

*DIT v. Maharashtra Housing & Area Development Authority (Bom.)(HC); www.itatonline.org*

**99. S.254(1) : Appellate Tribunal – The duty is limited to the points raised before it – Tribunal is not required to consider pleadings, material etc. to which its pointed attention is not drawn**

It is true, as held by the Supreme Court in a long line of cases that the Tribunal is duty-bound to consider all the grounds, the evidence produced and consider the contentions of the parties before it and all other material brought to its notice in a judicial spirit and should not feel incommode by technicalities. The duty is limited to the points raised before it. It would be placing

an impossible burden on the Tribunal if it is ordained to rule upon aspects and contentions which were not raised by the parties before it or to deal with pleadings, evidence or material to which its pointed attention was not drawn in the course of the proceedings and which lies buried in the forest of papers filed by the parties. (WP (c) 369/2014 & CM Appl. 740/2004, dated 31-1-2014.)

*Dholadhar Investment Pvt. Ltd. v. CIT (Delhi)(HC), www.itatonline.org*

**100. S.254(2A) : Appellate Tribunal – Powers – Stay – The Tribunal has no power to extend stay of demand beyond 365 days even if the assessee is not at fault. If dept seeks an adjournment, ITAT may either refuse it or dept should undertake not to recover the demand**

The Tribunal {probably following the Special Bench judgement in *Tata Communications Ltd. v. Asst. CIT* (2011) 138 TTJ 257 (Mum)} extended the stay beyond 365 days as the assessee was not responsible for the delay in disposal of the appeal. The department challenged the decision of the Tribunal by way of a Writ Petition to the High Court on the ground that after the insertion of the third Proviso to s. 254(2A), the Tribunal had no power to extend stay beyond 365 days even if the assessee was not at fault. HELD by the High Court allowing the Petition:

- (i) In view of the third proviso to s. 254(2A) of the Act substituted by Finance Act, 2008 with effect from 1st October, 2008, the Tribunal cannot extend stay beyond the period of 365 days from the date of first order of stay;
- (ii) In case default and delay is due to lapse on the part of the Revenue, the Tribunal is at liberty to conclude hearing and decide the appeal, if there is likelihood that the third

proviso to Section 254(2A) would come into operation;

- (iii) The third proviso to Section 254(2A) does not bar or prohibit the Revenue or departmental representative from making a statement that they would not take coercive steps to recover the impugned demand and on such statement being made, it will be open to the Tribunal to adjourn the matter at the request of the Revenue;
- (iv) An assessee can file a writ petition in the High Court pleading and asking for stay and the High Court has power and jurisdiction to grant stay and issue directions to the Tribunal as may be required;
- (v) Section 254(2A) does not prohibit/bar the High Court from issuing appropriate directions, including granting stay of recovery;
- (vii) The constitutional validity of the provisos to Section 254 (2A) of the Act has not been examined and the issue is left open. (WP (C) No. 5089/2013, dt. 21-2-2014.)

*CIT v. Maruti Suzuki (India) Limited (Delhi)(HC)*,  
[www.itatonline.org](http://www.itatonline.org)

**101. S.260A : Appeal – High Court – Adjournments – High Court lays down zero-tolerance policy over adjournments – Appeal may be dismissed, hear them ex-parte or and/or impose costs if counsel are not prepared**

- (i) We have noted that the Final Hearing Board consists of all Appeals of 2002. First two matters have been adjourned by us only because the Department or the Advocate for Appellant sought accommodation. They did not have either papers or were not ready with the case.

Such state of affairs will not be tolerated hereafter. In the event, the Counsel engaged by the Department is absent without a justifiable or reasonable cause, we will invariably impose costs and to be paid by the Counsel personally. Equally, we would proceed in his absence. In the event, the Appellant or his Advocate is absent, we will proceed to dismiss the Appeal for non prosecution. Thereafter, no application for restoration of the Appeal will be considered unless the Appellant makes out a sufficient cause for absence;

- (ii) We would also expect the Department and equally the Excise, Customs, Income Tax, all of which are stated to have engaged separate Advocates, to inform and caution their Advocates that their absence would result in either this Court proceeding ex-parte or the Appeals of the Department being dismissed for non prosecution. This Court will not hereafter countenance that the matters are adjourned and not heard due to absence of the Advocates. The Department is equally responsible to the Court and must ensure the presence of their Advocates. In the event only one Advocate is being briefed, the Department may consider handing over and entrusting the papers to an additional Advocate so as not to cause inconvenience to this Court. The disobedience of this order or inconvenience to this Court, would result in the Joint Secretary, Department of Law & Judiciary, Government of India, so also, the Secretary, Department of Law & Judiciary, Government of India, remaining present in the Court. (ITA No. 17 of 2002. order dated 4-3-2014.)

*Thermax Babcock & Wilcox Ltd. v. CIT (Bom.)(HC)*,  
[www.itatonline.org](http://www.itatonline.org)

**102. S.260A : Appeal – High Court – Substantial question of law – Ground not raised before Tribunal**

**– Can be raised before High Court if it is substantial question of law**

High Court in an appropriate case where no dispute arises on factual ground but purely legal issues arises in the case, may consider a substantial question of law even though it may not have been raised/ adjudicated before the Tribunal. (A.Y. 2007-08)

*Dr. Raghuvendra Singh v. CIT (2014) 98 DTR 255 (P&H)(HC)*

**103. S.260A : Appeal – High Court – Costs of ₹ 1 lakh levied on dept for “gross abuse of process of Court”. Later revoked on assurance that judicial orders would be abided**

The department did not point out that its appeal for the earlier years in the case of the same assessee had been dismissed by the High Court. The High Court took a serious view of the matter and levied costs of ₹ 1 lakh on the department while observing:

*“It is unfortunate that the Revenue insists in arguing Appeals in this manner and for subsequent Assessment Years. The Revenue ought to have been fair and brought to the notice of this Court the fact that its Appeal challenging the very findings and conclusions for prior Assessment Years has been dismissed by this Court on merits. The reasons assigned ought to have been pointed out to us and thereafter, any explanation should have been offered for admission of this Appeal ... It is a gross abuse of the process of this Court. It is dismissed with costs quantified at ₹ 1,00,000/ (Rupees One lakh). Costs be paid to the assessee within 4 (four) weeks from today.”*

However, later, based on the assurance of the department that hereafter judicial orders and directions would be abided by in all matters, the order on levy of costs was recalled. The Court made it clear that appropriate averments have to be made in the memo of Appeal as to whether the orders of the Tribunal for prior assessment years and in the case of very assessee have been either challenged or otherwise. If the challenge

is pending even that statement has to be made and if it is decided, the outcome thereof has to be indicated. (ITA No. 1001 of 2011, dated 17-4-2014.)

*CIT v. Kisan Ratilal Choksey Share & Securities (Bom.)(HC); www.itatonline.org*

**104. S.260A : Appeal – High Court – Dept. given “last opportunity” and warned of “heavy costs” for wasting judicial time by filing appeal on covered matters**

The assessee received an incentive/subsidy from SICOM for setting up a new undertaking. The assessee claimed that the subsidy was a capital receipt. However, the AO held the receipt to be a revenue receipt. The CIT(A) and Tribunal upheld the assessee’s claim on the basis that the issue was covered by *CIT v. Chaphalkar Brothers (2013) 351 ITR 309 (Bom) & CIT v. Ponni Sugars & Chemicals Ltd. & Ors. (2008) 306 ITR 392 (SC)*. The Department filed an appeal to the High Court. HELD dismissing the appeal:

We are afraid that if the Revenue persists with such stand and as has been turned down repeatedly, that would defeat the very object and purpose of the schemes and packages devised by the States. That would also result in frustrating the entrepreneurs and defeating the purpose of setting up new industries and particularly in backward areas. The Revenue, therefore, should bear in mind that in every such case and whenever the funds or receipts are from the schemes and packages devised by the State, it should note the object and purpose of the same. If that is of the nature specified in the judgments of this Court and equally that of the Hon’ble Supreme Court, then, the Revenue must act accordingly. We hope that this much is enough so as to dissuade the Revenue from bringing such matters repeatedly to this Court. Ordinarily and for wasting judicial time and which is precious, we would have imposed heavy costs on the Revenue while dismissing this Appeal, but we refrain from doing so by giving last

opportunity to the Revenue. (ITA No 2646 of 2011, dt. 17-4-2014.)

*CIT v. Kirloskar Oil Engines Ltd. (Bom.)(HC); www.itatonline.org*

**105. S.271AAA : Penalty – Search initiated on or after 1st June, 2007 – Neither in the assessment order nor in the order imposing penalty there was discussion – Matter remanded. [S. 132(4),( 264]**

Assessee had not filed regular return for the year under assessment. Search & seizure Operation was conducted on 6-2-2009 itself i.e. during the continuance of the AY concerned. In its statement u/s 132(4), the assessee submitted that the estimated tentative income on assumptive basis would be around 35 crores , but offered tax to an aggregate sum of ₹ 60 crores . He also claimed to have specified the manner in which such income was derived and adduced documents to substantiate manner in which undisclosed income was derived. Accordingly the AO levied penalty u/s. 271AAA. On revision Commissioner dismissed the petition and confirmed penalty by observing that above conduct shows that assessee has not acted in bonafides manner in filing initial return with lesser income, hence is liable for penal proceedings. In revision proceedings, CIT affirmed CIT's order without looking into these facts whether conditions u/s. 271AAA(2) of the Act was complied. There was no discussion with respect to u/s. 271AAA in the entire assessment order. The court held that CIT & the AO respectively have not looked into this aspect of the matter, therefore the matter was remanded to the AO. The court referred the judgment of Apex Court in *Competition Commission of India v. Steel Authority of India Ltd, 2010 JT 26 para 68.* "Clarity of thoughts leads to clarity of vision and therefore, proper reasoning is foundation of a just and fair decision". (A.Y. 2009-10)

*Crossings Infrastructure (P) Ltd. v. CIT (2014) 99 DTR 436 (All)(HC)*

**106. S.273A : Penalty-Interest – Waiver or reduction – Not a condition precedent to pay the tax and interest – Refers one instance and not one year – Petition was allowed. [S.220**

S. 273A does not require the assessee to pay the amounts of penalty and interest first in order to qualify for the relief. S. 273A(3) does not talk of one year but of one instance. Matter was remitted to the Commissioner to consider whether the assessee has made satisfactory arrangements for payment of tax. (i.e. without including any penalty and amounts dues under s. 220). (AYs. 1980-81 to 1988-89)

*Asha Pal Gulati v. CBDT (2014) 98 DTR 361 (Delhi) (HC)*

**107. S.279 : Offences and prosecutions – Sanction – Criminal proceedings are independent of recovery proceedings – Proceedings are allowed to be continued by trial court. [S. 2(35)(b), 201(1), 201(1A), 276B, 278B]**

Criminal proceedings are not dependent on the recovery proceedings. Therefore, the pendency of proceedings initiated u/s. 201(1) and s. 201(1A) is not a legal impediment to continue the criminal prosecution against the petitioner. Proviso to s. 279(1) is not a condition precedent for issue of an order of sanction by the CIT or the CIT(A) u/s. 279(1). Subsequent treatment of an individual as the principal officer of the petitioner company will not result in quashing of the proceedings against the individual who was treated as principal officer while initiating the proceedings. Proceedings are allowed to be continued by trial court. (A.Y. 2009-10 to 2011-12)

*Kingfisher Airlines Ltd. v. ACIT (2014) 98 DTR 245 (Karn.)(HC)*

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# DIRECT TAXES

Tribunal  
Research Team

**1. S.2(14) : Capital asset – Agricultural land – Transfer of land "as is and where is basis" to a developer – Neither assessable as capital gains nor business income. [Ss. 10(1), 28(i), 45]**

The assessee is engaged in agricultural operations on land classified as agricultural land in revenue records. The land was situated in rural area outside municipal limits. Assessee transferred the said land to developer on "as is and where is" basis to a developer. Tribunal held that profit earned on sale of land was agricultural income. Hence, it is exempt from tax. It is neither assessable as capital gains nor business income. (A.Y. 2006-07)

*Harniks Park (P.) Ltd. v. ITO (2014) 62 SOT 15 (URO) / 41 Taxmann.com 109 (Hyd.) (Trib.)*

**2. S.2(24) : Income – Capital or revenue – Carbon credit – Receipt on account of carbon credit is capital receipt hence not liable to tax. [Ss.4, 28(iv), 45]**

The amount received for carbon credits has no element of profit or gain and it cannot be subjected to tax in any manner under any head of income. (A.Ys. 2007-08 to 2009-10)

*Shree Cement Ltd. v. ACIT (2014) 100 DTR 33 (Jaipur)(Trib.)*

**3. S.2(24) : Income – Charitable trust – Donation towards building construction was held not taxable – Donations used for the benefit of trustees is held to be taxable – Matter was set aside. [Ss. 2.(24) (ia), 12]**

Donations received by the assessee-society towards building construction cannot be brought to tax and the donations used for the benefit of trustees are taxable as income of the assessee. The matter was sent back to Assessing Officer to segregate the donations which have been diverted for personal benefit of the members of the society.

*JB Educational Society v. ACIT (2014) 159 TTJ 236 (Hyd.)(Trib.)*

*Joginapally B. R. Education Society v. ACIT (2014) 159 TTJ 236 (Hyd.)(Trib.)*

**4. S.4 : Income – Capital or revenue – Forfeiture of warrants is capital receipt. [S. 28(iv)]**

While confirming the order of CIT(A), the Tribunal held that amount received on account of forfeiture of amount due to non-payment towards warrants issue has to be treated as capital receipt and since the assessee has also transferred it to the capital reserve account in the balance sheet the amount cannot be taxed as income of relevant financial year. (A.Y. 2006-07)

*Dy. CIT v. CNB Finwiz Ltd. (2014) 159 TTJ 146 (Delhi)(Trib.)*

**5. S.4 : Income – Capital or revenue – Termination of Agreement – Compensation so received was capital receipt and, hence, not taxable. [S. 28(i)]**

Compensation was received by assessee for termination of agreement for providing back office support services to bank. Assessee had parted with personnel who were handling this activity of assessee company to give them on role of bank and bank handled such activity itself. Compensation so received was capital

receipt and hence not taxable. (AYs. 2003-04 to 2006-07)

*3i Infotech Ltd. v. Add. CIT (2014) 146 ITD 405 / (2013) 38 Taxmann.com 422 (Mum.)(Trib.)*

**6. S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Liaison office of foreign company in India – Over and above the reimbursement of expenses – Taxable as income. [S. 5(2)]**

In the employment contract between the assessee, a US company and its employees at liaison office, there was a sales incentive plan whereby the employees were to be provided with the remuneration based upon the achievement of the target for sale of goods of the assessee company in India. The assessee company had also got itself registered with the ROC for carrying on business in India and filed its return declaring loss under the head "Profits and gains of business or profession". These clearly established that the liaison office was promoting sales of the assessee company in India. Therefore, the income attributable to the liaison office was taxable in India. Amount received by the liaison office from the head office over and above the reimbursement of expenses was rightly treated as income. (A.Ys. 2003-04 to 2005-06)

*Brown & Sharpe Inc. v. ACIT (2014) 98 DTR 405 (Delhi)(Trib.)*

**7. S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – Purchase of goods in India through liaison office for exports – No income was derived in India**

Assessee, a Hong Kong company acted as buying agent for group companies. It established a liaison office in India which acted as communication channel between the company

and the manufacturers for sourcing apparels from India. Liaison office's activities were prior to purchase of goods by the company and, therefore, Explan. 1(b) to s. 9(1)(i) was clearly applicable and no income was derived in India. (A.Ys. 2003-04 to 2007-08)

*Tesco International Sourcing Ltd. v. DDIT (IT) (2014) 98 DTR 33 (Bang.)(Trib.)*

**8. S.9(1)(i) : Income deemed to accrue or arise in India – Business connection – "composite" contracts for supply of offshore & onshore supply & services under Act & DTAA. [S. 90]**

It is wide off the mark to categorise the present contract agreement as a composite one since all its major four components are distinctly identifiable with separate consideration for each. There is a separate mention of consideration for supply of equipments and for rendition of services. Simply because the supply of equipment and the rendition of services is to one party and for a common purpose, we are unable to find any logic in treating the entire amount as one composite payment attributable commonly both to the supply of equipment and rendering of services, more so when there is a specific identifiable amount relatable to these segments.

Title to goods shall be considered to have passed outside India when delivery was made on high seas and the payment was also received outside India. Merely because the risk passed in India, it cannot be said that the sale took place in India. Therefore, no income can be said to have arisen in India.

In so far as the price for off shore supply of equipment simplicitor is concerned, profit from the same cannot be charged to tax as the assessee is a non-resident and there is absence of territorial nexus of such income with India. (ITA No. 5787/Del/ 2013. 2008-09, 26-2-2014.) (A.Y. 2008-09)

*POSCO Engineering & Construction Co. Ltd. v. ADIT (Delhi)(Trib.), www.itatonline.org*

- 9. S.9(1)(i) : Income – Deemed to accrue or arise in India – Permanent establishment – Business profits – Force of Attraction (FOA) – Similar business activities carried on by an enterprise of contracting State – Marketing and management services were provided outside India-Income would not be taxable under Articles 7. DTAA-India-USA DTAA. [Articles 5, 7]**

Marketing and management services in question were rendered outside India and income of such services cannot be said to have accrued or arisen to the assessee or deemed to have accrued or arisen to assessee in India, the existence of service PE in India would not make it taxable under Article 7 of Indo-US DTAA. (A.Y. 2007-08)

*ADIT v. WNS North America Inc. (2014) 146 ITD 435 / 38 taxmann.com 321(Mum.)(Trib.).*

- 10. S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Reimbursement of expenses – DTAA-India-Netherlands. [S. 90, Articles 7, 12]**

The amount received by the assessee Dutch Company from an Indian company for providing marketing services outside India is not taxable as royalty u/Art. 12(4) of the Indo-Netherlands DTAA. The said amount would be taxable in India u/s. Art. 7 if the assessee carries on business in India through a PE situated in India. Impugned order was set aside and the matter was restored to the AO for considering the facts in the light of Article 7 of the DTAA.

*Marriott International Licensing Co. BV v. DDIT(IT) (2014) 98 DTR 27 (Mum.)(Trib.).*

- 11. S.9(1)(vi) : Income deemed to accrue or arise in India – Royalty – Non-exclusive user right of a software owned by said company – Two subsidiaries in India – Taxable as royalty – DTAA-India-USA. [Articles 7, 12]**

The assessee was a company incorporated in USA. It entered into an agreement with a software company, oracle and obtained non exclusive user right of a software owned by said company. The assessee granted user right to its subsidiaries. The assessee treated the said income as business profits under Article 7 of the DTAA between India and USA and since it did not have PE in India income was claimed as exempt. AO held that the payment received was royalty covered under section 9(1)(vi) and the same is taxable in India. DRP confirmed the order of AO. On appeal to the Tribunal the Tribunal held that the payment received by assessee from its two affiliates for granting right of software was royalty and rightly been brought to tax in India. (A.Y. 2004-05 & 2006-07)

*Cummins Inc v. DIT (2014) 146 460 / (2013) 38 taxmann.com 286 (Pune)(Trib.).*

- 12. S.9(1)(vii) : Income deemed to accrue or arise in India – Fees for technical services – Providing software development services to its customers based in India – Liable to deduct tax at source – DTAA-India-USA. [S. 195, Articles 12]**

The assessee company was engaged in providing software development services to its customers based in India. During relevant assessment year, assessee company claimed deduction of payment made to a US based company towards management services rendered by it. The Tribunal held that it was undisputed that assessee was making use of advice, input

experience, experimentation and assistance rendered by USA based company in its decision making process of financial and risk management etc. Further apart from providing input service and advice, US based company was also providing training to employees of assessee-company. On facts services rendered by non-resident company were technical in nature as provided in clause 4(b) of Article 12 of DTAA, and thus, assessee was liable to deduct tax at source while making payments in respect of said services. (A.Y. 2007-08)

*US Technology Resources (P) Ltd. v. ACIT (2014) 61 SOT 19 (Cochin)(Trib.)*

**13. S.9(1)(vii) : Income deemed to accrue or arise in India – Business connection – Fees for technical services-services rendered by assessee outside India could not be brought to tax in India-DTAA-India-USA. [Articles 5, 12]**

For the earlier assessment years 2003-04 to 2006-07 an identical issue has been considered and decided by the Tribunal in favour of the assessee. It is further noted that in the assessment years 2004-05 and 2005-06 the Hon'ble Jurisdictional High Court has confirmed the order of this Tribunal. The assessee in the instant case has not made available any technical knowledge, experience skill etc. to WNS India, the same cannot be subjected to tax by considering the provisions of section 9(1)(vi) on stand-alone basis. It is held that the marketing and management services rendered by the assessee to WNS India are not chargeable to tax as FIS under Article 12 of the DTAA. (A.Y. 2007-08)

*ADIT v. WNS North America Inc. (2014) 146 ITD 435 / 38 taxmann.com 321 (Mum.) (Trib.)*

**14. S.11 : Property held for charitable purposes – Charitable or religious trust – Application of income-**

**Advance to purchase of land – Project grant neither income nor corpus – Interest on fixed deposit – Interest could not be treated as income. [S. 13]**

The assessee-society was formed at the instance of Government of India with the object to create world class automotive testing, validation etc. It had given advance for purchase of land and upgradation of existing facilities. The assessing officer held that said advance given was not according to section 11(5) and therefore violated provisions of section 13(1)(d). The CIT (A) allowed the assessee's appeal, *inter alia* observing that:

- (a) Project grant was neither income nor corpus of the assessee
- (b) Interest received on fixed deposit receipts made out of unutilised project grant received by the assessee was not an income of society. On appeal by the department before the Tribunal, the Tribunal confirmed the findings of the CIT (A) and held that the grant received was on capital account and not a recurring grant towards revenue expenses. Hence it could not be taken to income and expenditure account as per Accounting Standards 12 issued by the Institute of Chartered Accountants of India. (A.Y. 2006-07)

*ADIT(E) v. Natrip Implementation Society (2014) 61 SOT 43 (URO) / (2013) 26 ITR 333 (Delhi)(Trib.)*

**15. S.14A : Disallowance of expenditure – Exempt income – No disallowance of expenditure for investment in shares of subsidiaries & Joint Ventures as the investments are strategic in nature in the subsidiary companies on long term basis and**

**no direct or indirect expenditure was incurred. [R. 8D]**

The department has not disputed this fact that out of the total investment about 98% of the investments are in subsidiary companies of the assessee and, therefore, the purpose of investment is not for earning the dividend income but having control and business purpose and consideration. Therefore, *prima facie* the assessee has made out a case to show that no expenditure has been incurred for maintaining these long term investment in subsidiary companies. Accordingly disallowance by the AO was deleted. (ITA No. 4521/Mum/2012 dated 26-3-2014, (A.Y. 2009-10)

*JM Finacial Ltd. v. ACIT (Mum.)(Trib.) www.itatonline.org.*

**16. S.14A : Disallowance of expenditure – Exempt income – Disallowance as per section 14A(2) is required to be made, even if assessee claims that it did not incur any expenditure in earning dividend income [R. 8D]**

The assessee earned dividend income but did not allocate any amount as expenditure incurred in relation to such income and accordingly it did not disallow any amount u/s. 14A. The AO disallowed 0.5% of the average value of investment under Rule 8D(2)(iii). The CIT(A) upheld the disallowance made by the AO and further disallowed proportionate interest expenditure relating to the exempted dividend income u/s. 14A.

On appeal to the Tribunal, the assessee contended that it did not incur any expenditure in earning the dividend income. It also submitted that the AO was not right in taking average value of all the investments for the purpose of calculating the disallowance of expenses, instead of the average value of dividend yielding investments. The Tribunal

observed that as per rule 8D(2)(iii), the average value of investment, income from which does not or shall not form part of the total income is required to be considered, meaning thereby the entire value of investments made in shares is required to be considered. The Tribunal while dismissing the assessee's claim also noted that, as per section 14A(3) disallowance as per section 14A(2) is required to be made, even if the assessee claims that it did not incur any expenditure in earning the dividend income. (A.Y. 2008-09)

*ACIT v. Kerala State Industrial Development Corporation Ltd. (2014) 29 ITR 45 (Cochin)(Trib.)*

**17. S.14A : Disallowance of expenditure – Exempt income – Apportionment of expenses. [R.8D]**

No disallowance u/s. 14A can be made if the AO has not recorded his dissatisfaction as regards accounts of the assessee. U/r. 8D(2)(iii) the amount disallowable is equal to ½ percentage of the average value of investment, income from which does not/shall not form part of the total income and not the total investment at the beginning and end of the year. (A.Y. 2008-09)

*REI Agro Ltd. v. Dy. CIT (2014) 98 DTR 339 (Kol.) (Trib.)*

**18. S.14A : Disallowance of expenditure – Exempt income – Book Profit – Amount disallowed under section 14A to be added while computing book profit. [S.115JB]**

The Tribunal held that whatever expenditure is found to be disallowed under section 14A, the same is to be added back while computing book profit under section 115JB. (A.Y. 2007-08)

*Godrej Consumer Products Ltd. v. Addl. CIT (2014) 159 TTJ 21 (Mum.)(Trib.)*

**19. S.14A : Disallowance of expenditure – Exempt income – Interest on taxable business activity-For working the disallowance as per Rule, 8D(2) (ii), interest expenditure on loans taken for taxable business purposes has to be excluded**

If the assessee is able to demonstrate that the payment of interest is directly attributable to the assessee's taxable business activity, it cannot be considered under Rule 8D(2)(ii) of the I.T. Rules. (ITA No. 503/JP/2012. dated 27-1-2014.) (A.Y. 2007-08)

*ITO v. Narain Prasad Dalamia (Kol.)(Trib.), www.itatonline.org*

**20. S.14A : Disallowance of expenditure – Exempt income – If AO does not deal with assessee's arguments, it means that he has not reached objective satisfaction that assessee's method is incorrect & cannot invoke Rule 8D. [R. D]**

The invoking of Rule 8D to compute the disallowance u/s. 14A is neither automatic and nor is triggered merely because assessee has earned an exempt income. The invoking of Rule 8D of the Rules is permissible only when the AO records the satisfaction in regard to the incorrectness of the claim of the assessee, having regard to the accounts of the assessee.

On facts, the AO has given no reasons why the assessee's calculation was not proper except to say that "the said disallowance was not acceptable".

The department's objection that since the assessee was not maintaining separate accounts with regard to the activity of earning exempt income, the satisfaction contemplated u/s. 14A be considered as implied is contrary to how the implications of sub-section (2) of s. 14A have

been understood and explained by the High Courts in Godrej & Boyce Manufacturing Co. Ltd & Maxopp Investment Ltd. (ITA No. 1733/PN/2012. 30-1-2014.) (A.Y. 2008-09)

*Kalyani Steels Ltd. v. ACIT (Pune)(Trib.), www.itatonline.org*

**21. S.14A : Disallowance of expenditure – Exempt income – Controlling interest – No disallowance can be made if primary object of investment is to hold controlling stake in group concern and not to earn tax-free income. [R. D]**

We find merit and substance in the contention of the assessee that no expenditure had been incurred by the assessee for earning the exempt income on this point because the investment has been made by the assessee in the group concern and not in the shares of any unrelated party. Therefore, the primary object of investment is holding controlling stake in the group concern and not earning any income out of investment. Further, the investments were made long back and not in the year under consideration. Therefore, in view of the fact that the investment are in the group concern we do not find any reason to believe that the assessee would have incurred any administrative expenses in holding these investments. The AO has not brought on record any material to show that the assessee has incurred any expenditure in relation to the income which does not form part of the total income. Section 14A has within it implicit the notion of apportionment in the cases where the expenditure is incurred for composite/indivisible activities in which taxable and non taxable income is received but when no expenditure has been incurred in relation to the exempt income then principle of apportionment embedded in section 14A has no application. The object of section 14A is not allowing to reduce tax payable on the non

exempt income by deducting the expenditure incurred to earn the exempt income. In the case in hand it is not the case of the revenue that the assessee has incurred any direct expenditure or any interest expenditure for earning the exempt income or keeping the investment in question. If there is expenditure directly or indirectly incurred in relation to exempt income the same cannot be claimed against the income which is taxable. For attracting the provisions of section 14A “there should be proximate cause for disallowance which has relationship with the tax exempt income as held by the Hon’ble Supreme Court in case of *CIT vs. Walfort Share and Stock Brokers P. Ltd.* (2010) 326 ITR 1). Therefore, there should be a proximate relationship between the expenditure and the income which does not form part of the total income. In the case in hand the assessee has claimed that no expenditure has been incurred for earning the exempt income, therefore, it was incumbent on the AO to find out as to whether the assessee has incurred any expenditure in relation to income which does not form part of the total income and if so to quantify the expenditure of disallowance. The AO has not brought on record any fact or material to show that any expenditure has been incurred on the activity which has resulted into both taxable and non taxable income. Therefore, in our view when the assessee has *prima facie* brought out a case that no expenditure has been incurred for earning the income which does not form part of the total income then in the absence of any finding that expenditure has been incurred for earning the exempt income the provisions of section 14A cannot be applied. Accordingly we delete the addition/disallowance made by AO u/s 14A r.w. Rule 8D. (ITA No. 5408/Mum/2012. dated 15-1-2014.) (AY. 2009-10)

*Garware wall Ropes Ltd. v. ACIT (Mum.)(Trib.), www.itatonline.org*

**22. S.15 : Salary – Accrual – Salary income accrues at the place where**

**the services are rendered and not where the appointment letter is received. If salary, after accrual abroad, is brought into India, it is not taxable on receipt basis. S. 6(5) which deals with residential status is redundant. [S. 6(5)]**

(i) The AO’s stand that because the assessee has offered taxation of interest and pension, he has accepted himself as a “resident” and that the other income also becomes taxable u/s. 6(5) is wrong. The pension was paid by his former employer in India, and, therefore, irrespective of his residential status, the income was taxable in India. Similarly, so far as interest on savings bank account was concerned, the interest accrued in India was credited, in income character as such, in India, and was, therefore, taxable in India. This taxability does not require recipient of income to have ‘resident’ status u/s. 6 at all.

Once it is not in dispute that the assessee qualifies to be treated as a ‘non-resident’ under Section 6 of the Act, the scope of taxable income in the hands of the assessee, under Section 5(2), is restricted to (a) income received or is deemed to be received in India, by or on behalf of such person; and (b) income which accrues or arises, or is deemed to accrue or arise to him, in India.

That ‘receipt’ of income, for this purpose, refers to the first occasion when assessee gets the money in his own control – real or constructive. What is material is the receipt of income in its character as income, and not what happens subsequently once the income, in its character as such is received by the assessee or his agent; an income cannot be received twice or on multiple occasions. (ITA Nos. 319 and 320/Agr/2013. dated 14/02/2014) (A.Y. 2008-09, 2009-10)

*Arvind Singh Chauhan v. ITO (Agra)(Trib.), www.itatonline.org*

**23. S.28(i) : Business income – Income from other sources – Interest on**

**fixed deposits with banks for short periods one day to ninety days is assessable as income from business. [S.56]**

Interest earned by the assessee-company on fixed deposits for short periods ranging from one day to ninety days is taxable as business income and not as income from other sources. (A.Y. 2009-10)

*Green Infra Ltd. v. ITO (2014) 98 DTR 187 (Mum.) (Trib.)*

**24. S.28(i) : Business income – Interest on fixed deposits with bank for performance guarantee – Assessable as business income**

Fixed deposits with bank were kept by the assessee as its business necessity to obtain the performance guarantee in favour of clients. Interest on such deposits is business income. (AYs. 2002-03 to 2004-05)

*ITO v. Ricoh India Ltd. (2014) 98 DTR 435 (Mum.) (Trib.)*

**25. S.37(1) : Business expenditure – Capital or revenue – Only longevity of the facility cannot make capital asset**

The assessee incurred huge expenditure in laying cables for providing domestic viewers. It had shown the expenditure in its P & L A/c as revenue incurred for the purpose of its business. The AO held that the assessee having secured an enduring benefit by laying down the cables, the expenditure incurred was capital in nature and hence disallowed the expenditure, however, allowed depreciation thereon @ 25%. The CIT(A) held that the expenditure was revenue in nature.

On appeal by the Department, the Tribunal confirming the Order of the CIT(A) held that even though the cables were laid by the assessee for carrying on business, the cables did not satisfy the basic features of a capital asset.

Enduring benefit in the assessee's case related to safeguarding cable laid down underground or drawn over the electric poles. If an external agency interfered and the cables were damaged, the assessee had no course of action, it could not retrieve the cables profitably nor could it protect the cables. Accordingly, the costs involved was a sunk cost even though the assessee might get the benefit out of the cable for more than a year. That longevity of the facility could not make the cable a capital asset. Therefore, the Tribunal held that the expenditure on laying cables was revenue in nature. (A.Ys 2003-04, 2005-06)

*ACIT v. Gemini TV P. Ltd. (2014) 29 ITR 32 (Chennai)(Trib.)*

**26. S.37(1) : Business expenditure – Expenditure incurred on film which was abandoned halfway – Allowed as revenue expenditure [R. 9A]**

The assessee, a film producing company, abandoned a film under production as continuation would have led to a higher loss and claimed the expense incurred as revenue in nature. The AO disallowed the expense as expenditure incurred before release of a film was capital expenditure. The CIT(A) held that during production, the film was a stock-in-trade and on being abandoned was to be treated as revenue expense.

On appeal by the department, the Tribunal held that only when expenditure gives rise to an enduring benefit, it can be regarded as capital in nature. As per Rule 9A, for feature films (full cost of production of which is generally realisable within a period as low as 90 days), the cost of production of the incomplete project, is deductible as a business expenditure on its abandonment. Thus in the instant case, where suspension was not temporary, the expense is to be treated as revenue in nature. (A.Y. 2005-06)

*ACIT v. A. K. Films (P.) Ltd. (2014) 29 ITR 308 (Mum.)(Trib.)*

**27. S.37(1) : Business expenditure – Expenditure incurred on an abandoned film – is a revenue loss and allowable expenditure. [S.28(i)]**

The assessee is engaged in the business of hiring cine equipment, distribution and export of films. The AO disallowed the loss of ₹ 60 lakhs claimed by the assessee in respect of an abandoned film on account of non-advancing of a legal justification and held the same to be capital in nature. The CIT(A) allowed the claim of the assessee observing that since the film no longer had commercial viability, it was scrapped and the amounts incurred till date were written off.

On appeal by the department, the Tribunal relying on the decision of the Bombay High Court in the case of *CIT v. Mukta Arts P. Ltd.* (ITA No. 584 of 2001) and other decisions on the subject observed that the fact that the film in question was never released, it was simply a stock-in-trade and there was no question of it being a capital asset. Accordingly, the Tribunal confirmed the order of the CIT(A) and dismissed the departmental appeal. (A.Y. 2006-07)

*ITO v. Abdul Nadiadwala* (2014) 29 ITR 528 (Mum.)(Trib.)

**28. S.37(1) : Business expenditure – Expenses for advertising product of its holding company in Indian sub-continent – regarded as sales promotion expenses – allowable**

The assessee had incurred certain expenses towards sales promotion. The AO disallowed the expenses - specifically, expenses incurred towards sponsorship of events, hosting of conferences, promotional gifts, public relations as he was of the view that the said expenses cannot be said to be incurred exclusively for business purposes. The CIT(A) reduced the disallowance to 10% of the claim.

During the appeal to the Tribunal, the assessee submitted that such sales promotion expenses are necessary to create awareness of the different SAP products and its utility for the buyer in the Indian sub-continent. It was submitted that the expenses claimed by the assessee are not uncommon expenses and are incurred by any software product company. The quantum of sales promotion expenses are not abnormally high and were incurred wholly and exclusively for its business purposes and would satisfy the test of commercial expediency. Accordingly, the claim of the assessee was fully allowed by the Tribunal u/s. 37(1). (AYs. 2004-05 to 2008-09)

*SAP India (P.) Ltd. v. DCIT* (2014) 29 ITR 469 (Bang.)(Trib.)

**29. S.37(1) : Business expenditure – Commencement of business- ROC issued certificate of commencement of business – Business set up – Expenses including depreciation is allowable**

ROC had issued the certificate of commencement of business to the assessee company during the relevant year. The company had already set up three subsidiaries in furtherance of one of its main objects. It is entitled for deduction of all legitimate expenses including depreciation. (A.Y. 2009-10)

*Green Infra Ltd. v. ITO* (2014) 98 DTR 187 (Mum.)(Trib.)

**30. S.37(1) : Business expenditure – Vehicle lease rental – Operating lease – Lease rental are allowable as revenue expenditure**

Tribunal held that lease in question can be said to be essentially an operating lease and not a finance lease. Assessee has not claimed any depreciation. Thus the assessee is entitled to deduction under Section 37(1). The Tribunal

followed the decision of Supreme Court in the case of *I. C. D. S. Ltd. v. CIT* (2013) 255 CTR 449 (SC). (A.Y. 2005-06 to 2007-08)

*Godrej Consumer Products Ltd. v. Addl. CIT* (2014) 159 TTJ 21 (Mum.)(Trib.)

**31. S.37(1) : Business expenditure – Personal expenses – Amount suffered FBT can also be disallowed if the expenditure is of personal nature. [S. 115WB]**

Assessing Officer disallowed telephone expenses on account of personal use. Assessee claimed that telephone expenses also suffered Fringe Benefit Tax. Since FBT could only be in respect of expenses incurred for business purpose, it could not be co-related with expenses disallowed on ground of personal use. Where disallowance was effected on ground of non-business or personal nature, said disallowance could not be deleted on the ground that the amount has suffered FBT. (A.Y. 2007-08)

*Hercules Pigment Industry v. ITO* (2014) 146 ITD 31 / (2013) 35 taxmann.com 650 (Mum.)(Trib.)

**32. S.40(a)(ia) : Amounts not deductible – Deduction at source – Contractors – Tax deducted at source paid before due date of filing return, no disallowance can be made. [S.139(1), 194C]**

During the F.Y. 2008-09 the assessee had made certain contractual payments but deposited the same on 26-9-2009 i.e. before the due date of filing of return. The AO disallowed the payment u/s. 40(a)(ia) relying on the case of *Bharati Shipyard Ltd. v. DCIT* (2011) 132 ITD 53 (Mumbai) (SB). The CIT(A) deleted the addition following the decision of the Bangalore Bench of the Tribunal in the case of *ACIT v. M.K. Gurumurthy* (2012) 22 taxmann.com 72.

The Tribunal following the aforesaid decision of the Bangalore Bench of the Tribunal dismissed the departmental appeal by observing that the amendment to the provisions of section 40(a)(ia) by the Finance Act, 2010 is retrospective in nature. (A.Y. 2009-10)

*ACIT v. Ace Fire Services* (2014) 29 ITR 73 (Bang.) (Trib.)

**33. S.40(a)(ia) : Amounts not deductible – Deduction at source – Tax deducted before 31st March and paid before due date of filing return – amount deductible. [S.139(1), 263]**

The CIT exercised revisionary powers u/s. 263 and disallowed the expense u/s. 40(a)(ia) as tax on the said amount was deducted before 31st March and paid before the due date of filing return instead of being deposited within 7 days of the following month.

On appeal, the Tribunal relying on the decision of the Hyderabad Bench of the Tribunal in the case of *Madineni Mohan v. ITO* (I.T.A. No. 762/Hyd/2012) and various other judgments held that amendment to provisions of s. 40(a)(ia) made by the Finance Act, 2010 is applicable retrospectively from 1-4-2005 and if the assessee has deposited TDS before the due date of filing return u/s. 139(1), no disallowance can be made u/s. 40(a)(ia). The Tribunal noted that there is no dispute by the AO or the CIT on the fact that tax was appropriately deducted at source and paid before the due date of filing the return, and hence it held that the revisionary powers exercised by the CIT is not justified. (A.Y. 2007-08)

*R.V. Chakrapani v. ACIT* (2014) 29 ITR 342 (Hyd.) (Trib.)

**34. S.40(a)(ia) : Amounts not deductible – Special Bench**

### **decision in the case of Merilyn Shipping and Transports not accepted**

The assessee was engaged in the business of civil construction. It had *suo motu* disallowed an amount u/s. 40(a)(ia) of the Act in respect of payment to sub-contractors, labour charges, transport hiring charges, etc., on which no tax was deducted at source and this deduction continued in the assessment order. The assessee filed cross-objections before the Tribunal claiming that the disallowance made u/s. 40 (a) (ia) was not correct in lieu of the decision of the Special Bench in the case of *Merilyn Shipping and Transports v. ACIT (2012) 16 ITR (Trib.)*1.

The Tribunal dismissing the cross objections filed by the assessee observed that the decision of the Special Bench was found not acceptable in several cases before the High Court and the decision was itself stayed, therefore the view taken by the Special Bench cannot be accepted. (A.Y. 2008-09)

*ACIT v. Raviraj Relempaadu (2014) 29 ITR 387 (Mum.)(Trib.)*

### **35. S.40(a)(ia) : Amounts not deductible – Tax was deposited before due date of filing of return-Payments – Excess or unreasonable – Unable to prove that amounts paid are excessive or unreasonable – No disallowance can be made [S. 40A(2)(b)]**

The assessee, engaged in share broking business claimed deduction of ₹ 43 Lakhs as 'agents incentive'. The AO held that all three concerns to whom the incentive was being paid were related parties u/s. 40A(2)(b). These expenses were already disallowed u/s. 40(a)(ia) for failure to deduct tax at source. The CIT(A) observed that tax was deposited before the due date of filing

the return u/s. 139 of the Act and deleted the disallowance u/s. 40(a)(ia).

On appeal by the department, the Tribunal noted that since the AO was unable to prove that the parties to whom payments were made were related parties, and that payments made were unreasonable the disallowance u/s. 40A(2)(b) was deleted. (A.Y. 2008-09)

*ITO v. Anson Financial Holidays (2014) 29 ITR 620 (Cochin)(Trib.)*

### **36. S.40(a)(ia) : Amounts not deductible – Deduction at source – Amount paid or payable – Disallowance was held to be justified**

Disallowance under section 40(a)(ia) is to be made where there is non-compliance with the provision of TDS irrespective of the fact whether the amount has been already paid during the relevant year or the amount is outstanding at the end of the year. (AY. 2008-09)

*ACIT v. Rishiti Stock & Shares (P) Ltd. (2014) 159 TTJ 300 (Mum.)(Trib.)*

### **37. S.40(a)(i) : Amounts not deductible – Deduction at source – Non-residents without TDS violates 'deduction neutrality non-discrimination' clause in DTAA as there is no similar bar for residents as per Merilyn Shipping (2012) 136 ITD 23 (SB)**

The Tribunal had to consider whether, in view of the non-discrimination clause under the tax treaties, the law laid down in *Merilyn Shipping & Transport v. ACIT (2012) 136 ITD 23 (SB)* and approved in *Vector Shipping (All HC)*, in the context of s. 40(a)(ia), that the disallowance cannot be made for amounts already paid during the year, applies also to s. 40(a)(i)? HELD by the Tribunal:

- (i) *In Rajeev Sureshbhai Gajwani v. Asst. CIT (2011) 137 TTJ 1 (Ahd)(SB)* it was held that differentiation simplicitor is enough to invoke the non-discrimination clause. Consequently, it will be contrary to the deduction neutrality clause in non-discrimination in the tax treaties if the provisions for deduction of payments to non-residents are more onerous than those applicable for payments to residents. The payments made to residents of Ireland, Denmark and Austria are protected by the deduction neutrality clauses and any pre-conditions for deductibility, which are harsher than payments made to the residents are ineffective in law. However, payments to the residents of Belgium, UK, Italy and Spain will not be entitled to the same protection under the omnibus non-discrimination clause of Article 24(1) based on nationality (*Herbalife International India (P) Ltd. (2006) 103 TTJ 78 (Del.)* referred)
- (ii) On merits, it is a possible view that *Merilyn Shipping* (which has been suspended by the A. P. High Court & disapproved by the Gujarat High Court in *CIT v. Sikandarkhan & Tanwar & Ors. (2013) 87 DTR 137*) has not been approved by the jurisdictional High Court in *Vector Shipping Services*. However, as the CBDT has itself taken the view in Circular No. 10/DV/2013 dated 16-12-2013 that the Allahabad High Court has affirmed *Merilyn Shipping*, the department is bound by it and no disallowance can be made u/s. 40(a)(i) for sums paid to non-residents without TDS. (*ITA No. 257/Agr/2013. dt. 4-2-2014.*) (A.Y. 2008-09)

*DCIT v. Gupta Overseas (Agra)(Trib.)*, [www.itatonline.org](http://www.itatonline.org)

**38. S.45 : Capital gains – Business income – Purchase and sale of shares through portfolio**

**management services assessable as capital gains. [S.28(i)]**

Income earned by assessee on sale/purchase of shares and securities through PMS is to be assessed as capital gains and not business income. (A.Y. 2007-08)

*Nalin Pravin Shah v. ACIT (2014) 98 DTR 420 (Mum.)(Trib.)*

**39. S.45 : Capital gains – Business income – Purchase and sale of shares – Assessee had not borrowed any funds – Accepted as investment in earlier years – Assessable as capital gains [S. 28(i)]**

Assessee used his own funds for transacting in shares and did not indulge in any transaction for a holding period of less than 15 days or in repeated sale/purchase of same scrip. Held that the shares were purchased by assessee for investment more so when similar kind of transactions have been considered by AO as investment activity in the preceding years. (A.Y. 2007-08)

*Nalin Pravin Shah v. ACIT (2014) 98 DTR 420 (Mum.)(Trib.)*

**40. S.45 : Capital gains – Business income – Share dealing – Business of manufacture and export of electrical goods – Income derived from purchase and sale of shares was held to be Capital gain. [S. 28(i)]**

Assessee was a partner in firms which were engaged in the business of manufacture and export of electrical goods and electrical contractors. He had shown income derived from sale and purchase of shares as short-term capital gain. AO taxed the said income as business income. Tribunal held that the gain from such

investments has also been assessed as capital gains, even though such assessments have been completed under section 143(1) but the same have not been disturbed. From these facts, it can be gathered that the assessee's intention in the purchase of shares was mostly for investment purpose and to have maximum gain. The details of purchase and sale of shares, it is seen that the maximum gain has been on those shares, which have been held for period of 91 to 180 days and 181 to 365 days. If all these factors are considered in totality, it cannot be held that the assessee was engaged in organised and systematic activity of trading of shares. In case of purchase of shares for the purpose of investment, motive is maximising gain only. Therefore, income from purchase and sale of shares is to be assessed under the head "capital gain" and not under the head "business income". (A.Y. 2005-06)

*Bipin Ram Chainani v. Add.CIT (2014) 146 ITD 257 / (2013) 38 Taxmann.com 245 (Mum.)(Trib.)*

**41. S.50C : Capital gains – Full value of consideration – Stamp valuation – Assessee objected to the stamp duty valuation – Valuation should be referred to the Valuation Cell**

The assessee had recorded STCG on sale of property in which it had one third share. The AO noticed that the market price of the property was ₹ 7,79,635 as against ₹ 6,00,000 recorded by the assessee and thus made an addition to the capital gain of the assessee. The CIT(A) confirmed the addition as there was not much difference between the sale price adopted by the assessee and the sale price determined by the stamp duty authority.

On appeal by the assessee, the Tribunal held that if the assessee was not satisfied with the stamp duty valuation adopted by the AO, the AO ought to refer the valuation of the property to the Valuation Cell and then decide the matter. The case was thus remanded back to the AO for fresh consideration. (A.Y. 2006-07)

*Mansukhlal Ghelabhai Doshi v. ACIT (2014) 29 ITR 628 (Rajkot)(Trib.)*

*Nilesh Mansukhlal Doshi v. ACIT (2014) 29 ITR 628 (Rajkot)(Trib.)*

*Nilay Masukhlal Doshi v. ACIT (2014) 29 ITR 628 (Rajkot)(Trib.)*

**42. S.54 : Capital gains – Profit on sale of property used for residence – Income from building is chargeable to income tax under the head income from house property it is not necessary that the assessee must earn income from such property – Exemption was allowed**

The assessee was owner of a land on which a residential building was constructed with funds of assessee's husband. The assessee sold said property and invested sale consideration in purchasing a new residential house property and claimed exemption under section 54. Exemption was denied to assessee on the ground that assessee was not owner of the house property and no income had been assessed relating to the said property in hands of assessee under head 'House property'. Tribunal held that the requirement of s. 54 is that the income of the building which is being sold should be chargeable under the head "income from house property". The requirement of section is not that the assessee must earn income from said property. If there was a tenant then the income from the property was chargeable to tax. Therefore, exemption also cannot be denied to the assessee on the ground that assessee did not show any income chargeable under the head "income from house property. There cannot be any dispute on the fact that the new residential property purchased by the assessee and her husband is fulfilling the criteria for exemption u/s. 54, as the revenue itself has granted such exemption to the husband of the assessee for his

50% share. Exemption u/s. 54 has wrongly been denied in the case of assessee. (A.Y. 2004-05)

*Sheela Bhagwandas Nichlani (Mrs.) v. ITO (2014) 146 ITD 244 / (2013) 38 taxmann.com 289 (Mum.) (Trib.)*

**43. S.54EC : Capital gains – Investment in bonds – The term “month” in S.54E, 54EA, 54EB & 54EC does not mean “30 days” but the “calendar month”. So, the expression “within a month” means “before the end of the calendar month”**

The term ‘month’ is not defined in the Income-tax Act. Therefore, its meaning has to be understood as per the General Clauses Act, 1897 which defines the word “month” to mean a month reckoned according to the British calendar. In *CIT v. Munnalal Shri Kishan (1987) 167 ITR 415 (All)* it was held in the context of limitation u/s. 256(2) that the word ‘month’ refers to a period of 30 days and, therefore, the reference to “six months” in s. 256(2) is to “six calendar months” and not “180 days”. On some occasions, the Legislature had not used the term “month” but has used the number of days to prescribe a specific period. For example, the First Proviso to s. 254(2A) provides that the Tribunal may pass an order granting stay but for a period not exceeding 180 days. This is an important distinction made in the statute while subscribing the limitation/ period. This distinction thus resolves the present controversy by itself. (ITA No. 1973/Ahd./2012, dated 25-3-2014.)

*Alkaben B. Patel v. ITO(SB) (Ahd.)(Trib.) www.itatonline.org*

**44. S.56(2)(vii) : Income from other sources – Section does not apply to bonus & rights shares offered on a proportionate basis even if**

**the offer price is less than the FMV of the shares**

The assessee held 15,000 shares in Dorf Ketel Chemicals Pvt. Ltd representing 4.98% of the share capital. Pursuant to a further issue, it was allotted 1,94,000 shares at the face value rate of ₹ 100 each, on a proportionate basis. The AO held that as the book value of the shares was ₹ 1,538 per share, computed under Rules 11U & 11UA), the difference of ₹1,438 per share (aggregating ₹ 27.89 crore) was “inadequate consideration” and assessable to tax u/s 56(2)(vii)(c). This was upheld by the CIT(A). On appeal by the assessee to the Tribunal HELD allowing the appeal:

S.56(2)(vii)(c)(ii) provides that where an individual or a HUF receives any property for a consideration which is less than the FMV of the property, the difference shall be assessed as income of the recipient. S. 56(2)(vii) does not apply to the issue of bonus shares because there is a mere capitalisation of profit by the issuing-company and there is neither any increase nor decrease in the wealth of the shareholder as his percentage holding remains constant. The same argument applies *pari materia* to the issue of additional shares to the extent it is proportional to the existing share-holding because to the extent the value of the property in the additional shares is derived from that of the existing shareholding, on the basis of which the same are allotted, no additional property can be said to have been received by the shareholder. The fall in the value of the existing holding has to be taken into account. As long as there is no disproportionate allotment, i.e., shares are allotted pro-rata to the shareholders, based on their existing holdings, there is no scope for any property being received by them on the said allotment of shares; there being only an apportionment of the value of their existing holding over a larger number of shares. There is, accordingly, no question of s. 56(2)(vii)(c) getting attracted in such a case. A higher than proportionate or a non-uniform allotment though would attract the rigour of the provision to the

extent of the disproportionate allotment and by suitably factoring in the decline in the value of the existing holding (ITA No. 4887/Mum/2013, A.Y. 2010-11 and SA No. 192/Mum/2013. A. Y. 2010-11. order dt. 12-3-2014.)

*Sudhir Menon HUF v. ACIT (Mum.) (Trib.), www.itatonline.org*

**45. S.68 : Cash credits – Income from other sources – Share premium – ‘Income of every kind’ – Capital receipt – Neither assessable as cash credits nor as income from other sources [Ss. 4, 56(1)]**

Share premium, received by the assessee company on issue of shares, is a capital receipt and therefore, it could not be taxed u/s. 56(1). As assessee company is holding 99.88 per cent of shares in its subsidiaries and several PSUs are contributors in IDFC PE Fund-II which is holding 98 per cent shares of the assessee company, the receipt of share premium could not be said to be a sham transaction. S. 68 is not attracted in these facts. (A.Y. 2009-10)

*Green Infra Ltd. v. ITO (2014) 98 DTR 187 (Mum.) (Trib.)*

**46. S.68 : Cash credits – Fund manger for other people – Benefit of telescoping – Peak credit – May be allowed**

Assessee was held to be a fund manager for other people for which purpose moneys were frequently withdrawn or deposited. Therefore, assessee was entitled to work out a peak credit and avail the benefits of telescoping. (A.Ys. 2001-02 to 2003-04)

*Chetan Gupta v. ACIT (2014) 98 DTR 209 (Delhi) (Trib.)*

**47. S.80IA(8) : Income from generation of power – Market value of**

**captive consumption of power – Grid price – Arm’s length value – If there are multiple “market values” assessee has the right to choose the suitable one**

S. 80-IA(8) provides that if goods or services held by the eligible unit are transferred to the non-eligible business or *vice-versa*, the assessee must adopt ‘Market Value’ as the transfer price. In the open market, where a basket of ‘Market Values’ (say like independent third party transactions, grid price (average annual landed cost at which grid has sold power to the assessee), Power Exchange Price for the relevant period etc.) are available, the law does not put any restriction on the assessee as to which ‘Market Value’ it has to adopt, it is purely assessee’s discretion. So long as the assessee has adopted a ‘Market Value’ as the transfer price, that is sufficient compliance of law. The AO can adopt a different value only where the value adopted by assessee does not correspond to the ‘market value’. Even if assessee’s Cement Unit has purchased power, also from the Grid or that assessee’s Power Unit has also partly sold its power to grid or third parties that by itself, does not compel the assessee or permit the Revenue, to adopt ONLY the ‘grid price’ or the price at which the Eligible Unit has partly sold its power to grid or third parties, as the ‘market value’ for captive consumption of power to compute the profits of the eligible unit. Any such attempt is clearly beyond the explicit provisions of s. 80IA(8) of the Act. If the value adopted by the assessee is a ‘market value’ it is not permissible for the revenue to recompute the profits and gains on the eligible unit by substituting the said value by any other market value. (AYs. 2007-08 to 2009-10)

*Shree Cement Ltd. v. ACIT(2014) 100 DTR 33 (Jaipur)(Trib.)*

**48. S.80IB(10) : Housing projects – Joint venture agreement – Claim allowed in the hands one party**

**to the joint venture – Claim of assessee also to be allowed**

Assessee entered into a JV for developing a property. Assessee's claim for deduction u/s. 80IB(10) could not be disallowed on the ground that the assessee has not honoured the conditions of the JV agreement or that it could not substantiate its claim that the profit has been shared equally with the JV partner as these are not the conditions under s.80IB(10). On identical facts and for the same project the revenue has accepted the claim in the hands of one party to the joint venture agreement. Claim of assessee was allowed. (A.Y. 2009-10)

*Rajkotia Securities Ltd. v. Dy. CIT (2014) 98 DTR 275 (Mum.)(Trib.)*

**49. S.80IB(10) : Housing projects – Limit on extent of commercial area imposed by clause (d) of S. 80IB (10) inserted w.e.f. 1.4.2005 does not apply to projects approved before that date**

In the assessee's own case for the same project relating to AYs 2005-06 and 2006-07, which falls after the insertion of clause (d) to s. 80IB(10), the Tribunal held that the assessee is eligible for deduction u/s 80IB(10) in respect of the housing project. Not only this, in *Manan Corporation v. Asst. CIT (2012) 214 Taxmann 373 (Guj)* it was held that the condition of limiting commercial establishment/shops to 2000 sq.ft, which has come into force w.e.f. 1-4-2005 would be applicable for projects approved on or after 1-4-2005 and where the approval of the project was prior to 31-3-2005, the amended provision would have no application for those projects. The Gujarat High Court placed heavily reliance on the decision of the Bombay High Court in *Brahma & Associates 333 ITR 289 (Bom)*. (ITA No. 809/Mum/2011, dated 31-1-2014.) (A.Y. 2008-09)

*ITO v. Yash Developers (Mum.)(Trib.) www.itatonline.org*

**50. S.92B : Transfer pricing – Corporate guarantee – A transaction (such as a corporate guarantee) which has no bearing on profits, incomes, losses or assets of the enterprise is not an 'international transaction' u/s.92B(1) and not subject to transfer pricing**

The assessee issued a corporate guarantee to Deutsche Bank on behalf of its associate enterprise, Bharti Airtel (Lanka), whereby it guaranteed repayment for working capital facility. The assessee claimed that since it had not incurred any cost on account of issue of such guarantee, and the guarantee was issued as a part of the shareholder activity, no transfer pricing adjustment could be made. However, the TPO held that as the AE had benefited, the ALP had to be computed on CUP method at a commission income of 2.68% plus a mark-up of 200 bp. This was upheld by the DRP by relying on the retrospective amendment to s. 92B which specifically included guarantees in the definition of "international transaction". On appeal by the assessee to the Tribunal HELD allowing the appeal:

- (i) A transaction between two enterprises constitutes an "international transaction" u/s. 92B only if it has a bearing on profits, incomes, losses, or assets of such enterprises". Even the transactions referred to in the Explanation to s. 92 B, which was inserted with retrospective effect (which includes giving of guarantees under clause (c)), should also be such as to have a bearing on profits, incomes, losses or assets of such enterprise.
- (ii) The onus is on the revenue to demonstrate that the transaction has a bearing on profits, income, losses or assets of the enterprise. The said impact has to be on real basis, even if in present or in future, and not on contingent or hypothetical

basis. There has to be some material on record to indicate, even if not to establish it to hilt, that an intra AE international transaction has some impact on profits, income, losses or assets.

- (iii) When an assessee extends assistance to the AE, which does not cost anything to the assessee and particularly for which the assessee could not have realised money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction u/s. 92B (1). (ITA No. 5816/Del/2012, dated 11-3-2014, A.Y. 2008-09)

*Bharti Airtel Limited. v. ACIT (Delhi)(Trib.) www.itatonline.org*

### 51. S.92B : Transfer pricing – Arm’s length price – Outstanding balances cannot be added to total income of assessee

The assessee had certain receivable from its associated enterprise which were outstanding for more than 30 days. TPO, relying on the assessment years 2003-04 and 2004-05, worked out the interest that would have been charged at 3.26% on the outstanding balances with the associated enterprises exceeding 30 days and made transfer pricing adjustments. Similar addition was deleted by Tribunal in earlier years. Following the order of Tribunal for earlier years the Tribunal deleted the addition for the relevant year. (A.Y. 2005-06)

*ACIT v. Nimbus Communications Ltd. (2014) 100 DTR 259 / 30 ITR 349 (Mum.)(Trib.)*

### 52. S.92C : Transfer pricing – TNMM – Companies in ITES cannot be classified into low-end BPO services and high-end KPO

**services for comparability analysis but have to be classified based on the functions performed. Comparables with abnormal profit margins cannot be discarded per se but must be examined to determine whether the high margins are due to normal business conditions or not**

The Special Bench had to consider two issues: Whether, for determining the ALP under TNMM, (i) a company performing (high-end) KPO functions is comparable with a company providing (low-end) back office support services, given that both are in the “ITES” sector & (ii) companies earning abnormally high profit margin have to be discarded from the list of comparables? HELD by the Special Bench:

- (i) As regards Q. 1, in view of the peculiarity of the ITES sector, the problem of performing a comparability analysis has to be solved by splitting the exercise into two steps in order to attain relatively equal degree of comparability, the first being to select the potential comparables at ITES sector level by applying the broad functionality test. By applying a broad functionality test, all entities providing IT enabled services can be taken as potential comparables.
- (ii) In the second step, though further classification of IT enabled services may be required to be done, it cannot be on the basis of BPO (low end) and KPO (high end) services because the line of difference between them is very thin. There are a large number of services falling under ITES with significant overlap and it is difficult to classify these services either as low-end BPO services or high-end KPO services.
- (iii) Instead, the purpose of attaining a relatively equal degree of comparability

can be achieved by taking into consideration the functional profile of the tested party and comparing the same with the entities selected as potential comparables on broad functional analysis taken at ITES level. The principal functions performed by the tested party should be identified and the same can be compared with the principal functions performed by the entities already selected to find out the relatively equal degree of comparability. If it is possible by this exercise to determine that some uncontrolled transactions have a lesser degree of comparability than others, they should be eliminated. The examination of controlled transactions ordinarily should be based on the transaction actually undertaken by the AE and the actual transaction should not be disregarded or substituted by other transaction.

- (iv) As suggested in the OECD Guidelines on Transfer Pricing, determining a reliable estimate of arm's length outcome requires flexibility and the exercise of good judgment. It is to be kept in mind that the TNMM may afford a practical solution to otherwise insoluble transfer pricing problems if it is used sensibly and with appropriate adjustments to account for differences. When the comparable uncontrolled transactions being used are those of an independent enterprise, a high degree of similarity is required in a number of aspects of the AE and the independent enterprise involved in the transactions in order for the controlled transactions to be comparable. Given that often the only data available for the third parties are company-wide data, the functions performed by the third party in its total operations must be closely aligned to those functions performed by the tested party with respect to its controlled transactions in order to allow the former to be used to determine an arm's length outcome for the latter. The overall objective should be to determine a level of segmentation that provides reliable comparables for the controlled transaction, based on the facts and circumstances of the particular case. The process followed to identify potential comparables is one of the most critical aspects of the comparability analysis and it should be transparent, systematic and verifiable. In particular, the choice of selection criteria has a significant influence on the outcome of the analysis and should reflect the most meaningful economic characteristics of the transactions compared. Complete elimination of subjective judgments from the selection of comparables would not be feasible but much can be done to increase objectivity and ensure transparency in the application of subjective judgments.
- (v) On facts, the assessee is a captive contract service provider mainly rendering back office support services and incidental services involving some degree of special knowledge and expertise. It is not comparable to Mold-Tek & eClerx which are engaged in providing high-end services involving specialised knowledge and domain expertise in the field.
- (vi) As regards Q. 2, potential comparables cannot be excluded merely on the ground that their profit is abnormally high. In such cases, the matter would require further investigation to ascertain whether earning of high profit reflects a normal business condition or whether it is the result of some abnormal conditions prevailing in the relevant year. The profit margin earned by such entity in the immediately preceding year/s may also be taken into consideration to find out whether the high profit margin represents the normal business trend. The FAR analysis in such case may be reviewed to ensure that the potential

comparable earning high profit satisfies the comparability conditions. If it is found on such investigation that the high margin profit making company does not satisfy the comparability analysis and or the high profit margin earned by it does not reflect the normal business condition, the high profit margin making entity should not be included in the list of comparables for the purpose of determining the arm's length price of an international transaction. Otherwise, the entity satisfying the comparability analysis with its high profit margin reflecting normal business condition should not be rejected solely on the basis of such abnormal high profit margin. (ITA No. 7466/Mum/2012, dated 7-3-2014. (A.Y. 2008-09)

*Maersk Global Center (India) Pvt. Ltd. v. ACIT (SB) (Mum.) (Trib.), www.itatonline.org*

**53. S.92C : Transfer pricing – Business expenditure – After TPO determines the AMP expenditure incurred for benefit of AE, balance is deemed to be incurred for assessee's business & is automatically allowable u/s. 37(1). [S.37(1)]**

The avowed object of the TP adjustment on account of AMP expenses is to first find out and attribute the amount spent by the assessee towards promotion of its foreign AE's brand/logo etc and then make addition for such amount with appropriate mark-up. By this exercise, the total AMP expenses get segregated into two classes, viz., one benefiting the assessee's business and two, benefiting the foreign AE by way of promotion of the brand. Whereas the first amount is deductible in full subject to the regular provisions, the second amount is added to the total income with suitable mark-up by way of the TP adjustment. Once the total amount of AMP expenses is processed through the provisions of Chapter X

of the Act with the aim of making TP adjustment towards AMP expenses incurred for the foreign AE, or in other words such expenses as are not incurred for the assessee's business, there can be no scope for again reverting to s. 37(1) *qua* such amount to make addition by considering the same expenditure as having not been incurred 'wholly and exclusively' for the purposes of assessee's business. If the amount of AMP expenses is disallowed by processing under both the sections, that is 37 and 92, it will result in double addition to the extent of the original amount incurred for the promotion of the brand of the foreign AE *de hors* the mark-up. (ITA No. 426/Del/2013. dt. 13-1-2014, A. Y. 2008-09)

*Whirlpool of India Ltd. v. DCIT (Delhi)(Trib.) www.itatonline.org*

**54. S.92C : Transfer pricing – Arm's length price – Prior to the amendment to S. 92CA(4) w.e.f. 1-6-2007, AO was not bound to accept ALP as determined by TPO – TPO cannot make adjustment to the ALP by merely following order passed in earlier year. [S. 92CA]**

The AO proceeded to compute the total income of the assessee u/s. 92C(4) on the basis of the arm's length price worked out by the TPO. On appeal by the assessee, the Tribunal observed that the AO is not bound to accept the ALP as determined by the TPO but has to determine the ALP, only after giving an opportunity of hearing to the assessee. The Tribunal observed that in the case before it the AO had not given any such opportunity. Accordingly, the Tribunal restored the matter back to the AO with the direction that the AO will determine the computation of income having regard to the ALP after giving due and effective opportunity of hearing to the assessee. (A.Y. 2004-05).

*Abacus Distribution Systems (India) (P.) Ltd. v. DCIT (2014) 29 ITR 1 / 159 TTJ 156 (Mum.)(Trib.)*

**55. S.92C : Transfer pricing – Arms' length price – Where TPO made adjustment to ALP by merely following order passed in earlier year without going into merits of case, order was not sustainable**

While deciding the appeal for the subsequent year, the Tribunal observed that the TPO has duplicated the same order as passed by the TPO for the earlier year except for the variation in the figures. It also noted that the assessee's explanations and all its objections and documents have not been considered at all, which were specific to the issues involved for that particular year and that this shows that the TPO has passed the order without application of mind, which he is required to do under the provisions of law and equity. Accordingly, the Tribunal held that such an order shows an unprecedented bias and pre-determined mind without going into the merits of the case and therefore such an order passed by the TPO and confirmed by the CIT(A) cannot stand and the entire matter needs to be remanded back to the file of the TPO/AO for passing fresh order, in accordance with provisions of law and after giving due and effective opportunity of hearing to the assessee and also considering the entire material and evidence including explanation filed. (A.Y. 2005-06)

*Abacus Distribution Systems (India) (P.) Ltd. v. DCIT (2014) 29 ITR 1 / 159 TTJ 156 (Mum.)(Trib.)*

**56. S.92C : Transfer pricing – Arms' length price – TPO cannot determine ALP under TNMM by relying upon multiple year data where current year data of comparable companies are available on public domain. [R.10B(4)]**

The assessee charged its AE with ALP by adopting TNMM and operating profit/total cost (OP/TC) as the profit level indicator (PLI). The assessee

selected six companies as comparables with average OP/TC margin based on multiple year data worked out at 10%. Since the assessee's OP/TC margin of 11.03% for the current year was higher than the average margin of 10% of the comparables, thus it concluded that the price charged to its AE was within ALP. The TPO, however, rejected one of the comparables and relied on the data for the immediately preceding 2 years and arrived at the average OP/TC at 19%, thereby proposing an upward adjustment of ₹ 1,72,49,399/- for which an addition was made by the AO. The CIT(A) decided in favor of assessee by relying on the data of the relevant financial year.

On appeal by the tax department, the Tribunal held that the TPO's method of relying on multiple year data was contrary to Rule 10B(4) of IT Rules. The said rule makes it clear that only the data relating to the relevant financial year has to be relied upon for computing the OP/TC margin of the comparable company. The Tribunal observed that, when the current year data of the comparable companies were available on public domain, and since the assessee's OP/TC margin 11.03% is much higher than the OP/TC margin of the comparable companies by using the current year data being 8%, no adjustment can be made to the ALP declared. (A.Y. 2003-2004)

*ACIT v. Infotech Enterprises Ltd. (2014) 29 ITR 67 (Hyd.)(Trib.)*

**57. S.92C : Transfer pricing – Arms' length price – Adjustment of guarantee fee – Same rate as applied in the earlier year was to be applied as there were no change in facts and circumstances – Adjustment on notional interest – AO to decide on the basis of LIBOR prevalent at the relevant point of time**

The AO has made addition on account of guarantee fee of ₹ 1,77,61,212 and towards

notional interest of ₹ 2,03,02,396 on the directions of the DRP. On appeal to the Tribunal, it is observed that in light of the earlier years' orders of the Tribunal, in so far as the application of rate of 4.66% by the TPO on account of guarantee fee is concerned, the same cannot be upheld as in the earlier year, it has been held that the rate of 3% should be applied for the guarantee fee. In fact, there are many cases of the co-ordinate bench of the Tribunal where guarantee fee commission between 0.20% to 0.5% have been upheld. Thus, under the facts and circumstances wherein 3% has been upheld in the earlier year in case of the assessee, the same rate should be applied in this year also as a matter of consistency without there being any change in the facts and the circumstances.

For the disallowance of interest after applying the interest on the advance given to the AE, the Tribunal in the earlier year has restored this issue back to the file of the AO to deal and decide on the basis of LIBOR rate prevalent at the relevant point of time. Therefore, for the current year also the Tribunal restored the issue to the file of the AO to apply LIBOR rate with a direction that, in case LIBOR rate is less than 6%, then the charging of interest rate of 6% by the assessee should be taken at ALP. (A.Y. 2008-09)

*Mahindra & Mahindra Ltd. v. ACIT (2014) 29 ITR 95 (Mum.)(Trib.)*

**58. S.92C : Transfer pricing – Arms' length price – Contract manufacturer of jewellery entitled for making charges – Cannot be compared with full-fledged independent manufacturers-availability of internal CUP method would outwit TNMM**

The assessee was engaged in the activity of purchasing cut and polished diamonds, colour stones, etc. from its AEs and sold jewellery to same AEs as per designs supplied by said AEs. The assessee was simply a job worker or

a contract manufacturer who was entitled to making charges based on cost incurred by it and not based on value of material supplied by its AEs. The assessee failed to carry out any comparability analysis by following any of the prescribed methods and therefore its international transactions with its AEs had not been benchmarked by the assessee. The TPO applied the TNMM and made an adjustment, which was confirmed by the DRP.

On appeal by the assessee, the Tribunal held that if there is a direct method of CUP available, then there was no requirement of resorting to TNMM. If any of the direct methods, like CUP, RPM or CPM can be adopted for bench marking then they should be given preference and once these traditional methods are rendered inapplicable only then, the TNMM should be resorted to as a last measure. It observed that that the argument of applicability of internal CUP had not been taken up either before the TPO or before the DRP, and therefore, the order of the TPO / AO was set aside and the entire matter was remanded back to the file of the AO / TPO to examine whether the CUP could be considered as the most appropriate method or not. The Tribunal also directed that Cost Plus Method could also be examined with some external comparabilities by carrying out FAR analysis, if CUP method failed. Thus the entire matter of transfer pricing adjustment was remanded to the file of TPO/AO to consider the applicability of internal CUP and carry out comparability analysis afresh with the unrelated parties. (A.Y. 2008-09)

*Twilight Jewellery (P.) Ltd. v. DCIT (2014) 29 ITR 296 (Mum.)(Trib.)*

**59. S.92C : Transfer pricing – Arms' length price – Assessee and the TPO accept a particular company as functionally comparable – assessee did not agitate on such comparable before CIT(A) – The**

**same cannot be excluded from the list of comparables**

The Tribunal held that under Rule 10B(2) comparability of international transactions with uncontrolled transactions, has to be judged with reference to functions performed, assets employed and risks assumed (FAR analysis). It noted that the assessee has not contested that due to any of the above, such company is functionally not similar, its objections are only on the basis of high turnover or even low turnover in some cases. The Tribunal therefore observed that it would not be appropriate to apply turnover filter, when in fact assessee has accepted very low turnover company as comparable and since the assessee is in the service sector, scale of operations do not have any effect on margins unlike in manufacturing companies. The Tribunal held that this filter can only be considered in the light of the facts and cannot be applied in every case uniformly on the basis of decisions in other cases. Accordingly, the Tribunal upheld the order of CIT(A) and observed that it was appropriate to include the companies selected by the assessee as comparable for the purpose of determining the average PLI in the relevant assessment year. (A.Y. 2004-05)

*IVY Comptech (P.) Ltd. v. DCIT (2014) 29 ITR 328 (Hyd.)(Trib.)*

**60. S.92C : Transfer pricing – Arms' length price – Segmental results – To be accepted even if not included in audited accounts**

The Tribunal observed that the reason given by the TPO and DRP for not accepting the segment results was that the assessee had not shown the same in the audited financial accounts and that the segment reporting was done only for transfer pricing purposes. It noted that the, TPO / DRP have also stated that allocation of expenses between the contract manufacturing segment and non AE local/domestic segments are abnormal. Deciding on these, the Tribunal

held that in so far as the reason that the assessee has not shown the segmental report/ results in audited financial accounts and therefore, such segmental results cannot be accepted for ALP has not been accepted by the Tribunal in the case of *3i Infotec Ltd. v. ITO [2013] 35 taxmann.com 582 (Chennai)* wherein it has been held that even though segmental reports were not shown in audited financial accounts, they had to be accepted. Deciding on the issue of allocation of expenses, the Tribunal observed that the TPO/ DRP have rejected the segmentals alleging that the assessee could not substantiate as to how 'other expenses' were allocated to contract manufacturing segment and local manufacturing segment and that the low employee cost combined with higher depreciation in contract manufacturing segment indicates that the assessee did not apportion the employee cost to contract manufacturing segment appropriately. The Tribunal noted that, the figures adopted by the TPO/DRP in their orders in analysing these facts and coming to the decision/conclusion to reject the segmental results of the assessee are wrong. It also noted that the TPO has accepted the segmental results of the assessee in the earlier years on the contract manufacturing transactions with the AE for arriving at ALP while computing the relief under section 10A of the Act and the TPO/DRP has not given any reason as to why segmental results shall not be considered for determining ALP for transactions with AE having accepted very same segmental results of the assessee for the purpose of computing deduction under section 10B of the Act. Accordingly, the Tribunal held that there is no valid reason for not accepting the segmental reports in determining the ALP on the AE sales for assessment year in question having accepted the segmentation approach for the earlier assessment years and especially when there was no change in the facts and circumstances of the case in year.

*Honeywell Electrical Devices and Systems India Ltd. v. ACIT (2014) 29 ITR 347 (Chennai)(Trib.)*

**61. S.92C : Transfer pricing – Arms' length price – Diamonds of similar description sold to both AEs and third party-price of transactions with both AEs and third party can be compared-internal CUP method available [R. 10B(1)(a)]**

The assessee engaged in the business of manufacturing of cut and polished diamonds and selling them to AE as well as to the third parties. TPO made an adjustment as there was difference of price by more than 5% as price charged from AEs was less than the price charged from non-AEs. TPO observed that since for diamonds, properties of the product are very different the application of CUP method becomes very difficult. Even minor changes in the properties of the products, renders the applicability of CUP method inapplicable. The CIT(A) deleted the addition.

On appeal by the department, the Tribunal observed that though it is to be held that in the sale of diamonds, it is very difficult to benchmark the price by applying the CUP method, however, on the peculiar facts of the present case, it is seen that in the nature of sale transaction undertaken by the assessee and price which has been charged from the AE appears to be on similar description of diamonds which have been sold to the third party. Accordingly, the Tribunal upheld the findings of the CIT(A) that there was internal CUP available in the case of the assessee for determining the transfer price. It held that once a direct method of internal CUP is available then there is no need to resort to the TNMM method. (A.Y. 2007-08)

*Livingstones v. DCIT (2014) 29 ITR 362 (Mum.) (Trib.)*

**62. S.92C : Transfer pricing – Arms' length price – Delay in payment**

**is normal – No notional interest to be levied on delayed payment by AEs.**

The assessee was engaged in the business of manufacturing of cut and polished diamonds and selling them to AE as well as to the third parties. The TPO observed that average days of realisation in respect of sales to AE was 210 days, whereas in respect of non-AEs was 126 days and thus made an adjustment on account of notional interest on delayed collection of payment on sale invoices from AEs. The CIT(A) observed that there had been several instances when the unrelated parties also had made payments beyond the credit period granted and in such cases also the assessee had not charged any interest on such delayed payment. The CIT(A), while deleting the adjustment noted that in the diamond industry, payment beyond the credit period is a usual business practice and none of the entities charge any interest on such delayed payments.

On appeal by the department, the Tribunal observed that in the case of AE the volume of sale is very huge as compared to the volume of sale in case of 3rd party and such delay in realization of payment should not be adversely viewed on the basis of average working of days. The average days of delay in payment as worked out by the TPO is also inappropriate as the number of sale transactions with AE is far more than the non-AE. Accordingly, the Tribunal while dismissing the ground of the department held that such notional interest cannot be charged for the purpose of making adjustment in ALP (A.Y. 2007-08)

*Livingstones v. DCIT (2014) 29 ITR 362 (Mum.) (Trib.)*

**63. S.92C : Transfer pricing – Arm's length price – Comparable data which was not available to assessee at time of preparing TP documentation can be used by**

**TPO – Only if it is made available to assessee for its objections**

The assessee reported international transactions with its AE. The TPO recommended certain adjustments which were confirmed by the DRP.

On appeal to the Tribunal, the assessee challenged the adjustment on the ground that the comparables were not available with the assessee during the TP documentation. The Tribunal held that if comparables were available with the TPO/ public domain and the same were made available to the assessee who was given an opportunity to raise its objections, then adjustment can be made by the TPO. (A.Y. 2007-08)

*Avineon India (P.) Ltd. v. DCIT (2014) 29 ITR 404 (Hyd.)(Trib.)*

**64. S.92C : Transfer pricing – Arms' length price – Different segmental activities, which are independent of each other-required to be analysed on transaction-to-transaction basis-cannot be combined**

The assessee has 3 business verticals, GIS (STPI unit), IT (non-STPI unit), Engineering (STPI unit). Books of account were maintained with each unit as a separate profit centre and the common expenses were allocated on the basis of revenue. The TPO rejected segment result on the ground that segmental data is not audited. The AO, however, neither raised any objection on the profit computation nor made any adjustments to the working given by assessee. The DRP confirmed the decision of the TPO.

On appeal the Tribunal held that for the purpose of Transfer Pricing, each segment is a different activity and FA analysis will have to be distinct for each segment and the AO/TPO should consider each service separately for benchmarking and should not combine all of them into one. (A.Y. 2007-08)

*Avineon India (P.) Ltd. v. DCIT (2014) 29 ITR 404 (Hyd.)(Trib.)*

**65. S.92C : Transfer pricing – Arms' length price – Companies having supernormal profit – To be excluded.**

On appeal to the Tribunal the assessee objected adjustments made by the TPO and confirmed by the DRP as wrong comparables were used. The Tribunal held that as per rule 10B if there are any differences between comparables, relevant transactions should be taken and differences to be adjusted to arrive at the ALP for the reason that after taking number of companies as comparables, the TPO should allow adjustments towards differences in depreciation, differences in risk perceptibility, of working capital adjustments, etc., depending on the facts of the case. The Tribunal also held that selecting a company, which is not comparable at all or which affects comparison due to unusual features cannot be taken as a comparable company. Thus if there are certain extraordinary events or different business models, such companies cannot be used as comparables. (A.Y. 2007-08)

*Avineon India (P.) Ltd. v. DCIT (2014) 29 ITR 404 (Hyd.)(Trib.)*

**66. S.92C : Transfer pricing – Arm's length price – Direct comparables available – Segmental result of companies engaged in other business-should not be taken as a comparable**

The assessee is engaged in providing technical and administrative services relating to oil and gas exploration and drilling activities. It entered into international transactions with its AEs. The assessee chose TNMM with operating profit to total cost (OP/TC) ratio as the Profit Level Indicator (PLI) to benchmark its international transaction with the AEs at 8.30%. The assessee chose 14 comparables and used 3 years data. The PLI ratio of the comparables selected by the assessee was computed at 11.25% and thus,

the assessee contended that its transactions with the AEs were at ALP. The TPO, however, adopted the current year data and rejected the search process undertaken by the assessee to identify the comparables. The TPO selected seven comparables with the mean PLI of 31.9% and accordingly made certain adjustment after re-computing the ALP of international transactions. The action of the TPO was confirmed by the DRP.

On appeal by the assessee, the Tribunal held that when direct comparables are available then segmental results of companies engaged in other business should not be taken as comparable. (A.Y. 2008-09)

*Premier Exploration Services (P.) Ltd. v. ITO (2014) 29 ITR 427 (Delhi)(Trib.)*

**67. S.92C : Transfer pricing – Arms' length price – Foreign exchange fluctuation in case of exporter – To be regarded as operating income – To be included while working out the PLI.**

The assessee is engaged in providing technical and administrative services relating to oil and gas exploration and drilling activities. It entered into the international transactions with its AEs. The assessee had included foreign exchange difference income from the operating income while comparing ALP. The same was rejected by the TPO.

On appeal, the Tribunal following the decision of the Bangalore Bench of the Tribunal in the case of *SAP Labs India (P.) Ltd. v. ACIT (2010) 8 taxmann.com 207* directed the TPO to include the foreign exchange income as operating income while working out the PLI. (A.Y. 2008-09)

*Premier Exploration Services (P.) Ltd. v. ITO (2014) 29 ITR 427 (Delhi)(Trib.)*

**68. S.92C : Transfer pricing – Arm's length price – Risk adjustment – can be made – Only if difference**

**in risk results in deflation or inflation of financial results**

The assessee is engaged in providing technical and administrative services relating to oil and gas exploration and drilling activities. It entered into the international transactions with its AEs. The assessee made appropriate adjustment for varying risk profiles and difference in working capital *vis-à-vis* comparables. The same was rejected by the DRP.

On appeal, the Tribunal observed that no risk adjustment can be allowed when the same has not been quantified. It noted that the assessee has failed to bring any evidence on record to show that there was any difference in risk profile of comparable companies. Accordingly, it held that the risk adjustment cannot be allowed as a thumb rule and since the assessee has also failed to establish any working capital difference the same too was not allowed. (A.Y. 2008-09)

*Premier Exploration Services (P.) Ltd. v. ITO (2014) 29 ITR 427 (Delhi)(Trib.)*

**69. S.92C : Transfer pricing – Computation of arm's length price – Selection of comparables – Functionally different**

High profit margin of a company cannot be a factor for exclusion from comparables. Companies functionally different and persistently loss making cannot be considered as comparables. (A.Y. 2008-09)

*Syscom Corporation Ltd. v. ACIT (2014) 98 DTR 45 (Mum.)(Trib.)*

**70. S.92C : Transfer pricing – Computation of arm's length price – Data of relevant year. [Rules 10B(4), 10D(4)]**

In the absence of any exceptional circumstances influencing the determination of transfer prices the data relating to the financial year in which

the international transaction has been entered into shall be used. (A.Y. 2008-09)

*Syscom Corporation Ltd. v. ACIT (2014) 98 DTR 45(Mum.)(Trib.)*

**71. S.92C : Transfer pricing – Computation of arm’s length price – Tolerance range**

Assessee is entitled to benefit of proviso to s. 92C(2) if the prices of the international transaction of the assessee are within the tolerance range of + 5 per cent of the arithmetic mean of more than one comparable prices. (A.Y. 2008-09)

*Syscom Corporation Ltd. v. ACIT (2014) 98 DTR 45 (Mum.)(Trib.)*

**72. S.92C : Transfer pricing – Computation of arm’s length price – Relevancy of financial results of AE.**

Financial results of the AE are not at all relevant for the purpose of determination of ALP in relation to the international transaction entered into. (A.Y. 2008-09)

*Syscom Corporation Ltd. v. ACIT (2014) 98 DTR 45(Mum.)(Trib.)*

**73. S.92C : Transfer pricing – Computation of arm’s length price – Selection of comparables – Assessee not prevented from pointing out why comparables chosen by it are not correct**

Assessee had included two companies in its transfer pricing study, not being functionally comparable. In the course of transfer pricing proceedings, assessee cannot be prevented from pointing out cogent reasons and give proper analysis as to why the comparables chosen are not correct. (A.Y. 2008-09)

*Tata Power Solar Systems Ltd. v. Dy. CIT (2014) 98 DTR 250 (Mum.)(Trib.)*

**74. S.92C : Transfer pricing – Computation of arm’s length price – Selection of comparables – Absence of proper segmental details**

A comparable cannot be included in the absence of proper segmental details for the working of the margin and the operating expenses. (A.Y. 2008-09)

*Tata Power Solar Systems Ltd. v. Dy. CIT (2014) 98 DTR 250 (Mum.)(Trib.)*

**75. S.92C : Transfer pricing – Arm’s length price – Sale transactions with AE vis-à-vis entire sales**

ALP has to be determined on the international transactions undertaken by the assessee and not in relation to the assessee’s entire sales turnover. (A.Y. 2008-09)

*Tata Power Solar Systems Ltd. v. Dy. CIT (2014) 98 DTR 250 (Mum.)(Trib.)*

**76. S.92C : Transfer pricing – Arm’s length price – Interest on loan advanced to AE**

Interest charged by assessee from its AE on loan advanced in the foreign currency should be benchmarked by interbank rate. Assessee charged interest from its AE at a rate higher than LIBOR, therefore, transfer pricing adjustment is not warranted. (A.Y. 2008-09)

*Hinduja Global Solutions Ltd. v. ACIT (2014) 98 DTR 266 (Mum.)(Trib.)*

**77. S.92C : Transfer pricing – Arm’s length price – Price paid for import of LPG from AE.[R.10B(1) (a)]**

DRP found that the prices paid by the assessee for import of LPG from its AE in respect of two shipments were in excess of the ALP by

computing the freight charges on the basis of distance between the port of origin and port of destination as suggested by the assessee itself. The finding of the DRP was based on the most appropriate method under the given circumstances and warranted no interference.

*SHV Energy (P) Ltd. v. Dy. CIT (2014) 98 DTR 177 (Hyd.)(Trib.)*

**78. S.92C : Transfer pricing – Bank guarantee – Rate was modified to 0.5% as against 0.25% adopted by the CIT (A)**

The assessee was not charging bank guarantee commission from AE. The Tribunal held that the same is liable to adjustment towards ALP of the transaction and rate of guarantee commission modified to 0.05% as against 0.25% adopted by the CIT(A).(A.Y. 2005-06)

*ACIT v. Nimbus Communications Ltd. (2014) 100 DTR 259 / 30 ITR 349 (Mum.)(Trib.)*

**79. S.92C : Transfer pricing – Argument, based on BMW, that the AMP adjustment law laid down in L. G. Electronics (SB) does not apply to a full-risk distributor in not correct**

In *LG Electronics India Pvt. Ltd. v. ACIT (2013) 152 TTJ (Del) (SB) 273* the Special Bench held by majority that incurring of AMP expenses towards promotion of brand, legally owned by the foreign AE, constitutes a 'transaction'. The contention that no disallowance could be made out of AMP expenses by benchmarking them separately when the overall net profit rate declared by the assessee was higher than other comparable cases also came to be specifically rejected by the special bench. Resultantly, the transfer pricing adjustment in relation to such AMP expenses was held to be sustainable in principle. In the eventual order, the Special Bench restored the matter to the file of the AO/

TPO for fresh determination of Transfer Pricing Adjustment in relation to AMP expenses. In order to enable the determination of correct ALP of AMP expenses, the Tribunal listed out 14 parameters in Para 17.4 of its order which should be examined by the AO/TPO before reaching the final conclusion about the warrant for a TP Adjustment on this score. It is relevant to note that there were 22 interveners in this case, some of which were distributors, while others were licensed manufacturers. While setting out 14 parameters, the Special Bench has held *vide* first parameter that the AO/TPO should ascertain as to whether the Indian AE is simply a distributor or is holding a manufacturing licence from its Foreign AE. The second parameter talks of examining as to whether or not the Indian AE is a full fledged manufacturer and whether it is selling the goods purchased from the foreign AE as such or is making some value addition to the goods purchased from its foreign AE before selling it to customers. Thus there is not even a slightest doubt that the special bench order not only applies to a 'Manufacturer', but also extends to a distributor, whether he is a bearing full risk or least risk. Thus, such tests are applicable with full vigorur to the extent applicable, to the distributors. There is nothing in the special bench order which restricts its operation only to the 'Manufacturers'.

The argument, based on *BMW India Pvt. Ltd. vs. ACIT (Del)* that as the assessee was a full fledged distributor and as such the benefit of AMP expenses did not spill over to the foreign AE is not acceptable because the Special Bench order in *LG Electronics* is applicable with full force on all the classes of the assessees, whether they are licensed manufacturers or distributors. The Bench in *BMW* did not have any occasion to bestow its attention to the correctness of the application by the TPO of the aforesaid parameters laid down in the special bench order as these were naturally not considered by the Officer since he passed his order much before the advent of the special bench order. There is no

prize for guessing that Special Bench order has more force and binding effect over the Division Bench order on the same issue. (ITA No. 1180/kol/2011, dated 27-1-2014.) (A.Y. 2008-09)

*ACIT v. Casio India Co. Pvt. Ltd. (Delhi)(Trib.), www.itatonline.org*

**80. S.92C : Transfer pricing – Profit split method – Law for applying Profit Split Method as per Rule 10B(1)(d) explained. [Rule 10B]**

The Profit Split Method as provided under Rule 10 B(1)(d) is applicable mainly in international transactions: (a) involving transfer of unique intangibles; (b) in multiple international transactions which are so interrelated that they cannot be valued separately. The method specified in clause (ii) of Rule 10 B(1)(d) that the relative contribution made by each of the associated enterprise should be evaluated on the basis of FAR analysis and on the basis of reliable external data. Thus, bench marking by selection of comparables is mandatory under this method. The profits need to be split among the AEs on the basis of reliable external market data, which indicate how unrelated parties have split the profits in similar circumstances. For practical application, we are of the view that, bench marking with reliable external market data is to be done, in case of residual profit split method, at the first stage, where the combined net profits are partially allocated to each enterprise so as to provide it with an appropriate base returns keeping in view the nature of the transaction. The residual profits may be split as per relative contribution of the Associated Enterprise. In our view at this stage of splitting of residual profits, no bench marking is necessary, as it is not practicable. Nevertheless, for splitting the residuary profits a scientific basis for allocation may be applied. (ITA No. 4670/Del/2009, 31-12-2013.) (A.Y. 2004-05)

*ITO v. Net freight (India) P. Ltd. (Delhi)(Trib.), www.itatonline.org*

**81. S.92C : Transfer pricing – RBI approval – TPO cannot sit in judgment on commercial expediency- RBI approval means the payment is at ALP. If overall TNMM analysis done, royalty cannot be analyzed separately**

The TPO is not entitled to sit in judgment on the business and commercial expediency of the assessee in paying royalty to its' parent company as per the provisions of the Act as laid down clearly by the Delhi High Court in *CIT v. EKL Appliances Ltd.* (2012) 345 ITR 241. It is also noted that various Tribunals such as *DCIT vs. Sona Okegawa Precision Forgings* (ITA No. 5386 /Del/2010), *Hero Motocorp* (ITA No 5130 /Del/2010), *Thyssen Krupp Industries* (ITANo6460/Mum/2012), *Abhishek Auto Industries* (ITA No.1433/Del/2009) have taken a view that RBI approval of the Royalty rates itself implies that the payments are at Arm's Length and hence no further adjustment needs to be made viewed from this angle too. Furthermore, we are of the opinion that once TNMM has been applied to the assessee company's transaction, it covers under its ambit the Royalty transactions in question too and hence separate analysis and consequent deletion of the Royalty payments by the TPO seems erroneous. We draw support from *Cadbury India* (ITA No. 7408/Mum/2010 and ITA No. 7641/Mum/2010) wherein the ITAT upheld the use of TNMM for Royalty. (ITA No. 1040/Hyd/2011. dated 13-2-2014.) (A.Y. 2005-2006)

*DCIT v. Air Liquide Engineering India (Hyd.)(Trib.), www.itatonline.org*

**82. S.92C : Transfer pricing – CUP method – No bar on reliance of private database u/R 10D(3)- Nuances of the CUP Method under Rule 10B(1)(a)(i) explained**

Rule 10 D(3) is only illustrative in nature and merely describes the information required to be

maintained by the assessee under section 92D “shall be supported by authentic documents, which may include the following ...”. The logic employed by the Transfer Pricing Officer that since databases compiled by private entities is not included in rule 10D (3), such databases cannot be relied upon by the assessee is clearly fallacious inasmuch as an item not being included in illustrative list of required documents does not take outside the ambit of ‘acceptable document’ for the required purposes. It was also open to the TPO to, if he had any doubts, call for further information from this database supplier and examine authenticity of the data so furnished. His summary rejection of the data as unreliable on a technical ground is not tenable in law;

If there are minor variations in prices of generic goods, such factors are adequately taken care of by average in the case of large size of comparables;

The expression ‘the international transaction’ referred to in rule 10 B(1)(a)(iii) is used in singular and does not permit taking into account, unlike rule 10B(1)(a)(i), ‘a number of such transactions’. While averaging is thus permissible for the uncontrolled transactions, each international transaction is to be taken on standalone basis. It is not open to the assessee to compare the average price in his transactions with AEs with average price in uncontrolled transactions;

Also, the CUP method does not allow exclusion of high priced sale instances unless such high prices could be explained by differences of product or commercial terms. In any event, exclusion of extreme cases, such as in quartile ranges, is normally not permissible under the scheme of determination of ALP under the CUP method. (ITA No. 6279/Del/2012. dated 21-2-2014.) (A.Y. 2008-09)

*Tilda Riceland Pvt. Ltd. v. ACIT (Delhi) (Trib.)*  
*www.itatonline.org*

**83. S.92C : Transfer Pricing – TNMM-Unaudited segmental accounts can be relied upon for comparing profitability of controlled transactions with uncontrolled transactions – While size is relevant in entity level comparison, it is not relevant in transaction level comparison within the same entity**

(i) In applying the Transactional Net Margin Method (TNMM) under Rule 10B(1) (e) it is not necessary that the net profit computations, in the case of internal comparables (i.e. assessee’s transactions with independent enterprise), have to be based on the audited books of accounts or the books of accounts regularly maintained by the assessee. All that is necessary for the purpose of computing arm’s length price, under TNMM on the basis of internal comparables, is computation of net profit margin, subject to comparability adjustments affecting net profit margin of uncontrolled transactions, on the same parameters for the transactions with AEs as well as non aes, i.e. independent enterprises, and as long as the net profits earned from the controlled transactions are the same or higher than the net profits earned on uncontrolled transactions, no ALP adjustments are warranted. It is not at all necessary that such a computation should be based on segmental accounts in the books of account regularly maintained by the assessee and subjected to audit;

(ii) The size of the uncontrolled transaction being smaller, by itself, does not make it incomparable with the transaction in controlled conditions. Size of the comparable does matter in entity level comparison because scale of operations substantially vary and so does the underlying profitability factor, but in a

transaction level comparison within the same entity, mere difference in size of the uncontrolled transactions does not render the transaction incomparable. If the size of uncontrolled transaction is too big, it may call for an adjustment for volume business. If the size of the uncontrolled transaction is too small, it may provoke an inquiry by the TPO to ensure that it is not a contrived transaction outside the normal course of business or with regard to other significant factors surrounding smallness of such transaction. However, in none of these cases, a comparable can be rejected on the basis of its size per se. (ITA No. 6227/Del/2012. dt. 21-2-2014.) (A.Y. 2008-09)

*Lummus Technology Heat transfer BV v. DCIT (Delhi) (Trib), www.itatonline.org*

**84. S.92C : Transfer Pricing – Adjustment to profit margin for “capacity underutilization” can be made. In choosing comparables, there cannot be a cherry picking for deciding parameters of rejection. All comparables must face the same test.**

- (i) Under Rule 10B(1)(e)(ii), an adjustment to the net profit margin has to be made for “capacity underutilization”. Capacity underutilization by enterprises is an important factor affecting net profit margin in the open market because lower capacity utilisation results in higher per unit costs, which, in turn, results in lower profits. Of course, the fundamental issue, so far as acceptability of such adjustments is concerned is reasonable, accuracy embedded in the mechanism for such adjustments, and as long as such an adjustment mechanism can be found, no objection can be taken to the adjustment. On facts, the CIT(A)’s approach is reasonable and the adjustments are on a conceptually sound basis;

- (ii) In view of *Dy. CIT v. Quark Systems (P) Ltd.* (2010) 132 TTJ 1 SB there is no estoppel against an assessee changing his stand as regards the acceptance or rejection of a comparable. However, there cannot be a cherry picking for deciding parameters of rejection of a comparable, and the parameters have to be broad enough of being general application. In the scheme of things envisaged under the TNMM, it is inevitable that there will be some differences between the comparables and the tested party but the impact of these differences is substantially mitigated by the averaging. If a comparable is being sought to be rejected on the ground of its differences vis-à-vis the tested party, similar criteria must be adopted for deciding suitability of other comparables as well. It is not be open to any judicial authority to reject a comparable on the ground that the comparable has significant differences vis-à-vis the tested party, unless the differences are broad enough of general application, are such as materially affecting the profitability, as not being capable of reasonably accurate adjustments to eliminate the impact of such differences, and as are also not found in other comparables. All the comparables must face the same test on which comparability of a particular comparable is being sought to be rejected. (ITA No. 4620/Del/2011, A.Y. 2004-05, 21-2-2014.) (A.Y. 2004-05)

*DCIT v. Panasonic AVC Networks India Co. Ltd. (Delhi)(Trib), www.itatonline.org*

**85. S.92C : Transfer pricing-Arm’s length price Comparables – General submissions without filing profit and loss account and balance sheet in support of comparables chosen by it, such comparables were liable to be**

**rejected-There is no limit fixed in Act or in Rules on number of comparables which can be used.- Assessing Officer is directed to allow the benefit of +/-5 per cent benefit to the assessee**

The assessee is engaged in manufacturing of diamonds studded gold jewellery and trading of diamonds. The assessee sold diamonds studded jewellery manufactured by it to AE and had also imported diamond from the AE. The assessee in the transfer pricing study selected TNMM as the most appropriate method for bench marking the transactions. In relation to manufacturing segment, the assessee selected 7 comparables out of which 4 were rejected by the TPO. The TPO thereafter added nine more comparables selected by him and computed the arithmetic mean margin of 12 comparables including the three comparables selected by the assessee. For the trading segment, the assessee selected seven comparables for carrying out the transfer pricing study. The TPO held that these comparables were not comparable to the trading business of the assessee which was dealing in diamonds. He, therefore, rejected all the seven comparables and selected his own 10 comparables. The assessee objected to six of the comparables selected by the TPO, which was not accepted, and TP adjustment was made. Before the DRP, the assessee also objected to rejection of its claim of abnormal expenses in relation to the manufacturing segment. The assessee also claimed that there was lower capacity utilisation in its case. However, DRP confirmed the order of TPO. Tribunal held that where assessee only made general submissions and did not file profit and loss account and balance sheet in support of comparables chosen by it, such comparables were liable to be rejected. There is no embargo on Transfer Pricing Officer to carry out a fresh search when some comparables chosen by assessee are found unreliable, as there is no limit fixed in Act or in Rules on number of comparables which can be used. where segmental data was not available in

respect of a comparable chosen by assessee, and it also had related party transactions in excess of 16 per cent, such company could not be taken as a comparable. The objection raised in relation to comparables is therefore rejected. However there is substance in the additional ground raised by the assessee requesting for benefit of +/-5 per cent margin. Therefore, the Assessing Officer is directed to allow the benefit of +/-5 per cent benefit to the assessee. (A.Y. 2008-09)

*Royal Star Jewellery (P.) Ltd. v. ACIT (2014) 146 ITD 1 / [2013] 36 taxmann.com 500 (Mum.)(Trib.)*

**86. S.92C : Transfer pricing – Arms' length price – Comparables – Reimbursement of mark up cost – Matter remanded**

AO levied mark up of 5 per cent on reimbursement of cost recovered by assessee from its Associated Enterprises. In AY. 2005-06, there existed an arrangement for mark up on cost at 2 per cent and 5 per cent, whereas TPO applied 5 per cent mark up on flat basis. Tribunal restored the matter to the AO for restricting transfer pricing adjustment to agreed mark up as per arrangement between assessee and its AEs. In view of order passed by Tribunal in assessee's own case for assessment year 2005-06, impugned order was to be set aside and matter was to be remitted to AO / TPO for deciding in accordance with directions given by Tribunal. (A.Y.2007-08)

*Tecnimont ICB Ltd. v. Dy. CIT (2014) 146 ITD 219/ (2013) 32 taxmann.com 357 (Mum) (Trib.)*

**87. S.92C : Transfer pricing – Arms' length price – Comparables – Recover of expenses from AE beyond credit period allowed – Matter remanded to AO to consider the interest beyond agreed period**

Assessee recovered expenses from AEs .TPO noticed that in some cases expenses incurred

on behalf of AEs were recovered after a delay of substantial period without charging any interest, therefore proposed adjustment on that score which finally came to be made in assessment order. Contention of assessee was that computation of delay by TPO was not correct inasmuch he ignored credit period allowed by assessee as agreed. Impugned order was to be set aside and matter was to be remitted to Assessing Officer/TPO for restoring amount of adjustment on account of interest to period beyond agreed credit period. (AY.2007-08)

*Tecnimont ICB Ltd. v. Dy. CIT (2014) 146 ITD 219/ (2013) 32 taxmann.com 357 (Mum.)(Trib.)*

**88. S.92C : Transfer pricing – Arms' length price – TNMM – Comparables – when overall price of assessee was within tolerance limit of 5 per cent, in terms of proviso to section 92C(2) no adjustment to ALP determined by assessee was permissible**

The Assessee company is engaged in the business of manufacturing and dealing in textile machinery and its spare. The assessee is a joint venture between M/s. ATE Enterprises Pvt. Ltd. and M/s. Saurer GmbH. M/s. Saurer GmbH & Com. KG holds 70% shares in assessee's company. During the year under consideration, the assessee has undertaken international transaction relating to purchase and sale of components, payment of royalty and reimbursement (payment) with its AE. The assessee bench marked the International transaction relating to purchase of components valuing ₹ 22.93 crores by using Cost Plus Method (CPM) as most appropriate method. For the international transaction relating to sale of components and payment of royalty, the assessee has used (TNMM) as the most appropriate method. TPO made adjustment only with respect to royalty payment by treating ALP of royalty at nil. Commissioner (Appeals)

confirmed adjustment made by TPO in respect of royalty payment and he also enhanced assessment by making adjustment in respect of purchase of components. Commissioner (Appeals) determined ALP by taking TNMM as most appropriate method but at entity level of assessee. He arrived at arithmetic mean of comparables' operating profit at 8.33 per cent against operating profit at entity level of assessee at 4.71 per cent. Tribunal held that Commissioner (Appeals) determined arm's length price by considering entity level results of assessee which included all international transactions, in such a case, when overall price of assessee was within tolerance limit of 5 per cent, in terms of proviso to section 92C(2) no adjustment to ALP determined by assessee was permissible. (A.Y. 2007-08)

*Zinser Textile Systems (P.) Ltd. v. Dy.CIT (2014) 146 ITD 222 / (2013) 37 taxmann.com 59 (Mum.)(Trib.)*

**89. S.92C : Transfer pricing – Arm's length price – Comparables and adjustments/CUP method- Assessee seconded its employees to foreign AEs – Cost of deputation of employees – Not seconded employees to any independent enterprise – CUP method could not be applicable**

The CUP method could not be applied under the facts of the case, as the assessee has not transferred/seconded employees to any other independent enterprises. The similar transaction on the basis of which the TPO determined ALP was not with an independent enterprise and the said transaction was also with an Associated enterprise. In such circumstances, even the determination of ALP by the TPO was not proper. (A.Ys. 2003-04 to 2006-07)

*3i Infotech Ltd. v. Add. CIT (2014) 146 ITD 405 / (2013) 38 Taxmann.com 422 (Mum.)(Trib.)*

**90. S.92C : Transfer pricing – Arm’s length price – TNM Method-subsidary of NNML – TPO rejected three out of seven comparables adopted by assessee-Arithmetic mean of remaining four comparables which were accepted by TPO – Determination of ALP was to be restored to file of TPO for *de novo* consideration**

The assessee adopted transactional net margin method (TNMM) to establish the arm’s length price of its International Transaction with overseas group of companies. It adopted operating profit over operating revenue(OP/OR) as the profit level indicator (PLI). In its transfer pricing analysis the assessee identified seven comparables. The TPO accepted the TNMM method adopted by assessee and held that three comparables were not comparable. Certain adjustments were made in ALP determined by assessee, which were confirmed by the DRP. On appeal the Tribunal held that no details were provided as regards claim of assessee in respect of AMP expenses provision for warranty and prior period expenses matter could not be concluded. (A.Y. 2006-07)

*Nortel Networks India (P) Ltd. v. Add. CIT (2014) 146 ITD 463 / (2013) 36 Taxmann.com 439 (Delhi) (Trib.)*

**91. S.92C : Transfer pricing – Arm’s length price – Information Technology (IT) enabled back office services and contract software development services – Transactional Net Margin Method (TNMM).**

TPO rejected some of the comparables adopted by assessee and at same time TPO selected four new comparables on the basis of fresh list of comparables TPO made certain adjustment to ALP determined by assessee. In appeal CIT(A) held that comparables selected by TPO owning

software products and undertaking R&D, command a premium return as compared to any routine contract software development service provider like assessee and thus they could not be taken as comparables. Accordingly adjustments were set aside. On appeal by revenue in absence of four comparables searched by the TPO were not comparable with the assessee, the order of CIT(A) was confirmed. (A.Y. 2005-06)

*ITO v. Clot Technology Services India (P.) Ltd. (2014) 146 ITD 468 / 34 taxmann.com 182 (Delhi) (Trib.)*

**92. S.115JB : Book profit – Carbon credit – Receipt being capital in nature to be excluded in computation of book profit. [S.2(24),4]**

Receipt of carbon credit being capital in nature to be excluded in computation of book profit. (A.Ys. 2007-08 to 2009-10)

*Shree Cement Ltd. v. ACIT (2014)100 DTR 33 (Jaipur)(Trib.)*

**93. S.115JB : Book profit – Sales tax deferred scheme – Benefit arising on premature payment of deferred sales tax at net present value could not be excluded while computing book profit. [S.41(1)]**

The assessee did not include benefit arising on premature payment of deferred sales tax at net present value while computing book profit under section 115JB. The ITAT held that said amount cannot be excluded by applying Clause-(viii) in II Part to Explanation-1 of Sec. 115JB (2). (A.Y. 2004-05)

*ACIT v. Spicer India Ltd. (2014) 146 ITD 272 / (2013) 38 taxmann.com 317 (Pune)(Trib.)*

**94. S.144C : Reference to dispute resolution panel – NO debit to Profit and loss account still**

**addition was confirmed by DRP – Tribunal deleted the addition – Accountability – ITAT hauls up AO & DRP for “blatantly frivolous & unsustainable” additions. Suggests that accountability mechanism be set up to put a check on AO. Rationale for existence of ineffective DRP questioned**

Pursuant to a scheme of arrangement the assessee transferred its telecom infrastructure assets to Bharti Infratel Ltd for Nil consideration with the result that the WDV of the said assets amounting to ₹ 5,739 crore was written off by debiting the P&L A/c. A corresponding amount was credited to the P&L A/c from the 'business restructuring reserve' with the result that there was no net debit to the P&L A/c. The AO & DRP noted that there was no effect on the P&L A/c but still held that an addition of ₹ 5,739 crore had to be made to the assessee's income. On appeal by the assessee to the Tribunal, HELD by the Tribunal allowing the appeal:

... if an action of the AO is so blatantly unreasonable that such seasoned senior officers well versed with functioning of judicial forums, as the learned DRs are, cannot even go through the convincing motions of defending the same before us, such unreasonable conduct of the AO deserves to be scrutinised seriously. At a time when evolving societal pressures demand greater degree of accountability in the governance also, it does no good to the judicial institutions to watch such situations as helpless spectators. If it is indeed a case of frivolous addition, someone should be accountable for the resultant undue hardship to the taxpayer-rather than being allowed to walk away with a subtle, though easily discernable, admission to the effect that yes it was a frivolous addition, and, if it is not a frivolous addition, there has to be reasonable defence, before us, for such an addition.

... Whichever way one looks at these entries, the inescapable conclusion is that the addition made by the AO is wholly erroneous and devoid of any legally sustainable merits.

... The fact that even such purely factual issues are not adequately dealt with by the DRPs raises a big question mark on the efficacy of the very institution of Dispute Resolution Panel. One can perhaps understand, even if not condone, such frivolous additions being made by the AOs, who are relatively younger officers with limited exposure and experience, but the Dispute Resolution Panels, manned by very distinguished and senior Commissioners of eminence, will lose all their relevance, if, irrespective of their heavy work load and demanding schedules, these forums do not rise to the occasion and do not deal with the objections raised before them in a comprehensive and effective manner.

... While we delete the impugned addition of ₹ 5739,60,05,089, we also place on record our dissatisfaction with the way and manner in which this issue has been handled at the assessment stage. Let us not forget that the majesty of law is as much damaged by not rendering justice to the conduct which cannot be faulted as much it is damaged by a wrongdoer going unpunished; not giving relief in deserving cases is as much of a disservice to the cause of justice and the cause of nation as much a disservice it is, to these causes, by granting undue reliefs. The time has come that a strong institutional check is put in place for dealing with such eventualities and de-incentivising this kind of a conduct. (ITA No. 5816/Del/2012. order dated 11-3-2014. A. Y. 2008-09)

*Bharti Airtel Limited v. ACIT (Delhi)(Trib.) www.itatonline.org*

**95. S.145 : Method of accounting – Rejection of accounts – Audited account books maintained consolidated books of account in electronic form cannot be rejected without pointing out specific defects**

Assessee was in the business of infrastructure development. It maintained the consolidated books of account in electronic form. Which

were audited. A.O. rejected books of account of assessee by invoking provisions of section 145(3), by observing that (i) assessee was not maintaining day-to-day stock register, (ii) it had not furnished details of closing stock, (iii) there was substantial increase in all expenses debited to profit and loss account, (iv) expenses claimed by assessee were unverifiable, and (v) true and correct income of assessee could be ascertained only after assessee produced complete books of account with supporting documents. Books of account were audited. Auditor had not given any adverse comments in maintenance of books of account or stock register. Maintenance of books is accordance with provisions of law. (A.Y. 2004-05)

*ACIT v. ITD Cementation India Ltd. (2014) 146 ITD 59 / (2013) 36 taxmann.com 74 (Mum.) (Trib.)*

**96. S.147 : Reassessment – Reason to believe – Recovery of pen drive by police forwarded to IT department – Reassessment is valid. [S. 148, Evidence Act, 1872, Criminal Procedure Code, 1973]**

A pen drive was recovered by police and forwarded to IT department containing various accounting entries having correlation with activities of the assessee. This could validly form the basis for AO to entertain reason to believe the income chargeable to tax has escaped assessment. The assessee has raised various objections regarding irregularities committed by Police while carrying out the search and seizure of the alleged pen drive and taking print outs as per the CRPC, IPC, Indian Evidence Act and cyber laws. Tribunal held that which have no effect on recording of reasons for forming a belief about escapement of income. Income-tax proceedings are non-adversarial in nature and the entire exercise is directed to ensure a fair and proper assessment on the assessee. It is the trite law that technical rules of Evidence Act AND CRPC are not applicable to these proceedings. Thus the reasons for reopening the

assessments were properly recorded by AO. (A.Y. 2001-02 to 2003-04)

*Chetan Gupta v. ACIT (2014) 98 DTR 209 (Delhi) (Trib.)*

**97. S.147 : Reassessment – Notice sent wrong address – Not valid. [S.148, 282]**

Notice u/s. 148 sent on a wrong address and served on a person who was neither employee nor authorised agent of assessee was not valid and therefore, the consequent assessment was held to be bad in law. (A.Y. 2001-02)

*Chetan Gupta v. ACIT (2014) 98 DTR 209 (Delhi) (Trib.)*

**98. S.148 : Reassessment – Notice – Non-service of Notice – Proceedings not valid**

A notice u/s. 148 of the Act was issued, in compliance with the notice, the AO received a letter stating that the notice had not been received by the company and the reopening was bad in law. The AO passed the reassessment order observing that the notice u/s. 148 of the Act was duly served at the address of the company and it was duly acknowledged and the signature and telephone number of person receiving the notice were taken by the process server while serving notice. The CIT(A) held that there was no valid service of notice u/s. 148 of the Act and therefore the reassessment proceedings were void *ab initio*.

On appeal by the department, the Tribunal observed that though there was signature, date and number on the copy of the notice retained by the process server, neither the time of service, nor the manner of service, nor the name and address of the person identifying the service and witnessing the delivery of the notice were present. Thus, the requirement of the Code of Civil Procedure, 1908 were not met. The service of the notice was not identified and in the absence of identification of the service, it was impossible to prove that the

serviced was an agent of the assessee. Therefore the Tribunal confirmed the Order of the CIT (A). (A.Y. 1998-1999, 1999-2000 and 2003-2004)

*DCIT v. Usha Stud and Agricultural Farms P. Ltd.* (2014) 29 ITR 279 (Delhi)(Trib.)

**99. S.194A : Deduction at source – Interest other than interest on securities – Discounting charges of bills of exchange – Expenditure on discounting/factoring charges is not in the nature of interest for purposes of TDS u/s 194A or disallowance u/s 40(a)(ia). [S.2(28A, 40(a)(ia)]**

The term “interest” relates to a pre-existing debt, which implies a debtor creditor relationship. Unpaid consideration gives rise to a lien over goods sold and not for money lent as held in *Bombay Steam Navigation Co. Pvt. Ltd. v. CIT* (1963) 56 ITR 52 (SC) where interest on unpaid purchase price was not treated as interest on loan. It is clear from the definition that before any amount paid is construed as interest, it has to be established that the same is payable in respect of any money borrowed or debt incurred. According to us, discounting charges of Bill of Exchange or factoring charges of sale cannot be termed as interest. The assessee in the present case is acting as an agent. Now what is this to be seen. A del credere is an agent, who, selling goods for his principal on credit, undertakes for an additional commission to sell only to persons for whom he can stand guarantee. His position is thus that of a surety who is liable to his principal should the vendee make default. The agreement between him and his principal need not be reduced to or evidenced by writing, for his undertaking is a guarantee. A del credere agent is an agent who not only establishes a privity of contract between his principal and the third party, but who also guarantees to his principal the due performance of the contract by the third party. He is liable, however, only when the third party fails to carry

out his contract, e.g., by insolvency. He is not liable to his principal if the third party refuses to carry out his contract, for example, if the buyer refuses to take delivery. In the present case before us the assessee has assessed the income as del credere being trading in goods and merchandise and also dealing in securities and which is assessed as income from business and not income from other sources. The expenditure incurred is also on account of business expenditure and not interest expenditure in the nature of interest falling u/s. 194A of the Act. Accordingly, these discount/factoring charges do not come within the purview of section 194A and assessee is not liable to TDS on these charges. (ITA No. 729/Kol/2011. dated 27-1-2014.) (A.Y. 2007-08)

*ITO v. M K J Enterprises Ltd. (Kol.)(Trib.)* [www.itatonline.org](http://www.itatonline.org)

**100. S.194-I : Deduction of tax at source – Rent – Neither landlord – Tenant relationship nor a licensor-licencee relationship – Not liable to deduct tax at source as rent. [S.194C, 201, 201(IA)]**

The assessee company took over the running BPO business of a company at its various locations. It entered in to use of tenanted premises for a period of six months. All the payments were remitted to various parties by other company on behalf of assessee company. The assessee reimbursed said payments and deducted the tax at source in terms of section 194C on the amount of reimbursement on actual basis. AO held that the assessee was required to deduct tax in terms of section 194 I from the said payments. The AO raised the demand for short deduction of TDS under section 201 and also levied interest under section 201(1A). In appeal, CIT(A) held that the assessee was under no obligation to deduct tax at source and not liable for interest. On appeal by revenue, the Tribunal held that, revenue has not brought any evidence to demonstrate any tenancy or sub-tenancy agreement between the assessee and other

party, the order of CIT(A) was confirmed. (A.Y. 2009-10)

*ACIT v. Serco BPO (P) Ltd. (2014) 146 ITD 453 / (2013) 32 taxmann.com 223 (Delhi)(Trib.)*

**101. S.195 : Deduction at source – Payment for legal consultancy services – DTAA – India-Portugal. [S.90, 201(1) & 201(1A); Art. 14 & 15]**

Assessee made payment for legal consultancy services to the non-resident who had no fixed base available to her for performing her duty or any PE in India and who was in India for 22 days only. Such payment is not taxable in India either u/art. 14 or 15 of the India-Portugal DTAA. The assessee was under no obligation to deduct TDS u/s. 195. Order passed under section 201(1) and 201(IA) was quashed. (A.Y. 2011-12)

*Cedrick Jordan Da Silva v. ITO (IT) (2014) 98 DTR 314 (Panaji)(Trib.)*

**102. S.195 : Deduction at source – Non-resident – TDS obligation depends on law prevailing on date of payment and is not affected by retrospective amendment-No disallowance can be made under section 40(a)(i) read with section 9(1)(vii) if that law did not require TDS to be deducted. [S.9(1)(vii), 40(a)(ia)]**

In accordance with the law laid down in *Ishikawajma-Harima Heavy Industries*, which was good law at the time of the remittance, unless the services are rendered in India, the same cannot be brought to tax as 'fees for technical services' u/s 9. Though the law was amended retrospectively, so far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax deductor cannot be expected to have clairvoyance of knowing how the law will change in future. A retrospective amendment in law does

change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. As there is no material whatsoever to establish that the design and development services were rendered in India, the assessee did not have any liability under s. 195 r.w.s. 9(1)(vii) to deduct tax at source from these payments. As a corollary thereto, no disallowance can be made in respect of these payments u/s. 40(a)(i). (ITA No. 256/Agr/2013. dated 14-2-2014.) (A.Y. 2008-09)

*DCIT v. Virola International (Agra)(Trib.) www.itatonline.org*

**103. S.199 : Deduction at source – Credit for TDS given to person in whose hands income is assessable**

The assessee had claimed TDS on interest on bonds received by her on behalf of the AOP where she was member. Though the funds utilized and invested were of the AOP, the investment being in the name of assessee the TDS certificate was issued in the name of assessee, who then remitted the full amount of interest to the AOP. The AO held that such interest should be assessed in the hands of the assessee. The CIT(A) held that the AOP being the beneficiary of the interest, the same should be assessed in hands of the AOP, but assessee could claim the credit for TDS.

On appeal by the department, the Tribunal held that since income is assessable in hands of AOP credit for the TDS shall also be granted only to the AOP and cannot be granted to the assessee. (A.Y. 2008-09)

*ITO v. Ameer Hosang Mistry (2014) 29 ITR 397 (Mum.)(Trib.)*

**104. S.234C : Interest – Deferment of advance tax – Liability to pay interest – On advance tax payable on returned income and not on assessed income**

The Tribunal directed the AO to re-calculate the interest u/s. 234C of the Act for deferment of

advance tax based on the advance tax payable on the 'returned income' and not on the 'assessed income'. (A.Ys. 2004-05 to 2008-09)

*SAP India (P.) Ltd. v. DCIT (2014) 29 ITR 469 (Bang) (Trib.)*

**105. S.244A : Refunds – Interest – MAT credit – Entitle to interest. [S. 115JB]**

Assessee is entitled to interest under section 244A on refund arising to it under MAT credit. (A.Y. 2007-08 to 2009-10)

*Shree Cement Ltd. v. ACIT (2014) 100 DTR 33 (Jaipur) (Trib.)*

**106. S.254(1) : Appellate Tribunal – Orders – Double taxation relief – Claim not made in the return – Tribunal directed the AO to allow the claim as per law. [S. 90, 139(1), 143(3)]**

Assessee had inadvertently mentioned as "Advance tax" in the electronically filed tax return, instead of putting the eligible amount of double taxation credit u/s. 90. The AO rejected the assessee's contention on the ground that no claim shall be allowed otherwise than by way of return or revised return of income. He followed the ratio of *Goetze India Ltd. v. CIT (2006)284 ITR 323(SC)*. Tribunal held that the judgment provides that operation is restricted to the AO and it does not, in any way, affect the powers of the Tribunal u/s. 254 of the Act. Therefore, the ITAT directed the AO to examine and allow assessee's claim about the eligible amount of double taxation credit as per law after allowing a reasonable opportunity of being heard to the assessee. (A.Y. 2007-08)

*Tecnimont ICB Ltd. v. Dy. CIT (2014)146 ITD 219 / [2013] 32 taxmann.com 357 (Mum.)(Trib.)*

**107. S.263 : Commissioner – Revision of orders prejudicial to revenue**

**– Transfer pricing-Binding order – CIT cannot revise the TPO's transfer pricing order passed u/s 92CA(3). CIT also cannot revise s. 143(3) order because such order is not erroneous if it follows binding order of TPO.[S.92CA(3), 143(3)]**

The Commissioner cannot exercise revisionary jurisdiction u/s. 263 on the transfer pricing order passed u/s. 92CA(3) by the TPO. As regards the assessment order, it cannot be said to be "erroneous" because the AO is bound by the transfer pricing order u/s. 92CA(4) is binding on the AO. Consequently, the CIT's order is without jurisdiction. (ITA No. 3121/Mum/2013, 20-12-2013) (AY. 2005-06)

*Tata Communication Limited v. DCIT (Mum.)(Trib.), www.itatonline.org*

**108. S.271AAA : Penalty – Search initiated on or after 1st June, 2007 – Failure to specify the manner in which undisclosed income had been derived, penalty cannot be levied in the absence of query by the authorized officer during course of statement under section 132(4). [S.132(4),271(1)(c), Explanation 5]**

On basis of certain documents found and seized during search at his premises, assessee surrendered certain amount as undisclosed income and also paid tax due thereon. In statement u/s. 132(4), assessee stated income was derived from forward/speculative and property transactions carried out in F.Y. 2009-10. Being not satisfied with assessee's explanation, A.O. imposed penalty. The Tribunal held that when authorized officer had not raised any query during course of recording of statement under section 132(4) about manner in which undisclosed income had been derived and about its substantiation. A.O. was not justified in imposing penalty under section 271AAA, specifically when offered undisclosed income had been accepted and

taxes due thereon had been paid by assessee. (A.Y. 2010-11)

*Neerat Singal v. ACIT (2014) 146 ITD 152 / (2013) 37 taxmann.com 189 (Delhi)(Trib.)*

**109. S.271(1)(c) : Penalty – Concealment – When assessee has declared undisclosed income after search and paid tax and interest- entitled to immunity under the Explanation 5 to section 271(1)(c)**

Pursuant to search and seizure and the statement recorded of the director of the assessee company, undisclosed income of ₹ 151 lakh was disclosed in the return of income and tax was paid on it. The AO levied penalty u/s. 271(1)(c) which was confirmed by the CIT(A).

On appeal by the assessee, the Tribunal allowing the appeal held that since the three conditions mentioned in Explanation 5 to section 271(1)(c) were satisfied and assessee had paid the tax alongwith interest, the assessee was entitled to the benefit available and penalty levied was to be deleted. (A.Ys. 2004-05 to 2006-07)

*Kalpna Nursing Home Pvt. Ltd. v. ACIT(OSD) (2014) 29 ITR 633 (Jodh)(Trib.)*

**110. S.271(1)(c) : Penalty – Concealment – Explanation 7 – Addition on account of transfer pricing adjustment – TPO rejected methodology adopted by assessee – Levy of penalty was not justified**

TPO determined ALP of international transaction after rejecting the transfer pricing study report submitted by the assessee primarily on account of difference of opinion with regard to use of multiple year data and selection of certain comparables. It could not be said that the difference in ALP arose on account of concealment of income or furnishing of inaccurate particulars or income by the assessee. Therefore, penalty was not leviable. (A.Y. 2004-05)  
*ACIT v. ADP (P) Ltd. (2014) 98 DTR 413 (Hyd.)(Trib.)*

**111. S.275(1)(c) : Penalty – Limitation – Loan or deposit – Section 275(1)(c) which is applicable not section 275(1)(a) – Levy of penalty was barred by limitation. [S. 269 SS, 269T, 271D, 271E & 275(1)(a)]**

Search action was on June 1999, Block assessment was completed on June 2001. JCIT issued show cause notice dated 15th Jan, 2002 for levy of penalty under sections 271D and 271E in the course of block assessment proceedings and levied penalty on 30th March, 2006. Before CIT(A) it was contended that penalties having been initiated in the month of January 2002, the same could not have been levied after 31st July, 2002, which was clearly the last date for levying these penalties under section 275(1)(c) of the IT Act. Since the penalties have been levied as late as on 30th March 2006, i.e.; after three full years and eight months of the period of limitation, the same are clearly barred by limitation and hence bad in law. CIT(A) deleted the penalty levied on the ground that the order was time barred as per section 275(1)(c) of the Act. Before the Tribunal the department challenged the order passed by the CIT(A) deleting the penalty under sections 271D & 271E imposed for violation of sections 269SS & 269T on the basis that it was barred by the limitation under section 275(1)(c). Both the Tribunal Members did not agree on the issue, then on the difference of opinion between AM & JM, the issue was referred to third member. The third member followed the view taken by Hon'ble Rajasthan High Court in the case of Jitendra Singh Rathore (2013) 352 ITR 327 the Hon'ble High Court after considering the relevant provisions of the Act has concluded that the order imposing penalty was hit by the limitation prescribed under the Act under section 275(1)(c). The Tribunal confirmed the order of CIT(A) and deleted the penalty as it was section 275(1)(c) which is applicable not section 275(1)(a).

*ACIT v. Dipak Kantilal Takvani (2014) 159 TTJ 304(TM) (Rajkot)(Trib.)*

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# DIRECT TAXES

Advance Rulings  
Research Team

1. **S.195 : Deduction at source – Non-resident – Film production services – Services rendered by the non-resident company to the applicant company fall under the definition of ‘work’ u/s. 194C and the payments made thereafter by the applicant to the said company were not taxable in absence of any PE of the latter in India and consequently, the said payments would not suffer withholding of tax u/s. 195-DTAA-India-Brazil. [S. 9(1)(i), 90, 194C, Articles 7, 12]**

The applicant was a resident company incorporated under the Companies Act, 1956. It was engaged in the business of producing and distributing television programmes. The assessee entered into an agreement with the Brazilian Country Utopia Films for availing line production services. For the purposes of shooting a programme/show outside India, it engaged a foreign company for receiving line production services under an agreement. The issue was whether line production services provided by the non-resident company to the applicant company fall under the definition of ‘work’ u/s. 194C & payments thereof were taxable in India. The court held that that the services rendered by the non-resident company to the applicant company fall under the definition of ‘work’

u/s. 194C & the payments made thereafter by the applicant to the said company were not taxable in absence of any PE of the latter in India & consequently, the said payments would not suffer withholding of tax u/s. 195. (AAR Nos. 1081/1082 of 2011 dt 19-2-2014)

*Endemol India (P.) Ltd. v. (2014) 99 DTR 397 (AAR)*

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# INDIRECT TAXES

Sales Tax  
D. H. Joshi

## 1. Apex Court News – Flash

Garnishee Orders issued by Civil Courts against dealers attaching amounts from dealers out of tax collected by them under the Act and placing the amount at the disposal of the court. Held – it is against the provisions of section 49(A) of KGST Act and section 79A of the KVAT Act. High Court registry is therefore directed to issue instructive communication in the form of Circulars to all Civil Courts (within the State) about the aforesaid provisions. Office of the Advocate General also to pass relevant information for the guidance of District/ Subordinate Courts and Govt. pleaders.

*Bharat Petroleum Corpn. Ltd. v. State of Kerala & Ors. (Ker.) Kerala Tax Reporter Vol. 22 Part-IV Main Page.*

## 2. Admitted tax against the provision of law

In this case, decided by the Tribunal, the assessee paid administrative charges on the sale of 'Molasses'. Jt. Commr. imposed additional tax on sale of molasses as it was admitted in original assessment. Tribunal relied on the judgment of the Court held that where as per the provisions of law, tax is not payable, then, in such a case where assessee admits it then also it does not become a basis for the authority to impose tax merely on the ground that the assessee had admitted the tax liability in the original assessment.

*Dwarikesh Sugar Industries Ltd. v. Commercial Tax Commissioner (2014) NTN 179*

## 3. Appeal

In this case decided by the Punjab VAT Tribunal, the question was whether assessment time barred and also no notice for penalty was served on the assessee and interest imposed without affording reasonable opportunity. The assessee never sold stone dust for any consideration nor made any sale thereof. In the course of assessment, complete books of account were produced before the AO and no defect was pointed out by him nor any adverse material was shown to the assessee.

In the above facts and circumstances, the Tribunal held that the Orders passed by the authorities below were not sustainable in the eye of law and they were, therefore set aside by remanding the matter to the AO for fresh decision as per law.

*Khalsa Stone Crushers v. State of Punjab (2014) 47 PHT 500 (PVT)*

## 4. Assessment

(A) In the present case, decided by the Punjab & Haryana VAT Tax Tribunal, assessment done u/s 29 came for consideration. The issue was non-production of proof regarding returned and availing an inadmissible ITC. The assessment was framed in a hurried manner without affording due and reasonable opportunity to the assessee, though adequate time was left for framing assessment. Additional demand created against the assessee. The

appellant was in the process of procuring statutory forms, debit and credit notes and sufficient time was left for framing the assessment. In the above facts and circumstances, the Tribunal set aside the Orders passed by both the authorities below.

*Supreme Industries Ltd. v. State of Punjab (2014) 47 PHT 474 (PVT)*

- (B) The issue before the Punjab VAT Tribunal was classification of Bitumen Emulsion. Assessee paid tax at 4% classifying it to be an item under Schedule B of the Act, but the Assessing Authority charged tax at 12.5% and created additional demand of ₹ 24,21,070, treating the same chargeable to under Schedule F. On appeal the Tribunal deleted the demand by following the verdict in the case of *CCE v. Osnar Chemical Pvt. Ltd. (2012) 226 ELT 162 (SC)* holding the same liable to tax at 4% as Bitumen emulsified forms remains as Bitumen. It does not result into transformation of new product having different identity, characteristic and use.

*Shiva Bitumen, Mohali v. State of Punjab (2014) 47 PHT 498 (PVT)*

### 5. Cancellation of Registration

In this case, decided by the M.P. High Court, Registration Certificate was cancelled by a non-reasoned order simply by mentioning that “for 1999-2000 to 2006-07 recovery amount ₹ 146.90 lakh”, while the issue of petitioner’s eligibility for exemption was pending for consideration before the High Court and the Revision against the assessment orders were also pending. The High Court set aside the

said RC Cancellation Order with liberty to the Respondent i.e. AO to pass fresh appropriate reasoned order after giving opportunity of hearing to the petitioner and taking into consideration all the grounds as may be raised by the petitioners.

*Shrirang Petrochem Industries, Jhabua v. CTO & Ors. (2014) 24 STJ 573 (M.P.)*

### 6. Circulars/Clarifications

In *Ratan Melting and Wire Industries (2006) 8 STJ 1 (SC)*, the Constitution Bench of the Supreme Court clarifying paragraph 11 in *Dhiren Chemicals Industries (2005) 7 STJ 147 (SC)* has stated that circulars and instructions issued by the CBEC are no doubt binding in law on the authorities under the respective statutes, but when Supreme Court or High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular be given effect to and not the view expressed in a decision of the Supreme Court or High Court. So far as the clarifications/circulars issued by the Central Govt. and the State Govt. are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the Court. It is for the court to declare what the particular provision of statute says and it is not for the executive.

*Commissioner of Central Excise v. Super Syntex (India) Ltd. & Ors. (2014) 24 STJ 542 (SC)*

### 7. Composition Scheme

In this case on consideration of writ petition, the Allahabad High Court held that composition scheme in relation to refined oil, entire compounding fees deposited

on demand, but simultaneously company represented against the computation and on realizing of such high fees as there was no justification for realizing compounding fees for the period of 1-4-2003 to 22-10-2003 and, therefore, demanded refund of the same. Held that once the company exercised its option under compounding scheme, thereafter, it cannot be permitted to turn around from its liability merely on the ground that it had no turnover or had not produced oil during the said period. Accordingly, writ petition was dismissed.

*Vaibhav Edibles Pvt. Ltd. v. State of U.P. & Ors.* (2014) NTN (Vol. 54) 291 (All.)

## 8. Entries in Schedule

(A) In this case, the High Court was required to decide rate of tax on – “Wireless Transmission Projectors”. High Court held that Wireless Transmission Projectors was not projecting any film and, therefore, it is not a 16 mm projector, but was a unique equipment used for reproduction of computer images in enlarged form. It is specifically covered by Entry No. 32, First schedule along with other items like cameras, etc. Accordingly, order of the Tribunal was upheld.

*Godrej & Boyce Mfg. Co. Ltd. v. State of Kerala* (2014) 22 KTR 137 (Ker.)

(B) ‘Woollen felt’ – it was obtained by Compressing woollen fibres and subjecting the same to hit and moisture. It is a non-woven material going by the meaning of ‘Cloth’ given in dictionaries as well as by its generally accepted popular meaning, it is woven, knitted

or felted material which is pliable and is capable of being wrapped, folded or wound around. It need not necessarily be suitable for making garments because their can be “Cloth” suitable only for industrial purpose. But it must possess the basic feature of pliability. Hard and thick material which cannot be wrapped or wound around cannot be regarded as “Cloth”. The Commissioner was right in his view that only those varieties of felt which satisfy the test of pliability would constitute “Cloth”.

*Filterco v. Commissioner of Sales Tax M.P. (SC)* (2014) 24 STJ 491.

(C) In this case, Superior Kerosene purchased for sale/distribution under Public Distribution System (PDS) – it was exempt from Entry Tax if at the time of assessment a certificate (issued by Collector or any other authority authorised for this purpose) was produced to the effect that the said goods had been entered into a local area for sale/distribution under PDS.

*Bharat Petroleum Corpn. Ltd. v. CCT, M.P.* (2014) 24 STJ 592 (CCT, M.P.)

(D) The Allahabad High Court held that Paddy husk and Rice husk were different commodity. Accordingly, Revenue’s revision petitions were dismissed.

*C.T.T. v. Sariya Distillery* (2014) NTN (Vol. 54) 333.

(E) Chicory Roots were specifically mentioned in Notification dated 29-1-2001 while Notification dated 31-1-1985 contained a general entry with

respect to fresh roots. Therefore, Chicory Roots were specifically covered by Notification dt. 29-1-2001, the contention that it shall be covered by general entry mentioned in any other notification is not correct

*Hindustan Lever Ltd. v. Commissioner of Trade Tax, Lucknow & Another (2014) 24 STJ 614 (All.)*

- (F) 'Kuber Kunji' – it was a combo pack consisted of Kuber Kunji, Kuber Pendent, Kuber Yantra made from metal, Lord Kuber Idol, Kuber Mantra Pustika and CD of Kuber Mantras. Applicant contended that its predominant constituent was semi-precious stones studded in metal and other items were either tax-free or were given free, and, therefore, it should be liable to tax at 1% under Entry I / I / 3 of the MP VAT Act, which pertained to "Precious & Semi-precious Stones..... whether they were sold loose or as part of any article in which they were set." The Commissioner held that the product was sold by the applicant and purchased by the people as 'Kuber Kunji', and there was no separate sale of its constituent items. In Schedule I or II, there was no specific entry in which 'Kuber Kunji' could be covered. Therefore, it was covered under residuary entry and it was liable to tax at 13%.

*G.T.M. Teleshopping Pvt. Ltd., Indore v. Commissioner of Commercial Tax, M.P. (2014) 24 STJ 665 (CCT, M.P.)*

### 9. Exemption to new units

Cancellation of eligibility certificate in view of provisions of Section 41(c) of the BST Act,

1959. The Tribunal was justified in holding that cancellation of certificate of entitlement of the assessee shall take effect prospectively from the date of cancellation order passed by the Commissioner.

*Addl. Commr. of ST, VAT-3, Mumbai v. B.G. Chitale (2014) 24 STJ 524 (Bom.)*

### 10. Mistake of counsel

In this case, decided by the Bombay High Court, facts were thus:

Appeal filed against the CST Assessment Order in which appellate authority passed an Order on Stay Appln. requiring the petitioner to deposit ₹ 10 Lakhs as a condition to stay balance demand. Petitioner filed appeal to Tribunal against the said order. Meantime, First Appeal against CST Assessment Order was decided ex parte. Tribunal partly allowed the appeal passed on Stay Appln. by a reducing deposit amount to ₹ 50,000/- and remanded the case to Appellate Authority. When appeal against CST Assessment Order came up for hearing before Tribunal, the petitioner's advocate filed an application for withdrawal of appeal, possibly due to his understanding that as the appeal against the Order on stay application is partly allowed by way of remand to decide the issue on merits, no further orders were necessary in appeal pertaining to assessment order, while in fact, there was no decision on merits of the CST Assessment Order. In the circumstances, the Bombay High Court in Writ Petition held that the assessee should not suffer for mistake of his counsel.

*Sambhav Interchem Pvt. Ltd. v. State of Maharashtra (2014) 24 STJ 520 (Bom.).*

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# INDIRECT TAXES

Service Tax  
Sunil Moti Lala\*

## A] Classification of Service

### Business Auxiliary Services

1. The assessee was granted an exclusive privilege to carry on wholesale trade in liquor but never had the ownership / title in the liquor supplied to it by the distilleries. The Hon'ble Tribunal held that the assessee was providing services in relation to marketing / sale of goods belonging to the distilleries (and not purchase and sale of liquor) and accordingly the same would be liable for service tax under the category of business auxiliary services.

*Rajasthan State Beverages Corpn. Ltd. v. CCE (2013) 32 STR 329 (Tri.-Del.)*

2. The activity of the assessee providing comprehensive sanitation assistance to Municipal Corporation cannot be liable under Business Auxiliary Services since Municipal Corporation was not doing business of providing sanitation work to be supported by auxiliary service.

*Global Waste Management Cell vs. CCE, 2013(32) STR 734 (Tri.-Del)*

3. The assessee did electroplating of electrical contacts on Job-work basis and supplied the same to its clients, an EOU unit. The Hon'ble Tribunal held that the services were not liable for service tax under the category of 'business auxiliary services' since:

- The process amounted to manufacture [in view of Note No. 6 to section 16 of the Central Excise Tariff and as held by the Tribunal in *Modison Metal Refiners vs. CCE (1996) 88 ELT 292 (T)*] and process amounting to manufacture was specifically excluded from Business auxiliary services.

- The assessee was also entitled to exemption under Notification No. 8/2005 which exempts goods supplied to principal manufacturer on job-work basis who uses such goods for further manufacture and pays 'appropriate duty of excise' on the final products. The term 'appropriate duty of excise' excludes Nil rate of duty or duty wholly exempt. The EOU availed exemption under Notification No. 24/2003-CE dated 31/3/2003 which exempted goods manufactured in an EOU provided the goods were not brought to any other place in India. However, in spite of the exemption to the EOU, the Hon'ble Tribunal held that the exemption envisaged in the definition of 'appropriate duty of excise' in Notification No. 8/2005 was an unconditional exemption and since the EOU exemption was not an unconditional exemption the EOU would be deemed as having paid 'appropriate duty to excise'. Thus the assessee was entitled for exemption under Notification No. 8/2005 even if it was assumed that the process does not amount to manufacture.

*Interplex Electronics India Pvt Ltd v. CST (2014) 33 STR 56 (Tri.- Bang.)*

4. The assessee provided services to DT, USA for preparation and filing of US Federal, State and local tax returns, and property tax returns, as well as for computing advance tax estimates, wage card processing and transfer pricing planning and execution which involved data entry, data processing, and such other incidental and support services and paid service tax on the said services under the category of "Business Auxiliary Services". Further they also claimed CENVAT credit on various input

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\* Assisted by Sheetal Jain

services and claimed refund of input credit on the basis that their services were exported. The Department denied refund on various grounds one of which was that the services were in the nature of 'information technology service' not liable under business auxiliary services and accordingly input credit cannot be taken. The Hon'ble Tribunal dismissed the Revenue's contention and held that the services were not information technology services since the use of computer or computer programme for their services was only secondary and the primary activity that was of business-related services. Hence their services would be liable as "Business Auxiliary Services". On the department's appeal, the Hon'ble High Court upheld the order of the Hon'ble Tribunal.

*CCE v. Deloitte Tax Services India Pvt. Ltd. (2014) 33 STR 129 (A.P.)*

5. The Hon'ble Tribunal held that the activity of placement of channels of different broadcasters at desired frequency and carrying the channel to the users through own cable network in consideration for a 'carriage fee' was liable for service tax under the category of 'business auxiliary service'.

*Indusind Media & Communications Ltd. v. CCE (2013) 32 STR 418 (Tri.-Del.)*

6. The Hon'ble Tribunal held that prior to 9/7/2004, service tax was not payable by a commission agent (broker) dealing with Mutual Funds i.e. marketing of mutual funds.

*CCE vs. Yogesh J. Shah (2014) 33 STR 163 (Tri.-Mum.)*

7. The assessee was contractor running the retail outlet for petroleum products of IBP/IOC and incurred expenses like tea/coffee/consumables, salary of employees, handling losses of generator set, bank charges, electricity charges, etc. and claimed reimbursement of such expenses without levying service tax. The Hon'ble Tribunal held that, as per Section 67 of Finance Act, 1994 value of any taxable service

was gross amount charged by service provider and it did not provide for any deduction therefrom. It further held that extended period of limitation was invocable as the assessee had neither paid service tax nor filed any ST-3 returns.

*Krishan Kumar v. CCE (2014) 33 STR 60 (Tri.-Del.)*

8. The assessee was undertaking grinding of herbs on job work basis during the period 10-9-2004 to 15-6-2005. The Commissioner (A) passed order taking grinding as processing holding no production can take place without processing. The Hon'ble Tribunal observed that processing has been included in Business Auxiliary Service definition w.e.f. 16-6-2005 and therefore demand of service tax on activity of grinding prior to 16-6-2005 is illegal.

*Prakash Pulversing Mills v. CCE (2014) 33 STR 454 (Tri.-Del.)*

#### **Construction Services**

9. The Hon'ble High Court held that:

- The scope and ambit of Commercial or Industrial and Residential construction service cannot be read down on imposition of service tax on works contract, which covers contractor only supplying labour or undertaking construction service, whether with or without supply of material. The levy under construction services is valid, the only condition being that it should be on service element and not on materials or goods used, as power to levy Sales Tax or VAT is with State Government.
- After 46th amendment to Constitution of India composite contracts can be bifurcated to compute the value of goods sold / supplied in contracts for construction of building with labour and material. Service portion of composite contracts can be subjected to Service Tax. Aspect doctrine can be applied for bifurcating / vivisectioning the composite contract.

- Notification providing for 67% abatement towards value of material used for computing service tax payable is to ensure that service element is taxable. It is alternative to otherwise subjective determination in each case, which may be cumbersome and require detailed examination for ascertainment of service element. It provides convenient, alternative, optional and hassle free method for exclusion of non-service element and payment of service tax provided requirements mentioned in the notification are satisfied.
- Service tax can be levied on service element. Computation of this component is matter of detail and not relating to validity of imposition of service tax. It is procedural and matter of calculation and merely because no rules are framed for computation, it does not follow that no tax is leviable.

#### **Cargo Handling services**

10. The assessee society was receiving the goods from its member manufacturers at its doorstep for auction sale to member merchants. It stored the products, tested its quality, provided a finance facility for the manufacturers by way of advances, sold the products on auction whereafter the buyer took delivery of the goods. The Hon'ble High Court held that in absence of any responsibility to collect the goods from the manufacturer's premises nor to arrange for dispatch to the buyer, the assessee cannot be held to be a clearing and forwarding agency.

*CCE Salem v. Salem Starch & Mfr's Service Indl. Co-op. Society Ltd., (2014) 33 STR 16 (Mad.)*

11. The Hon'ble Tribunal held that Freight forwarding is distinct and different from "Clearing & Forwarding Agency Service" as defined in law and hence not liable for service tax under the category of "Clearing & Forwarding Agency" service.

*Swagat Freight Carriers Pvt. Ltd. v. CST (2014) 33 STR 81 (Tri.-Mum.)*

#### **Commercial Training and Coaching**

12. The assessee was engaged in imparting skills in areas relevant to journalism, print or audio-visual and documentary film making and had claimed exemption as a 'vocational training centre' under Notification Nos. 9 / 2003 - S.T and 24 / 2004 - S.T. The Hon'ble Tribunal held that the exemption cannot be denied on the ground that there was no evidence of employment / self-employment by trainee after completion of course as was sought to be done by the Revenue.

*IILM Film & Media School v. CST (2013) 32 STR 321 (Tri.-Del.)*

13. The assessee conducted training programme for various bank officials and also post-graduate diploma for the students in Banking Management, for which it charged a lump-sum amount from the participants or sponsors. The Hon'ble Tribunal held that the assessee's activity would be covered under the category of 'Commercial Coaching or Training' services and accordingly would be liable for service tax.

*National Institute of Bank Management v. CCE (2013) 32 STR 340 (Tri.-Mum.)*

#### **Commercial or Industrial Construction Service**

14. The Hon'ble Tribunal held that the Sports Complex Stadium constructed for the purpose of holding games which was allowed to be used by the public later on, on payment of user charges was a public facility for the recreation of the public and it does not come under the category of commercial or industrial construction merely because some amount was charged for using the facility. Hence construction of sports stadium being a non-commercial construction was not liable for service tax under the category of "Commercial or Industrial Construction service".

*B. G. Shirke Construction Technology Pvt. Ltd. v. CCE (2014) 33 STR 77 (Tri.-Mum.)*

15 The Hon'ble Tribunal held that excavation of land (digging, extraction of core), preparation of earthen floor, soil stabilisation, raising / widening of bunds, plantation and increasing height of reservoir which supply water to industrial units was liable to service tax under Commercial or Industrial Construction Service.

*Radius Corporation Ltd. v. CCE (2014) 33 STR 416 (Tri.-Del.)*

#### Commission and Installation Services

16. The Hon'ble Tribunal held that the laying of pipeline for the period 1/7/2003 - 31/3/2004 does not fall under the category of "Commissioning or Installation Service", since pipelines are not "plant, machinery or equipment" and such service were specifically brought under 'Commercial Construction Service' w.e.f. 16/6/2005.

*CST v. Hyundai Heavy Industries Co. Ltd. (2014) 33 STR 111 (Tri.-Mum.)*

#### Club or association service

17. The assessee, a cricket association, collected membership fees from its members. It contended that such membership fees was to be treated as charitable in nature and accordingly fell under the exclusionary clause of the category 'Club or association service', and hence was not liable to service tax. The Hon'ble Tribunal upheld the demand, observing that:

- The object of the assessee, being promotion of cricket, cannot be considered as a service to the poor and needy, and therefore was not charitable in nature.
- Promotion of a particular game or sport was not a public service, though it may be in the public interest.
- Public services, generally, are understood to mean services which are provided by organizations like Municipal Corporations and State Governments relating to health, education, etc.

- The assessee's treatment as a 'charitable organization' under the Act was immaterial for the purposes of service tax.

*Vidarbha Cricket Association v. CCE [TS-234-Tribunal-2013-ST]*

#### Consulting Engineer Services

18. The Hon'ble Tribunal held that the activity of operation and maintenance of windmills not being in the nature of rendering any advice, consultancy or technical assistance in any field of engineering, was not liable for service tax under the category of "Consulting Engineer Service'.

*Suzlon Windfarm Services Ltd. v. CCE, (2014) 33 STR 65 (Tri.-Mum.)*

19. The Hon'ble Tribunal held that the supply of technical know-how in consideration for a royalty or licence fees was not liable for service tax under the category of Consulting Engineering Service.

*CCE v. Leibert Corporation (2014) 33 STR 161 (Tri.-Mum.)*

20. The assessee carried out positioning service, hydrographic survey, oceanographic survey, seismic survey, geophysical and geotechnical survey and engineering survey in connection with oil exploratory operations to be carried out by the client. The Hon'ble Tribunal held that since, no service relating to advice, consultancy or technical assistance has been given and the service merits classification under Survey and Exploration of Minerals Service. It also held that when activity covered under specific entry, which came later, service tax should not to be demanded on same activity under different category for prior period.

*CST v. Fugro Geonics Pvt. Ltd. (2014) 33 STR 170 (Tri.-Mumbai)*

#### Construction of Residential Complex Services

21. The explanation inserted by the Finance Act 2010 to Section 65(105)(zzq) and (zzh)

that brings within the fold of taxable service a construction service provided by the builder to a buyer where there is an intended sale between the parties whether before, during or after construction was prospective in operation and hence not liable for the period prior to 1-7-2010.

*CCE v. U.B. Construction (P) Ltd., 2013 (32) STR 738 (Tri.-Del.)*

#### **Clearing and Forwarding agent**

22. The activity of supervision and loading of coal at the collieries and arranging for transportation of coal by rail or road to client's plant / factory does not fall within the scope of "clearing and forwarding agent's service".

*CST v. Shah Coal Pvt. Ltd. (2013) 32 STR 568 (Tri.-Mum.)*

23. The assessee provided services for movement of coal from collieries to their client's premises (purchasers of the coal), by coordinating with the collieries and railways (as agents of their clients). The Hon'ble Tribunal held that services provided by the assessee were liable for service tax under the category of "Clearing and Forwarding Agency services".

*Karamchand Thapar & Bros. (Coal Sales) Ltd. v. CST (2013) 32 STR 577 (Tri.- Kolkata)*

#### **Erection, Commissioning and Installation Service**

24. The activities of executing heating, ventilation and air-conditioning projects on turnkey basis were chargeable to Service Tax under Commissioning or Installation/Erection service, w.e.f. 1-7-2003.

*Suvidha Engineers India Ltd v. CCE, 2013(32) STR 735 (Tri.-Del.)*

25. The assessee established power distribution network for providing connections to consumers and claimed immunity from tax on the basis of Exemption Notification No. 45/2010-ST. The Hon'ble Tribunal held that in view of Exemption Notification No. 32/2010-

ST and immunity Notification No. 45/2010-ST, all taxable services provided in relation to distribution of electricity energy are exempt from service tax liability. The expression in relation to is of wide import indicating all activities having direct and proximate nexus with distribution of electrical energy and distribution of energy cannot be effectively accomplished without installation of substations, transmission towers and installation of meters.

*Noida Power Co. Ltd. v. CCE (2014) 33 STR 383 (Tri.-Del.)*

#### **Event Management Services**

26. The assessee advertised products by way of putting hoardings during Cricket Tournament. The Department sought to tax the said activity under Event Management Service. The Hon'ble Tribunal held that the assessee has not organised tournament at the request of any franchisee or co-sponsors therefore no Event Management Service has been provided by the assessee.

*CCE v. Lokmat Media Ltd. (2014) 33 STR 272 (Tri.-Mum.)*

#### **Mandap Keeper Service**

27. The Hon'ble Tribunal held that in case where services have been provided by club to members the relationship of client and employer was absent and therefore activities carried out by Club do not amount to taxable service.

*CST v. Safdarjung Club (2014) 33 STR 415 (Tri.-Del.)*

#### **Management, Maintenance or Repair Service**

28. The Hon'ble High Court held that the Goods which were deemed to be sold in the execution of a works contract shall be outside the ambit of service tax.

*CCE v. Balaji Tirupati Enterprises (2013) 32 STR 530 (All.)*

29. The Hon'ble Tribunal held that repairs and maintenance work carried out by the assessee

in respect of property of municipality was not taxable under the category of “management maintenance or repairs services” since municipal roads were not immovable properties under the Transfer of Properties Act.

*Manjit Singh v. CCE (2013) 32 STR 624 (Tri.-Del.)*

30. The Hon’ble Tribunal held that the activity of reconditioning old and worn out shells of sugar mills was not liable for service tax under the category of “management, maintenance and repair services” since:

- In the absence of a maintenance contract between the assessee and its client such services would not be liable;
- Further, the activity of ‘reconditioning’ and ‘restoration’ was liable to service tax under the category of maintenance or repair service only w.e.f 16-6-2005 and hence a service tax demand on such activity prior to 16-6-2005 was not sustainable.

*Jagat Machinery Manufactures P. Ltd. v. CCE (2013) 32 STR 663 (Tri.- Del.)*

31. The assessee claimed exclusion of cost of goods sold or deemed to have been sold to service recipient. The department contended that benefit of Notification No. 12/2003-ST is confined to sale of goods, excluding ‘deemed sale’. The Hon’ble Tribunal observed that precedent decisions found to limit scope of Section 67 of Finance Act, 1994 only to ascertain value of service component, wherever complex transactions involving service and sale element including deemed sale were presented for valuation of transaction as taxable service. It also observed that, jural basis of Larger Bench decision in Aggarwal Colour Advance Photo System (2011) 23 STR 608 (Tri.-LB) was eclipsed by binding authority of other decisions of Supreme Court and Delhi High Court. It thus held that, as core dispute was settled by higher authority of Supreme Court and Delhi High Court, there was no need for Larger Bench to decide issued referred for its consideration and it was to be decided by regular Bench.

*Hindustan Aeronautics Ltd. v. CST (2013) 32 STR 783 (Tri-LB)*

32. The Hon’ble Tribunal relying on Madras High Court judgment in [Kasturi & Sons Ltd. (2011) 22 STR 129 (Mad.)] held that maintenance of computer software was not liable to service tax under Maintenance or Repair Service prior to 1-5-2006. It further held that certification of ATM was squarely covered by the definition of Technical Inspection and Certification Service and introduction of new service relating to ATM not to be interpreted that prior to date of notification of such service, certification of ATM was not liable to tax. Further, the appellants plea of *bona fide* belief of non-taxability was not based on legal position, hence there was no merit in prayer for non-invocation of extended period of time.

*Financial Software Systems Pvt. Ltd. v. CST (2014) 33 STR 393 (Tri.- Chennai)*

#### **Steamer Agent’s Services**

33. The assessee, a steamer agent, did not pay service tax for the period 1-11-2003 to 19-11-2003 on services provided to their foreign principals for which they received their consideration in convertible foreign exchange. The Hon’ble Tribunal upheld the stand of the assessee on the ground that the benefit of the clarification issued by CBEC *vide* its Circular No. 56/5/2003-S.T. dated 25-2-2003 (which clarified that service tax is a destination based consumption tax) would be available to the assessee and no service tax would be payable on the services exported.

*Maersk India Pvt. Ltd. v. CST (2013) 32 STR 546 (Tri.-Mum.)*

#### **Rent a Cab Service**

34. The assessee was having contract with PEPSU Road Transport Corporation for providing buses for operation on various routes for which they have received payment on per day basis. The Hon’ble Tribunal held that ratio of Deepak Transport Bus Service (2013) 27 STR 357

(T) is to be followed as factually the present case was identical and therefore, services were liable to tax under Rent-a-Cab Service.

*Harjinder Singh v. CCE (2014) 33 STR 437 (Tri.-Del.)*

#### **Renting of immovable property**

35. The assessee rented out immovable property to tenants and also recovered electricity charges separately from them. The Hon'ble Tribunal held that electricity was 'goods' chargeable to excise duty (nil rate) under the Central Excise Act, 1944 and Maharashtra Value Added Tax Act, 2005 and accordingly the electricity charges collected from the tenants would not be liable for service tax under the category of "renting of immovable property services".

*ICC Reality (India) Pvt. Ltd v. CCE (2013) 32 STR 427 (Tri.-Mum.)*

#### **Tour Operator Service**

36. The Hon'ble Tribunal held that renting of vehicles by assessee was held not taxable since they cannot be said as person engaged in the business of planning, scheduling, organising or arranging tours and thereby cannot be termed as "Tour Operators".

*Divisional Controller v. CCE (2014) 33 STR 168 (Tri.-Mum.)*

37. The Hon'ble Tribunal held that Government has granted retrospective exemption from Service Tax to tour operators plying buses, inter-State and intra-State, from point-to-point and therefore the appeal was allowed.

*A. Manimegalai v. CCE(ST) (2014) 33 STR 412 (Tri.-Chennai)*

#### **Outdoor Caterer's Service**

38. The assessee provided canteen service in service recipients premises under contract with NTPC and Lanco and received consideration

from them. The Hon'ble Tribunal held that the assessee had provided Outdoor Catering Service and adjudication order was impeccable and no interference was warranted.

*Indian Coffee Workers Co-op. Society Ltd. v. CCE (2014) 33 STR 266 (Tri.-Del.)*

#### **Works Contract Service**

39. The services was rendered prior to 1-3-2008 when rate of service tax was 2% but payment received after 1-3-2008, when rate of service tax was 4%. The Hon'ble High Court held that rate of service tax applicable would be that which was in force at the time of rendition of service and not which was in force at the time of receipt of payment. Taxable event being the rendition of service and such rendition having been completed prior to 1-3-2008, the applicable rate of tax would be 2% i.e. rate of tax prevalent prior to 1-3-2008.

*CST v. Ratan Singh Builders Pvt. Ltd. (2014) 33 STR 242 (Del.)*

#### **B] Valuation**

40. The Hon'ble Tribunal held that the value of diesel supplied free of cost by the service recipient to the assessee service provider for providing the taxable "site formation and clearance, excavation and earthmoving and demolition" service would not be a component of the gross value charged for the service provided, for computation of service tax.

*Karamjeet Singh & Co Ltd v. CCE (2013) 32 STR 740 (Tri.-Del.)*

41. The assessee, a telecom company, supplied SIM cards / recharge coupon for the value of talk time to its subscribers and also charged them an activation charge. It paid service tax on the activation charges but not value of SIM cards and recharge coupons contending that it is value of goods sold which is exempt under Notification No. 12/2003- ST dated 20/6/2003. The Hon'ble Tribunal held that the supply of SIM cards / recharge coupons were not supply

of “goods” and service tax alone could be levied on these supplies. Further, it was also held that the rate of tax at the time of rendering the service and not at the time of consideration is relevant. Hence the advance rentals received on post-paid cards used after the increase in the rate of tax and the talk time utilised on pre-paid cards after the increase in the rate of tax would be liable at the increased rate.

*Bharati Tele-Ventures Ltd. v. CCE (2014) 33 STR 86 (Tri.-Mum.)*

42. The Hon’ble High Court held that the amount received by a clearing and forwarding agent towards reimbursement of expenditure incurred for their client would not be includible in taxable value of ‘clearing and forwarding agents service’ unless it has the character of the remuneration / commission.

*CST v. Sangamitra Services Agency (2014) 33 STR 137 (Mad.)*

43. The assessee did not include the value of spare parts sold in value of Maintenance or Repair Service. The Hon’ble Tribunal held that :

- The transactions involving only sale of spare parts should be excluded for the purpose of computation of service tax demand;
- Even in case where the transaction involves [composite transaction] both sale of spare parts and also rendering of service, the value of spare parts should be excluded if sales tax/ VAT liability has been discharged on such sales as is evident from the invoices/ bills issued.

*Ketan Motors Ltd. v. CCE (2014) 33 STR 165 (Tri.-Mum.)*

44. The Department denied benefit of exemption under Notification No. 6/2005-ST while determined value of Works Contract Service without excluding value of goods sold. The Hon’ble Tribunal held that, once value of goods sold excluded from value of works

contract, taxable service falls below ₹ 4 lakhs for financial year entitling taxpayer to the benefit of Notification No. 6/2005-ST as small service provider.

*CCE v. Amarjit Aggarwal & Co. (2014) 33 STR 59 (Tri.-Del.)*

### C] CENVAT

45. The Revenue had sought to recover proportional CENVAT credit attributable to the amount of bad debts written off by the assessee on the ground that no Service Tax was realised on the output services in which such input services has been used. The Hon’ble Tribunal held that the same was not permissible since:

- On facts there was no dispute as to the eligibility of availment of CENVAT credit and about the receipt and utilisation of input services for providing output service;
- It is a settled law that there cannot be one-to-one co-relation in availing of CENVAT credit of the input service and provision of output service; and
- There is no provision in the CENVAT credit rules to deny proportional credit on the inputs which were used in providing the output services realisation of which are pending.

*CST vs. Krishna Communication (2013) 31 STR 285 (Tri.-Ahmd.)*

46. The assessee, a manufacturer of cigarettes, supplied tobacco seeds free of cost to the farmers and under an agreement with a third party, paid the third party for providing expert supervisory and advisory services to the farmers for cultivation of Tobacco. The Hon’ble Tribunal allowed the CENVAT credit on the services provided by the third party to the assessee since –

*VST Industries Ltd. v. CCE (2013) 31 STR 357 (Tri.-Bang.)*

- The assessee who entered into the agreement, paid for it and included the cost of such service in their cost of production was the recipient of services.
- The service had a nexus with the manufacturing of cigarettes.

47. The Hon'ble Tribunal held that the telephones installed at the residences of the officials used for business purposes were integrally connected with the business of the manufacture of final product and hence CENVAT credit thereon was admissible.

*Bharat Petroleum Corporation Ltd v. CCE (2013) 31 STR 455 (Tri.-Mum.)*

48. CENVAT credit of tax paid on Construction services availed for construction of workers quarters and 'Vastuwall' within the factory premises would not be admissible since the same did not have any relationship with the manufacturing activity of the appellants. However, construction services availed for construction of godowns within the factory premises for storing of inputs and finished goods being an activity relating to business, CENVAT credit of tax paid thereon is admissible.

*Polylink Polymers (P) Ltd v. CCE (2013) 31 STR 457 (Tri.-Ahmd.)*

49. The Hon'ble Tribunal held that interest was payable on irregular availment of credit from the date of wrong availment of credit till the date of payment of tax to the service provider in terms of Rule 4(7) of the CENVAT Credit Rules, 2004.

*Ballarpur Industries Ltd. v. CCE, C & ST (2013) 31 STR 745 (Tri.-Kolkata)*

50. The Hon'ble Tribunal held as follows:

- CENVAT Credit availed on Input services such as lawn mowing, garbage cleaning, maintenance of swimming pool, collection of household garbage, harvest cutting, weeding etc., which were availed by the

assessee for maintenance of the residential staff colony of the assessee situated in a remote location, was admissible as being directly and intrinsically linked to the manufacturing activity of the assessee since in absence of provision of accommodation to its employees it was not feasible for the assessee to carry out its manufacturing activity.

- Availment of CENVAT credit on various input services on the basis of invoices issued by the Head Office of the assessee cannot be denied on the ground that the Head Office was not registered as Input Service Distributor, since during the relevant period of time i.e. prior to June 2005 there was no requirement for the Head Office to be registered as Input Service Distributor.

*CCE v. Plastichemix Industries (2013) 32 STR 383 (Tri-Ahmd.)*

51. The Hon'ble Tribunal held that the CENVAT credit available to the assessee for its manufacturing activities can be utilized for payment of service tax on Goods Transport Agency service as a payer of freight.

*CCE v. Deepak Spinners Ltd. (2013) 32 STR 531 (H.P.)*

52. The Hon'ble Tribunal held that the CENVAT credit on input services utilized for installation of ammonia storage tanks situated outside factory of production was allowable on the ground that use of ammonia was an intrinsic part of the manufacturing of final product and there was no stipulation that the input services must be received in the factory.

*Deepak Fertilizers and Petrochemicals Corporation Ltd. v. CCE 2013 (32) STR 532 (Mom.)*

53. The Hon'ble Tribunal held that the CENVAT credit on telecommunication services (interconnection services) availed by a telecom service provider from another telecom provider

for servicing its customers located in areas serviced by the other telecom provider was admissible.

*Aircel Cellular Ltd. v. CST (2013) 32 STR 618 (Tri.-Chennai)*

54. The Hon'ble Tribunal held that :

- CENVAT credit on Pest Control Services and Manpower Supply Services used for maintaining a garden in the factory premises in a case wherein the assessee was required by law to maintain such garden was admissible.
- CENVAT credit on construction services utilised for constructing a compound wall around the factory was admissible since the compound wall was essential.

*Nirma Ltd. v. CCE & ST (2013) 32 STR 622 (Tri.-Ahmd.)*

55. Service tax paid as a recipient of GTA service by utilising CENVAT credit must be reversed and paid by debiting the PLA / TR – 6 challan. However, for such procedural error causing no loss of revenue to the department interest and penalty cannot be imposed.

*U.M. Cables Ltd. v. CCE (2013) 32 STR 635 (Tri.-Ahmd.)*

56. The Hon'ble Tribunal held that:

- CENVAT credit on 'outdoor catering service' for providing food to its workers in a case where the appellant was not required by any law to provide such facility was not admissible.
- CENVAT credit on repairs and maintenance of guest house where the assessee claims that the guest house was used to accommodate business guests and conducting business meetings was not admissible in the absence of any positive evidence substantiating such claim.

*IFB Industries Ltd. v. CCE (2013) 32 STR 650 (Tri.-Bang.)*

57. The Hon'ble Tribunal held that:

- CENVAT credit on the service of dismantling a plant was not admissible as such input service does not give rise to any tangible output.
- CENVAT credit on installation charges of doors was not admissible when such doors were not proved to be capital goods under any tariff entry under the Central Excise tariff Act, 1985.
- CENVAT credit on services in relation to laying of roads was not admissible since no intimate connection with manufacture was clearly brought out.

*Nectar Lifesciences Ltd.(Unit -I) vs. CCE (2013) 32 STR 659 (Tri.-Del.)*

58. The Hon'ble Tribunal held that the CENVAT credit on banking charges paid in relation to purchase of raw material and sale of finished goods was admissible since such expenditure was relatable to the business of the manufacturer.

*Meghmani Dyes & Intermediaries Ltd. v. CCE (2013) 32 STR 671 (Tri.-Ahmd.)*

59. The Hon'ble Tribunal in this case allowed CENVAT credit of service tax paid on transport of goods from factory to port in respect of Cargo Handling Agency service and terminal handling charges and similar other charges incurred within port area.

*Rajdhani Crafts v. CCE (2013) 32 STR 607 (Tri.-Del.)*

60. The Hon'ble Tribunal allowed service tax paid on insurance premium, though paid by contractor as insurance of labourers being essential for smooth functioning and amount of premium reimbursed by the manufacturer from part of cost of cement.

*CCE v. India Cements Ltd. (2013) 32 STR 672 (Tri.-Bang.)*

61. The Hon'ble Tribunal held that dismantling/handling and transportation of unusable material used for renovation and repair of factory machinery was covered under definition of Input Service and credit thereon was admissible.

*Hindustan Zinc Ltd. v. CCE (2014) 33 STR 71 (Tri.-Del.)*

62. The assessee providing Management Consultancy services, availed credit in respect of Management, Maintenance or Repair service, employee mediclaim insurance, car hire, car parking service for which department objected for. The Hon'ble Tribunal held that departments contention of functional utility and integral nexus of input to final product to be considered for entitlement of CENVAT credit, does not merit acceptance. Input and Input Service definition are distinct under CENVAT Credit Rules, 2004. Input service is defined illustratively, not restrictively; illustratively and not exhaustively as comprising *inter alia* the enumerating service. Expression in relation to the definition of Input service signifies broad expression indicating comprehensiveness having direct and indirect significance depending on context and expression signifies an inclusive definition and meaning, is illustrative and not exhaustive. It further held that on fair construction of definition of Input Service, any service used by provider of taxable service for providing output service including services used in relation to setting up, modernisation, renovation or repairs of premises, procurement of inputs, activity relating to business to constitute input service.

*KPMG v. CCE, New Delhi (2014) 33 STR 96 (Tri.-Del.)*

63. The assessee discharged service tax liability on Goods Transport Agency service through CENVAT credit. The Department objected to such adjustment. The Hon'ble High Court after going through Rules 2(1) and (p) of CENVAT Credit Rules, 2004 held that in payment of service tax liability by recipient of taxable service, such assesseees are also entitled

to make use of CENVAT credit to discharge their liability under Service Tax provisions.

*CCE v. Cheran Spinners Ltd. (2014) 33 STR 148 (Mad.)*

64. The Hon'ble Tribunal in this case allowed CENVAT credit of service tax paid on Cargo Handling Agency services availed at port for export of goods. It further held that Commissioner (Appeals) is a departmental officer and is bound by Circular issued by Board.

*Stovec Industries Limited v. CCE (2014) 33 STR 155 (Tri.-Ahmd.)*

65. The Hon'ble Tribunal held that CENVAT credit was not admissible on the services used with respect to traded goods when utilised only for export of such traded items, which were not used in the stream of manufacture.

*Crossword Agro Industries v. CCE (2014) 33 STR 185 (Tri.-Ahmd.)*

66. The Hon'ble Tribunal held that CENVAT credit of service tax paid on services for obtaining export incentives was related to manufacturing activity and therefore credit was admissible.

*CCE v. Ahmedabad Strips Pvt. Ltd. (2014) 33 STR 291 (Tri.-Ahmd.)*

67. The Hon'ble Tribunal in this case allowed CENVAT credit of service tax paid on services such as setting up of labour hutments, kisan sheds for providing temporary residential facility to workers and cane growers as the assessee was under statutory obligation to provide these facilities and the facilities were in relation to business activity. It further held that raising new structure after dismantling of old structure for setting up of a factory was in relation to business activity. It also held that assessee has filed proper returns under Rule 9(7) of CENVAT Credit Rules, 2004 and therefore limitation period cannot be invoked.

*Bajaj Hindustan Ltd. v. CCE (2014) 33 STR 305 (Tri.-Del.)*

68. The assessee had two factories with separate registration. The department denied credit on the ground that, services were received by Unit-2, whereas credit was utilised by Unit-1. The Hon'ble Tribunal held that as per definition of Input Service credit was available for setting up of factory also and credit could be taken in Unit-2 as the same was to be used in or in relation to manufacture.

*Chintamani Lamination v. CST (2014) 33 STR 327 (Tri.-Ahmd.)*

69. The assessee, manufacturer of telecom equipments and other related products, claimed CENVAT credit of service tax paid on Stock Broking Service for sale of shares, acquired as investment. The department sought to disallow the same. The Hon'ble High Court held that incidental object of investing and dealing in shares did not relate to and form part of main business of the assessee and the plea by department that it was not carried on regular business scale and did not partake in business activity had been upheld. It thus held that it was not input service on which company could have taken credit of service tax paid.

*United Telecoms Ltd. v. CCE (2014) 33 STR 357 (Kar.)*

70. The department denied CENVAT credit of service tax paid on Goods Transport Agency service on the basis of Challan indicating payment of service tax. The Hon'ble Tribunal held that when tax has gone into treasury, credit cannot be denied unless assessee was otherwise disentitled.

*CCE v. DSCL Sugar (2014) 33 STR 480 (Tri.-Del.)*

71. The Hon'ble Tribunal held that removal of inputs from the factory premises for providing output services does not warrant reversal of CENVAT Credit in view of the proviso to sub-Rule 5 of Rule 3 of the CENVAT Credit Rules, 2004.

*Protech Galvanizers & Fabricators Pvt. Ltd. v. CCE (2013) 31 STR 298 (Tri.-Del.)*

72. The Department denied CENVAT credit availed on the strength of insurance policy. The Hon'ble Tribunal observed as follows:

- According to Rule 4A of Service Tax Rules, 1994, in case of banks, financial institutions and NBFCs, an invoice includes 'any document' by whatever name called whether or not serially numbered whether or not containing address of the person receiving taxable service but containing other information in such document as required under sub-Rule 4A of the Service Tax Rules; and
- The terms 'Invoice', 'bill' or 'challan' have not been defined but the statute only provides for the details that are required to be given in such documents. Therefore what is required to be seen is whether the document on the basis of which the credit has been taken, shows all the necessary details or not. And where the document does not contain all the details, whether it is covered by provisions which empower the proper officer to allow the credit even when there are deficiencies in such documents.

The Hon'ble Tribunal observed that the insurance policy contained Serial No., service tax and cess credit and thus credit could not be denied.

*CCE v. Shree Khedut Sahakari Khand Udyog Mandli Ltd., (2013) 31 STR 555 (Tri.-Ahmd.)*

73. The Hon'ble Tribunal held that the CENVAT Credit on security service availed for securing safe custody of inputs is admissible.

*Triveni Engineering & Industries Ltd. v. CCE (2013) 31 STR 632 (Tri.-Del.)*

74. The service provider charged service tax on 'documentation charges' under the category of 'Clearing and Forwarding Agency Service'. The Hon'ble Tribunal held that refund of same to the service recipient under Notification

No. 17/2009-S.T. cannot be denied by its jurisdictional officers on the ground that the said charges would not be covered under the category of 'clearing and forwarding agent services'.

*Jollyboard Ltd. v. CCE (2013) 32 STR 357 (Tri.-Mumbai)*

75. The Hon'ble Tribunal held that CENVAT Credit in respect of erection, commissioning, installation, manpower recruitment and civil construction services used in the employees' staff colony, canteen and residence of the executive director of the assessee-company was held to be inadmissible.

*Shree Cement Ltd. v. CCE (2013) 32 STR 416 (Tri.-Del.)*

76. The Hon'ble Tribunal held that CENVAT Credit on management consultant's services in relation to merger of other companies into the assessee company was admissible as being for the business of manufacturing.

*Cable Corporation of India Ltd. v. CCE (2013) 32 STR 434 (Tri.-Mum.)*

77. The Hon'ble Tribunal held that CENVAT Credit on rent-a-cab services and contract bus services utilised to transport workers or executives between factory / office and their residences and telephone services used by the assessee in its business was admissible. It also observed that so long as the expenditure was incurred by the company in its books of account there was a presumption in favour of the assessee that the service was availed in relation to their business unless proved to the contrary by the Revenue.

*Thiru Arooran Sugars Ltd. v. CCE (2013) 32 STR 435 (Tri.-Chennai)*

78. The Hon'ble Tribunal held that where the assessee hired JCB machine for uprooting trees to get charcoal required in manufacture of calcium carbide, CENVAT credit of service tax paid on hire of JCB machines was held to be admissible.

*DCM Shriram Consolidate Ltd. v. CCE (2013) 32 STR 440 (Tri.-Del.)*

79. The Hon'ble Tribunal held that the CENVAT Credit of service tax paid on telephone services in respect of mobiles and telephones installed at the residence of the Managing Director or senior employees was admissible since they had a nexus with the business of manufacturing.

*Golden Tobacco Ltd. v. CCE (2013) 32 STR 474 (Tri.-Mum.)*

80. The Hon'ble Tribunal held that the CENVAT credit of service tax on outward transportation from the depot / factory was admissible as being 'clearance of final products from the place of removal' (as the definition of input service stood before 1/4/2008) since the service extended to the stage of handing over the goods to the customers for whom it is meant and therefore any service tax paid up to that point was to be taken into consideration while granting the CENVAT credit benefit.

*Rohit Surfactant Pvt. Ltd. v. CCE (2014) 33 STR 194 (Tri.-Del.)*

81. The Hon'ble Tribunal held that the credit of service tax paid on gardening services i.e. services used for maintaining garden was admissible since maintaining garden was required as per law.

*Murugappa Morgan Thermal Ceramics Ltd. v. CCE (2014) 33 STR 181 (Tri.-Ahmd.)*

82. The assessee claimed CENVAT credit of the service tax paid on outward transportation of the goods upto the point of delivery to customer. The Hon'ble High Court distinguishing the judgment of Karnataka High Court in the case of ABB Limited [2011 (23) STR 97 (Kar.)] wherein it was held that Service tax paid on outward transportation of goods up to the point of delivery to customer was allowable as credit as sale and transfer of property in goods took place at that point, held that CENVAT credit of Service tax paid on outward transportation of goods up

to the point of delivery was not admissible. It observed that:

- The amendment made with effect from 1 April, 2008 in the definition of 'input service' under CENVAT Credit Rules, 2004, by substituting the phrase 'from the place of removal' by 'up to the place of removal', was brought to clarify the intention to allow CENVAT credit only in the cases of transport of goods from one place of removal to another place of removal.
- The Central Board of Excise and Customs (CBEC) Circular clarifying the issues regarding admissibility of CENVAT credit on output freight and allowing the credit under certain scenarios (such as, where place of removal is customer's premises), cannot amend the definition of 'input service' and hence, was erroneous in nature.

*CCE v. Vesuvius India Limited [2013-TIOL-1038-HC-KOL-ST]*

83. The assessee provided services of promoting, organising or assisting in arranging the sale of lottery tickets of the Government of Sikkim. The Hon'ble High Court held that the transactions in lottery tickets were not liable to Service tax since:

- The assessee was engaged in buying and selling of lottery tickets on a principal to principal basis;
- Actionable claims (which would include lottery tickets) were specifically excluded from the definition of 'service' under the Service tax law;
- Lottery was specifically included under the Negative list; and
- There being no levy of Service tax under the Constitution or Finance Act 1994 ('the Act'), the imposition of tax on the basis of a Notification and the Service tax Rules

was *ultra vires* the very provisions of the Act, being in excess of the powers vested therein.

*Future Gaming Solutions India Pvt Ltd. v. UOI and others [2013-TIOL-904-HC-SIKKIM-ST]*

84. The assessee claimed refund of service tax paid on input services received by a branch office before the date of obtaining centralised registration, against export of service. The Hon'ble Tribunal held that the facility of centralised registration was a special facility granted under the CENVAT Credit Rules, 2004 and therefore, in the absence of this, the assessee was not eligible to claim credit on input services received at a branch office before the date of centralised registration. It also held that a provision for exemption, concession or exception must be construed strictly, and if such exemption is available subject to compliance with the conditions, these conditions should be complied with.

*Compass Business Process Outsourcing Pvt. Ltd. v. CCE [TS- 239-Tribunal-2013-ST]*

## D] Penalty

85. The Hon'ble Tribunal held that an interpretational error by the appellant without any *malafide* intent does not warrant a levy of penalty.

*Nectar Lifesciences Ltd.(Unit-I) v. CCE (2013) 32 STR 659( Tri-Del.)*

86. The assessee being a franchisee of Hindustan Lever Ltd. had provided beauty parlour services on behalf of Hindustan Lever Ltd. and had not discharged the service tax liability. Further on investigation, the amount of service tax along with interest was discharged. The Hon'ble Tribunal held as follows:

- Payment of service tax along with interest before issue of show cause notice but after investigation does not indicate *suo moto* payment and therefore it would attract

provisions of Section 73 and penalty will be applicable.

- If the penalty is not paid within one month of receipt of the order the benefit of 25% of tax amount as penalty would not given.
- Prior to 10/5/2008 (i.e., before the amendment to Section 78), penalties under Section 76 and 78 could simultaneously be levied since Sections 76 (penalty for failure to pay service tax) and Section 78 (penalty for suppressing value of taxable service) operated in distinct and separate fields even if the offences are committed in the course of same transactions or arise out of the same act.

*Care & Cure Pvt. Ltd. v. CCE (2014) 33 STR 176 (Tri.-Del.)*

87. On a question whether the penalty under Section 76 can be reduced below the limit prescribed by Section 76, the Hon'ble High Court held that:

- The quantum of penalty has been specified in Section 76 by laying down minimum and maximum limits. Hence it is not possible to read any further discretion, than the discretion provided by the legislature when legislature has prescribed minimum and maximum limits. Thus, Section 76 does not give any discretion to the authority to reduce the penalty below the minimum prescribed.
- Section 80 says no penalty is impossible once the assessee establishes reasonable cause. The provision does not say that even upon establishment of reasonable cause a reduced quantum of penalty is impossible.

Therefore on a conjoint reading of Sections 76 and 80 of the Act it is not possible to envisage discretion as being vested in authority to levy a penalty below the minimum prescribed limit.

*CCE v. Ashish Amand & Co. (2014) 33 STR 153 (Guj.)*

88. The Show Cause Notice sought to impose penalties under Sections 76, 77, 78 but the adjudicating authority had confirmed penalties only under Sections 77 and 78 against which an appeal was filed before the CCE (A). The Hon'ble Tribunal held that there was no bar for the reviewing authority to initiate proceedings for imposition of penalty under Section 76.

*Professional Couriers v. CST (2013) 32 STR 348 (Tri.-Mum.)*

89. The Hon'ble Tribunal held that imposition of penalties was not warranted as the assessee a service recipient had discharged its service tax liability along with interest post receipt of Show Cause notice but before adjudication and the credit of service tax paid on such services was available to the assessee as CENVAT credit for discharging duty liability on its final products,

*Matrix Telecom P. Ltd. v. CCE (2013) 32 STR 423 (Tri.-Ahmd.)*

## E] Others

### Appeal

90. The Hon'ble Tribunal held that the order passed under Section 73C for provisional attachment would not be appealable before the Appellate Tribunal.

*Kingfisher Airlines Ltd. v. CST, 2013 (32) STR 744 (Tri.-Mum.)*

91. The Hon'ble High Court held that an appeal against the CESTAT's order involving a question whether the activity carried on by the assessee falls within 'business auxiliary service' or 'business support service', being a question having a relation to the rate of duty or the value of goods for purposes of assessment, the same would lie before the Supreme Court under Section 35L and was not maintainable before the High Court under Section 35G.

*CCE v. Chadha Auto Agencies (2013) 32 STR 265 (Kar.)*

**Demand**

92 The Show Cause notices were issued upon the assessee seeking to raise a service tax demand under the category of Stock Broker services and the adjudication order confirmed the demand under the category of Stock Exchange Services. The Hon'ble Tribunal held that the impugned order was beyond the scope of the Show Cause notice and set aside the demands.

*I.S.E. Securities & Services Ltd. v. CST (2013) 32 STR 442*

93. The department in this case, confirmed demand falling within jurisdiction of various other Commissionerates. The Hon'ble Tribunal held that, in absence of Notification or Board Circular authorising / directing Commissioner Ahmedabad-I to issue SCN and adjudicate demand for services rendered at Mumbai, Karnataka and Kanpur, the jurisdiction exercised for confirming demand is beyond jurisdiction.

*Vihar Aahar Pvt. Ltd. v. CST (2013) 32 STR 563 (Tri.-Ahmd.)*

94. The assessee produced dutiable and exempted products and took CENVAT credit in respect of input services utilised for both without maintaining separate records. The Hon'ble Tribunal sustained the demand of the adjudicating authority even for the extended period of limitation but deleted the penalty with a passing observation that there was no intention to evade tax. On appeal, the Hon'ble High Court held that the fact that the Hon'ble CESTAT deleted the penalty based on the said passing observation, will not nullify or negate the fact that the principal finding of the adjudicating authority [invocation of extended period] has been confirmed by the Hon'ble Tribunal and that no substantial question of law arises.

*R . R. Paints Pvt. Ltd. v. CCE (2014) 33 STR 156 (Mum.)*

**Export of services**

95. The applicant proposed to engage itself in providing Marketing and Sales Support

Services to US and Chinese companies for sale of their products in India, for which it was to receive monies in convertible foreign exchange, the Authority on Advance Ruling held that the place of provision service to be provided by the applicant would be outside India since the location of the service recipient is in China and US respectively (*vide rule 3 of the Place of Provision Rules, 2012*). Further, since the case met with the requirements of Rule 6A of Service Tax Rules, 1994, the applicants service would also be considered as "export" of service.

*Tandus Flooring India Pvt. Ltd. v. CST (2014) 33 STR 33 (AAR)*

**Review**

96 The Hon'ble Tribunal held that where an appeal against the order of the adjudicating authority has been preferred before the CCE(A), the CCE has no power to review the order of the adjudicating authority under Section 84 of the Finance Act, 1994.

*Alpha Polypropylene v. CCE (2013) 32 STR 352 (Tri.-Ahmd.)*

**Miscellaneous Application**

97. The Hon'ble High Court observed that the Miscellaneous Application filed for additional evidence was listed for hearing and the Hon'ble Tribunal took up the stay application before considering the Miscellaneous Application which caused grave prejudice to the petitioner. It thus set aside the order passed by the Hon'ble Tribunal.

*SCV Cable Net v. CESTAT (2014) 33 STR 144 (A.P.)*

**Limitation**

98. The assessee, engaged in the business of computer training, failed to pay service tax for the period July 2004 to March 2005 under a bona fide belief based on several Tribunal decisions in its favour. The Hon'ble

Tribunal held that the demand was barred by limitation.

*Gargi Consultants Pvt. Ltd. v. CCE (2013) 32 STR 654 (Tri.-Del.)*

99. In a case where the SCN made a mere allegation without any reference to specific evidence showing wilful misstatement or suppression of facts and where the appellant had a *bona fide* belief based on Board Circulars, extended period of limitation was held to be not invocable.

*Karamchand Thapar & Bros. (Coal Sales) Ltd. v. CST (2013) 32 STR 577 (Tri.-Kolkata)*

100. The assessee were carrying on the activity of reconditioning of old worn out rollers which was taxable only w.e.f. 16-6-2005. The demand pertaining to the period 16 June 2005 to Feb 2006 was sought to be raised by a Show cause notice dated 27-4-2007. The Hon'ble Tribunal held that the extended period of limitation is not invocable as there was no suppression of facts by the assessee as the assessee had written several letters to the department intimating them that they have reversed the CENVAT credit pertaining to reconditioning activity and this fact was also reflected in their RG-1 (Stock) register and returns.

*Jagat Machinery Manufactures P. Ltd. v. CCE (2013) 32 STR 663(Tri.-Del.)*

101. The assessee had submitted details of receipts (from executing HVAC projects) for the period 1 July, 2003 to 15 June, 2005 on which they did not pay service tax vide letter dated 5 September 2005. The Hon'ble Tribunal held that Show Cause Notice issued on 30 October 2007 for the aforesaid period was barred by limitation as extended period cannot be invoked.

*Suvidha Engineers India Ltd v. CCE, (2013) 32 STR 735 (Tri.-Del.)*

102. The adjudicating authority dropped part of the demand on the ground that extended period of limitation was not invocable since

the records of the assessee were audited and there was no suppression of facts and hence the balance demand for the same period was sustainable by invoking extended period of limitation.

*Bharati Televentures Ltd v. CCE (2014) 33 STR 86 (Tri.-Mum.)*

#### Prosecution

103. The Hon'ble High Court held that:

- In absence of any specific provision in the Finance Act, 1994, only criminal courts are competent to try the offence punishable under Section 89 of the Finance Act, 1994 in accordance with the Parent Act i.e., the Code of Criminal Procedure, 1973 and not the Commissioner, Central Excise or officers of the Central Excise Department.
- Additional Advocate Generals / Public or Assistant public prosecutors / panel lawyers of State cannot appear for the accused-assessee since administration of criminal justice has been entrusted to the office of the Advocate General.
- Considering that out of ₹ 2.17 crores collected and not paid, ₹ 87 lakhs was deposited and postdated cheques clearing the balance dues within 3 months had been given, the Court granted a conditional and temporary bail to the appellant subject to conditions.

*Sandeep Nair v. UOI (2014) 33 STR 7 (Chhattisgarh)*

#### Interest

104. The assessee had paid service tax on commission paid to foreign agents under reverse charge mechanism and took CENVAT credit of the same. Subsequently, on realising that the said services were not liable for service tax it reversed the CENVAT credit availed by it and filed a refund claim which was sanctioned by the department. However, when the department sought to recover interest under Rule 14 of the

CENVAT Credit Rules on account of wrong availment of CENVAT credit, the Hon'ble Tribunal held that there was no wrong availment of CENVAT credit and hence no interest under Rule 14 was payable.

*Steelco Gujarat Ltd v. CCE (2013) 32 STR 448 (Tri.-Ahmd.)*

### Recovery

105. The Department froze the bank accounts of the assessee after the issue of Show Cause notice but before adjudication. The Hon'ble High Court held that:

- Section 87 is one of the methods of recovery of the amount due and payable only after adjudication is done and the amount due and payable by the assessee is quantified and not at the Show Cause Notice stage.
- There is no power to freeze the Bank accounts under Section 87(b). At the most, the money due payable after adjudication can be claimed from the bank.

*R. V. Man Power Solution v. CCE (2014) 33 STR 23 (Uttarakhand)*

### Refund

106. The High Court had in a Writ filed by the assessee held that members of the assessee club cannot be considered as customers of the club on the grounds of mutuality and hence the mandap keeper services provided by the club to its members cannot be said to be liable for service tax. The Hon'ble Tribunal held that the bar of unjust enrichment would not be applicable to the assessee while refunding the amount of service tax paid by the assessee club under protest.

*Karnavati Club Ltd v. CST (2013) 31 STR 445*

107. Notification No. 9/2009-ST dated 3-3-09 read with 15/2009-ST dated 20/5/2009 allowed upfront exemption from payment of tax to the service provider where the services are consumed wholly within the SEZ unit. However,

the assessee (an SEZ unit) paid the service tax to the provider and claimed refund which was disallowed by the adjudicating authority on the ground that refund of service tax paid on services wholly consumed within the SEZ was not allowed under the notification. The Hon'ble Tribunal held that the over-arching provisions of Sections 7, 26 & 51 of the SEZ Act, 2005 provide immunity from service tax on services provided to an SEZ unit. Therefore, rejection of refund of service tax paid on services consumed wholly within the SEZ by a service recipient was not sustainable.

*Intas Pharma Ltd. v. CST (2013) 32 STR 543 (Tri.-Ahmd.)*

108. The assessee was issuing invoices for their taxable services showing service tax amount separately. For their non-taxable services they issued invoices without collecting service tax but pursuant to a Show Cause notice demanding service tax on such non-taxable service, the assessee paid a service tax out of their own pocket. Subsequently, the Show Cause Notice proceedings were dropped and the assessee filed a refund claim. The Hon'ble Tribunal held that there was no unjust enrichment and the assessee was entitled to a refund despite of the fact that the service tax paid was shown as 'expenditure' and not as 'receivable'.

*Ranade & Co. v. CST (2013) 32 STR 613 (Tri.-Ahmd.)*

109. The assessee had initially paid service tax 'under protest' during adjudication and claimed refund later when part of the demand was dropped and the refund was sought to be disallowed on the ground that it was not shown as 'receivables'. The Hon'ble Tribunal upheld the claim since it was substantiated by a Chartered Accountant's certificate which stated that the assessee had not passed on the duty to any other person.

*Eastern Shipping Agency v. CST (2013) 32 STR 630 (Tri.-Ahmd.)*

110. The Hon'ble Tribunal held that the CENVAT credit of service tax paid on input services such as infrastructure support service, chartered accountant's service, pay roll processing service, management consultancy services, insurance auxiliary services used for providing business auxiliary services was admissible being essential in running their business and accordingly refund of credit under Rule 5 was allowed.

*Kijiji (India) Pvt. Ltd. v. CCE (2013) 32 STR 661 (Tri.-Mum.)*

111. Notification 17/2009- S.T dated 7-7-2009 has been issued in supersession of Notification No. 41/2007 S.T. which extended the period for filing refund claim from 6 months to 1 year from the date of export. The Hon'ble Tribunal held that any refund claim filed after 7-7-2009 will be governed by time limit of 1 year under the Notification No. 17/2009 even though such refund pertains to a period prior to 7-7-2009.

*Havells India Ltd. v. CCE (2103) 32 STR 668 (Tri.-Del.)*

112. The refund claim of the assessee was rejected on the ground that service provided by telecom authorities by leasing of telecom lines was not eligible as input service. The Hon'ble Tribunal held that exports were undertaken electronically through dedicated lines from office premises to telecom authorities and without dedicated lines, the assessee could not deliver output service, therefore leasing of telecom lines by telecom authorities was input service. It further held that prior to 2006 there was no requirement for registration. If nexus could be established between input service and output service, the assessee was entitled for credit.

*WNS Global Services Pvt. Ltd. v. CCE (2013) 32 STR 657 (Tri-Mumbai)*

113. The assessee claimed refund tax paid under Courier Service though as per clarification issued by CBEC it was not liable to pay service tax. They have refund claim on 1-7-2011 after three years from the date of payment i.e.

7-6-2008. The adjudicating authorities rejected the refund claim on the ground that refund was filed beyond the period of limitation provided under Section 11B of Central Excise Act, 1944. However, the First Appellate Authority allowed the refund claim. The Hon'ble Tribunal held that any refund claim has to be filed under Section 11B within the prescribed time. Even if the service tax paid by the assessee was considered unconstitutional or nonleviable, recourse to assessee was to file a suit for recovery or file a writ petition as has been held by the Constitutional Bench of Apex Court in the case of *Mafatlal Industries Ltd. (1997) 89 ELT 247 (SC)*. In view thereof, the refund claim was liable to be rejected.

*CST v. Gujarat State Road Transport Corporation (2014) 33 STR 283 (Tri.-Ahmd.)*

#### Show Cause Notice

114. The Hon'ble Tribunal held that a revisionary show cause notice incorporating a completely new ground (ineligibility of refund) which was not taken in the original show cause notice (disallowance of refund due to non-production of documents) was not sustainable.

*AIA Engineering Ltd. v. CCE (2013) 32 STR 610 (Tri.-Ahmd.)*

#### Others

115. The Committee of Commissioners first accepted the Order in Appeal but on second review on direction of Chief Commissioner, in view of difference of opinion amongst Committee, Chief Commissioner decided to file appeal. The Hon'ble High Court held that decision of Committee was binding on Chief Commissioner, and there was no express provision for its review and since power of review had not been specifically provided, the Chief Commissioner was not empowered to exercise the same.

*CCE v. Dell Intl. Services India P. Ltd. (2014) 33 STR 362 (Kar.)*

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**1. Will – Execution of Will – Duty of propounder of will to prove its genuineness: Evidence Act sec. 68 and Succession Act sec. 63**

Even on the absence of any specific denial of execution of a will or even an admission of its existence will not absolve the duty of the propounder of a will to prove its genuineness and the further duty to dispel all the suspicious circumstances, if any, surrounding its execution.

*Vadakkayil Gopalan v. Vadakkayil Paru; AIR 2014 (NOC) 137 (Ker.)*

**2. Evidence – Marriage Certificate – Issued by Advocate – Void – Sec. 35, Evidence Act 1872**

Marriage Certificate issued by advocate exercising power of marriage officer.

The court held that the advocate was never authorised by any provision to register any marriage or to act as marriage officer. Marriage certificate issued by him would be void document. Cannot be relied upon as proof of marriage of parties.

*Satyam Kumar & Anr v. State of UP & Ors.; AIR 2014 (NOC) 104 (All)*

**3. Evidence – Execution of Power of Attorney – Presumption as to valid execution – Evidence Act 1872, secs. 85 and 57**

Power of attorney executed before and authenticated by Asst. Consular Officer of

High Commission of India in UK. Court bound to presume validity thereof under secs. 85 and 57 of Evidence Act.

*Mohan Murti v. Deutsche Ranco Gmbh; AIR 2014 (NOC) 92 (Del.)*

**4. Medical Negligence – Illness wrongly diagnosed**

Biopsy on patient conducted by Pathologist and illness wrongly diagnosed as Tuberculosis. Patient actually suffered from Cancer. Death of Patient for want of proper treatment in time. Wrong diagnosis by expert in Pathology amount to professional negligence. Pathologist held liable to pay compensation.

*Dr. N. Ummer v. K.M. Hameed & Ors.; AIR 2014 (NOC) 49 (Ker.)*

**5. Protection of Human Rights – Commission – Functions – No jurisdiction vested to fix remuneration of contract employees**

A person denied minimum wages fixed by the law can possibly contend that apart from violation of a statutory right, it also constitutes violation of a human right. But a person being paid above the minimum statutory wage claiming higher remuneration for a desired better standard of living can hardly contend that it constitutes violation of a human right.

The Commission does not have any plenary or prerogative powers like the High Court.

None of the provisions, vests jurisdiction in the commission to fix remuneration of contract employees.

*State of Bihar & Ors v. Bihar Human Rights Commission & Ors.; AIR 2014 Patna 30.*

**6. Eviction of unauthorised occupant – Can be evicted by using reasonable force permissible – Railways Act Sec. 147**

Section 147 of the Act can be perceived to be the law as enacted by the Parliament for a person to be evicted from any railway property.

Licensee occupying licensed premises after termination of licence can be evicted by taking resort to sec. 147. Use of reasonable amount of force is permissible under 147.

*Dhurjati Prosad Das vs. UOI & Ors. AIR 2014 (NOC) 200 (Cal.)*

**7. Lease or license – Distinction discussed : Transfer of Property Act, 1882**

The terms lease and licence have different connotation. Merely because in both the ownership of the property leased or licensed may vest in another will not lead to the presumption of a "licensee" unless conditions for the same are fulfilled. Under a lease, there is limited transfer of possession, ownership and enjoyment of the property temporarily to the lessee for a specified duration subject to terms and conditions. In case of a license, ownership and possession remains with

the licensor, giving only permission for permissive user to the licensee. While a lessee may have a right to continue for the duration of the lease, can contest premature termination and can be ousted only by the order of a competent court, such protection is not available to a licensee.

*Onkar Nath Tiwary & Ors vs. State of Bihar & Ors.; AIR 2014 (NOC) 180 (Pat.)*

**8. Liability of Guarantor – Bank Loan – Guarantor sent notice to Bank withdrawing his guarantee**

In the guarantee agreement, it has been provided that the guarantee shall be continuing security binding the guarantor and his personal representative until the expiration of three calendar months from the receipt by the Bank of notice in writing to discontinue it and if discontinued, the guarantee shall remain as continuing security for the liabilities of the borrower to the Bank as on the date of receipt of such notice. Thus, it is clear that the guarantor had the opportunity to cancel the guarantee agreement which as per the above terms of the guarantee agreement, shall be treated to be cancelled on expiration of three calendar months from the date of receipt of the notice by the Bank. In such event, liability of the guarantor will extend to the extent of liability of the debtor as on the date of cancellation of the guarantee.

*Amal Krishna Ray & Ors v. Bank of Baroda & Ors.; AIR 2014 (NOC) 179 (Ori.)*

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**PROGRAMME**

07.45 a.m. to 08.55 a.m.	Registration
08.55 a.m. to 10.15 a.m.	Inaugural Programme Inauguration by Mr. Justice C. Nagappan Judge, Supreme Court of India Guest of Honour: Mr. Justice Satish Agnihotri Acting Chief Justice, Madras High Court
10.30 a.m. to 11.45 a.m.	<u>1st Technical Session (Income Tax)</u> <b>Re-assessments, Revision and Rectification</b> Chairman Justice R. V. Eashwar (Retd.) Speaker: Mr. R. Chaitanya, Advocate, Bengaluru
11.45 a.m. to 1.00 p.m.	<u>2nd Technical Session (Service Tax and VAT)</u> <b>Overlapping Issues in Service Tax and VAT</b> Chairman: Mr. Bharatji Agrawal, Senior Advocate, Allahabad <u>Speaker (VAT):</u> Deepak Bapat, Advocate, Mumbai <u>Speaker (Service Tax):</u> Mr. M.V.J. Kumar, Advocate, Hyderabad
1.00 p.m. to 1.45 p.m.	<b>LUNCH</b>
1.45 p.m. to 2.30 p.m.	Luncheon Address
2.30 p.m. to 4.30 p.m.	<b>Panel Discussion on Companies Act, 2013</b> <u>Moderator:</u> Mr. Arvind Datar, Senior Advocate <u>Panelists:</u> Mr. Arvinth Pandian, Senior Advocate Ms. Savithri Parekh, CS, Pidilite (India) Mr. B. Ravi, Company Secretary

**DAY 2**

9.30 a.m. to 10.30 a.m.	<u>1st Technical Session</u> <b>Accounting Standards</b> <u>Chairman:</u> P. R. Ramesh, CA, Chairman <u>Deloitte Haskins and Sells</u> <u>Speaker:</u> Mr. M. P. Vijay Kumar, CA
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10.40 a.m. to 12.30 p.m.	<b>2nd Technical Session</b> <b><i>Taxation of Intellectual Property Rights under Indirect and Direct Taxes</i></b> <b>Chairman:</b> Justice Mr. Prabha Sridevan <b>Speaker (Indirect Taxes):</b> N.Venkatraman, Senior Advocate, Delhi <b>Speaker (Direct Taxes):</b> Ajay Vohra, Advocate, Delhi
12.30 p.m. to 1.15 p.m.	<b>LUNCH</b>
1.15 p.m. to 2.45 p.m.	<b>BRAINS' TRUST</b> <b>Chairman:</b> R. Rajarathnam <b>Trustees:</b> Ms. Prem Lata Bansal, Advocate Ms. Nikita Badheka, Advocate Mr. R.Vaitheeshwaran, Advocate Mr. Rajendra Kumar, Advocate
2.45 p.m. to 3.00 p.m.	Summing up of Proceedings

**Delegate Fees :**

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**EVENTS PLANNED**

**28-6-2014 – post-lunch**

**Dakshina Chitra**

Dakshina Chitra was founded through the encouragement, aid and guidance of the Indian National Trust (INTACH), in 1996. It preserves a heritage which would otherwise disappear and tells the story of the people and their history. An hour's journey out of town, Dakshina Chitra introduces the guest to the opportunity to visit villages and get an understanding of wider rural India. We welcome you to a Heritage museum showcasing products, practice, objects, arts and culture of the four Southern states of India—probably the only such museum in South India. (Food services, toilets and resting facilities are available at the venue on a chargeable basis). Enroute, a visit to ISKON on East Coast Road and various options for shopping.

The fee of ₹ 750 per person includes transport and entry to Dakshina Chitra

**Return in time for dinner at the conference venue**

**Sunday, 29–6–2014**

**Heritage Walk – 6.30 a.m. to 8.30 a.m. – Two millennia of a city: A glimpse into**

### Chennai's heritage

On a two-hour tour of the San Thome and Mylapore areas, the group will be taken through 2 millennia of Chennai's heritage. We start at the San Thome Basilica, with the legends of Doubting Thomas and his presence in the city. We then walk down a small street that gives off a very Iberian feeling because of the way some of its houses are built.

The history of the Portuguese, the British and the French come together at San Thome, as the locality changed hands over the years. In doing so, they pushed the ancient settlement of 'Meliapore' further inland. We learn of the legends of Mylapore, and the profusion of temples there. Kapaleeswarar takes the pride of place, but there are others. We shall pause to admire the oddly constructed Sree Mundakakanniamman temple. We then go ahead to learn of Thiruvalluvar, the poet-sage whose couplets were often quoted by a Union Minister of Finance as he presented the nation's budget.

The Swetambara Jain Temple reminds us of Chennai's Jains – and other business communities. More of business – in front of the factory making Amrutanjan – the century old pain-relief balm.

Along the way we see an old police station, a library named after a Maharashtrian freedom fighter, diverse colleges – of Ayurveda and Sanskrit.

The walk ends at the magnificent Temple of Kapaleeswarar. Individual Pujas and Archanas can be arranged at the Temple at cost. We close this tour with a South Indian breakfast at the Saravana Bhavan

Being a walking tour, make sure you have comfortable footwear, a bottle of water and a hat or cap. The fee of ₹ 350 includes breakfast.

**Day trips to Mahabalipuram, Kanchipuram and Pondicherry can be co-ordinated with the assistance of the Transport provider at request.**

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## One day Tax Conference of AIFTP

One day Tax Conference of AIFTP (Western Zone) along with Income Tax, Sales Tax Association and ICAI Nanded Branch on 14-06-2014 (Saturday) at Nanded, Maharashtra. Papers for discussion Maharashtra VAT, Income Tax, Service Tax.

Important Places to be visited in and around Nanded are Sachkhand Huzur Saheb Gurudwara (Asia Second) Shiv Mandir at kaleshwar Nanded, Parli Vaijyanath, Aundha Nagnath, Narsing Zara and Nanak Zara at Bidar.

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2014      Vol. 18      Part 4      06 April 2014

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**COMPANIES ACT**

**SECTION 391**

**COMPROMISE AND ARRANGEMENT (DEMERGER)**

Where scheme of arrangement is in interest of its shareholders and creditors as well as interest, same deserved to be sanctioned - *Quick Flight Ltd., In re (2014) 43 taxm (Chennai)*

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**SECTION 397**

**OPPRESSION AND MANAGEMENT**

Where appellant had not deviated from its original challenge of improper allotment of shares, way of amendment sought additional relief under sections 397 and 398, basic nature of company petition did not change and application filed by appellant seeking amendment was not maintainable - *Shri. Ravi v. S.M. Kavayappa Automobiles (P) Ltd. (2014) 43 taxm (Karnataka)*

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**Payment for transponder service is 'royalty'; ITAT refers Explanation 6 to Sec. 9(1)(vi) to interpret 'process'**

**Payment for use of transponder service for broadcasting of programme held as 'royalty' as it involves transmission by satellite which falls in the expression 'process' as per Explanation 6 of Section 9(1)(vi) of the I-T Act**

**Facts:**

1) The assessee, engaged in broadcasting television channels from India, receive transponder service from Intelsat, a tax resident of USA, in lieu of a fee.

2) The assessee approached to the AO under 195(i) of I-T Act for withholding tax certificates, for such payment of fees to Intelsat, which denied by the AO.

**Issue:**

On the question of whether fee payable to Intelsat is in the nature of 'process' in the light of amended provisions of section 9(1)(vi) as well as under Article 17 of Indo-US DTAA, the Tribunal held in favour of revenue as under.

**Held:**

a) The Explanation 6 introduced by Finance Act, 2012 was only clarificatory in nature and, therefore, it did not amend the definition of royalty per se.

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Date & Month	Programme	Place
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28, 29-6-2014	National Tax Conference (Southern Zone)	Chennai
22-8-2014	National Executive Committee Meeting	Nagpur
23, 24-8-2014	National Tax Conference (Western Zone)	Nagpur

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